

**AMERICAN BAR ASSOCIATION**  
**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE**  
**NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION**  
**SECTION OF STATE AND LOCAL GOVERNMENT LAW**  
**SENIOR LAWYERS DIVISION**  
**LAW STUDENT DIVISION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges Congress and state, local,  
2 territorial, and tribal legislatures to adopt or amend laws, regulations, and policies to  
3 prohibit discrimination on the basis of caste to protect Dalits and other caste-oppressed  
4 communities from discrimination based on caste;

5  
6 FURTHER RESOLVED, That the American Bar Association urges the U.S. Equal  
7 Employment Opportunity Commission, the Department of Justice, and other federal  
8 agencies to adopt regulations and guidelines specifying that caste is included within the  
9 meaning of the bases on which discrimination is prohibited;

10  
11 FURTHER RESOLVED, That the American Bar Association encourages lawyers, bar  
12 associations and judges to actively engage in civic education to recognize, prevent, and  
13 address caste-based discrimination;

14  
15 FURTHER RESOLVED, That the American Bar Association urges universities,  
16 colleges, schools, and other places of learning to adopt policies and practices that  
17 prevent discrimination against faculty, staff, and students on the basis of caste; and

18  
19 FURTHER RESOLVED, That the American Bar Association House of Delegates  
20 instructs the Board of Governors to amend the ABA Business Conduct Standards to  
21 include "caste" in its list of protected classes and to prohibit discrimination on the basis  
22 of caste.

## REPORT

### **I. Introduction**

Caste discrimination has existed in the United States for more than a century. However, “[c]aste is not well understood in the United States, even though it plays a significant role in the lives of Americans,” particularly those of South Asian descent.<sup>1</sup> As early as 1923, the United States Supreme Court, in United States v. Bhagat Singh Thind, 261 U.S. 204 (1923), held that “a high caste Hindu of full Indian blood” was not a “white person” within the meaning of the Naturalization Act and therefore not entitled to U.S. citizenship.<sup>2</sup> This decision was issued in response to Plaintiff Bhagat Singh Thind’s argument that he was “Caucasian,” and therefore white, because he was from a “high-caste, of full Indian blood,” whose racial purity was guaranteed by the strictly enforced caste apartheid system.<sup>3</sup> Thind’s arguments reflect the long legacy of caste in the United States and illustrates the way in which dominant caste individuals set themselves apart from the caste oppressed, characterizing caste oppressed peoples as akin to Black or Native peoples, by extension of Thind’s analogy.<sup>4</sup>

In 1906, almost two decades before Thind claimed caste-based racial purity, Maya Ram Mehmi became the first Dalit to arrive in North America.<sup>5</sup> Seven generations later, Mehmi’s family still experiences discrimination on the basis of caste. Mehmi’s descendant, Anita Lala writes, “[w]e are a Sikh family, a religion based on equity and the abolishment of caste. By all accounts, I really should not know what caste is or be affected by it. Yet, here I am, a caste abolitionist aware of my Dalit identity because I was born into a Chamaar family.”<sup>6</sup> Chamaars are Dalits. ‘Dalit’ is a self-given name used to label people formerly known as ‘untouchables.’<sup>7</sup> Lal’s story highlights how caste identity transcends religion. There are caste-oppressed<sup>8</sup> Christians, Hindus, Muslims,

---

<sup>1</sup> Paula Chakravarty and Ajantha Subramanian, *Why Is Caste Inequality Still Legal in America?*, NY TIMES, May 25, 2021, <https://www.nytimes.com/2021/05/25/opinion/caste-discrimination-us-federal-protection.html>.

<sup>2</sup> United States v. Bhagat Singh Thind, 261 U.S. 204 (1923). The question was significant because, at that time, the Naturalization Act applied “to aliens, being free white persons, and to aliens of African nativity and to persons of African descent, only.”

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Ahmad Adil, India’s ‘Black untouchables’ still fighting for social justice, November 2, 2022, ANADOLU AGENCY, <https://www.aa.com.tr/en/asia-pacific/indias-black-untouchables-still-fighting-for-social-justice/2499850>.

<sup>5</sup> Anita Lal, *Why I Celebrate The Seattle Ordinance To Outlaw Caste Discrimination*, BAAZ, February 23, 2023, <https://www.baaznews.org/p/seattle-caste-ban-celebrate>.

<sup>6</sup> *Id.*

<sup>7</sup> See Dalit, MERRIAM-WEBSTER DICTIONARY (stating that a Dalit is a member of the lowest class in the traditional Hindu social hierarchy having in traditional Hindu belief the quality of defiling by contact a member of a higher caste), <https://www.merriam-webster.com/dictionary/Dalit>.

<sup>8</sup> Here, the term “caste oppressed” refers to individuals who are identified as coming from communities outside the caste system, outcasted communities. Historically, such outcasted communities outside were treated as untouchable, some were also viewed as unseeable, all were subjected to institutional segregation. Practices of untouchability still impact caste oppressed peoples, to varying degrees—as does the stigma associated with being a member of a formally untouchable community.

Buddhists, atheists, and agnostics, as well as Sikhs.<sup>9</sup> Even in North America, caste is a sticky identity that follows people wherever they settle—across space and time.<sup>10</sup>

A 2021 Indian American Attitudes Survey (IAAS) revealed that many Indian Americans report being victims of caste discrimination.<sup>11</sup> For Americans from oppressed caste background, discrimination on the basis of caste is omnipresent, occurring not just in the work place but in social settings and relationships, including marriage.<sup>12</sup> Lal writes, “[a]ll these instances are unaddressed because there are no pathways to justice and no policies that provide [caste oppressed peoples] with protection or tools for employers to understand caste discrimination.”<sup>13</sup> She continues, “[t]hese systems of oppression are the same as white supremacy, and the same systems of discrimination that racism thrives under.”<sup>14</sup>

On October 22, 2022, the ABA’s Center for Human Rights published a report titled “Challenges for Dalits in South Asia’s Legal Community.” The report had found that “Dalit community is facing several structural challenges that impede their equal representation in the justice sector. Implicit and explicit biases expressed by members of the judiciary, who have the power to appoint fellow judges, have hindered efforts to ensure equal representation in the judiciary. Further, the chapter found that both aspiring and practicing lawyers from Dalit backgrounds are often denied mentorship, professional opportunities, and access to networks due to their caste.”<sup>15</sup>

This resolution continues the ABA’s engagement on this issue<sup>16</sup> and advances the ABA’s Goal III on eliminating bias and enhancing diversity by encouraging timely action

<sup>9</sup> See, e.g., Outlook Web Desk, Caste In Islam, Christianity: Why SC Is Pushing Centre To Decide On Reservations For Dalit Muslims, Christians, <https://www.outlookindia.com/national/caste-in-islam-christianity-why-sc-is-pushing-centre-to-decide-on-reservations-for-dalit-muslims-Christians-news-223149>.

<sup>10</sup> While this report uses examples from the Indian caste system to describe discrimination based on caste in the United States, it is notable that caste systems are not limited to the South Asian diaspora. U.S. Courts have recognized the existence of inequitable caste systems in Somalia and Mauritania. See, e.g., *D.W. v. Raufer*, 839 F App’x 723 [3d Cir 2020]; See, e.g., *Yonis v. Gonzales*, 130 F App’x 917 [9th Cir 2005] and *Abdulkadir v. Gonzales*, 131 F App’x 534 [9th Cir 2005]; *Diop v. Barr*, 2019 U.S. App. LEXIS 33244 [6th Cir Nov. 6, 2019, No. 19-3038]; *Soufi v. Lynch*, 655 F App’x 193 [5th Cir 2016]. See, e.g., *Biswakarma v. Holder*, 583 F App’x 638 [9th Cir 2014]. Cf., *Ba v. Holder*, 362 F App’x 189, [2d Cir 2010] (upholding “an agency decision that reasonably relied on “the lack of sufficient corroborating evidence regarding the caste system in Mali”).

<sup>11</sup> Prachi Patankar and Kshama Sawant, In the US, a big step against caste discrimination, THE INDIAN EXPRESS, February 19, 2023, <https://tinyurl.com/3ketcte4>. See also, Equality Labs, Caste in the United States (2016), <https://www.equalitylabs.org/castesurvey>.

<sup>12</sup> Anita Lal, *Why I Celebrate The Seattle Ordinance To Outlaw Caste Discrimination*, BAAZ, February 23, 2023, <https://www.baaznews.org/p/seattle-caste-ban-celebrate>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> The American Bar Association, Center for Human Rights, “Challenges for Dalits in South Asia’s Legal Community,” [https://www.americanbar.org/groups/human\\_rights/reports/challenges-for-dalits-in-south-asia-s-legal-community/](https://www.americanbar.org/groups/human_rights/reports/challenges-for-dalits-in-south-asia-s-legal-community/).

<sup>16</sup> For the past two years, the ABA’s Civil Rights and Social Justice Section (CRSJ) has been working with the South Asian Bar Association (SABA) to create programming to educate lawyers about discrimination on the basis of caste. In May 2021, CRSJ organized “Invisible Apartheid: What You Need to Know to Be an Ally in The Fight Against Caste Discrimination,” co-sponsored by SABA. On January 11, 2022, CRSJ

urging explicit protections against discrimination on the basis of caste in state and federal legislation, regulations, policies, and agency guidelines; urging professional and civic education about discrimination on the basis of caste and the importance of caste equity; urging support for protections against discrimination on the basis of caste in educational institutions; and incorporating protections against discrimination on the basis of caste in the work of the ABA.

## II. Caste Discrimination in the United States

Dominant castes make up a minority of all Indians. However, “their inherited social and material privilege” have allowed them to form a powerful presence in the US, making up around 80 percent of the Indian American population.<sup>17</sup> This means that in the United States, oppressed caste peoples “are a minority within a minority.” As a result, the Indian American diaspora is being segregated along caste lines—more aggressively than Indians living in India.<sup>18</sup>

Samir Khobragade migrated to the US, “in the hopes that [he] would finally be free of the chains of casteism.”<sup>19</sup> However, this was not to be. It is well-documented that Dalits and other oppressed-caste peoples feel forced to hide their caste in the United States.<sup>20</sup> As two separate autobiographies written by two Dalit-American feminists attest,<sup>21</sup> Dalits and other people from oppressed castes backgrounds do not feel safe revealing their caste identity in the United States.<sup>22</sup> For Khobragade, for example, this meant “[t]wenty

---

co-sponsored an event organized by SABA on “Caste, the Diaspora, and the South Asian Legal Community.” CRSJ also co-sponsored a conversation with SABA, “The Trauma of Caste: A Conversation on Healing with Thenmozhi Soundarajan,” that took place on April 11, 2023.

<sup>17</sup> *Id.* See also Nick Fountain, Caste Arrives in the Silicon Valley, NATIONAL PUBLIC RADIO, October 14, 2020, <https://www.npr.org/transcripts/923736245>; Rohit Chopra and Ajantha Subramaniam, Caste Discrimination Exists in the U.S., Too—But a Movement to Outlaw It Is Growing, TIME MAGAZINE, March 2022, <https://time.com/6146141/caste-discrimination-us-opposition-grows/> (stating that “[t]he 1965 Hart-Cellar Act legalized a preference for professional class migrants, such as doctors and engineers, from all over the world, even as it sought to undo the racial prejudices of the immigration laws that it replaced. The shift in immigration policy ensured that South Asians from dominant castes—the ones with privileged access to education and white-collar professions—were overrepresented in the United States in comparison to the South Asian population at large. The caste inequities of Indian education have allowed these groups to use their privilege to immigrate and succeed professionally. The highly selective character of the professional South Asian American population has therefore created the conditions for caste bias and discrimination in hiring and promotion. This is especially the case in the U.S. technology sector, which has significant privileged caste representation. Although the first to be made public, the experience of the Dalit employee in the Cisco case is not uncommon.”).

<sup>18</sup> Samir Khobragade, *Seattle Must Ban Caste Discrimination*, THE STRANGER, February 17, 2023, <https://www.thestranger.com/guest-editorial/2023/02/16/78864283/seattle-must-ban-caste-discrimination>.

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Sonia Paul, Trapped in Silicon Valley’s Hidden Caste System, Wired.com, March 1, 2022, <https://www.wired.com/story/trapped-in-silicon-valleys-hidden-caste-system/>; Thenmozhi Soundarajan, *The Trauma of Caste* (2022); Yashica Dutta, *Coming out as Dalit* (2019); Nick Fountain, Caste Arrives in the Silicon Valley, NATIONAL PUBLIC RADIO, October 14, 2020, <https://www.npr.org/transcripts/923736245>.

<sup>21</sup> See, e.g., Thenmozhi Soundarajan, *The Trauma of Caste* (2022); Yashica Dutta, *Coming out as Dalit* (2019).

<sup>22</sup> Samir Khobragade, *Seattle Must Ban Caste Discrimination*, THE STRANGER, February 17, 2023, <https://www.thestranger.com/guest-editorial/2023/02/16/78864283/seattle-must-ban-caste-discrimination>.

years of a closeted existence, of hiding from myself to avoid direct discrimination, [which] became increasingly difficult.”<sup>23</sup> In contrast, a significant number of dominant caste individuals and groups aggressively work to keep their dominant caste at the forefront of their personal identity.<sup>24</sup> This places further pressure on “[m]any Dalits and employees from other [oppressed] castes who live in the U.S...[who] feel they must hide their identity at work.”<sup>25</sup>

The extent of caste discrimination has compelled many Dalit workers to conceal their caste identities and pass as non-Dalits in workplaces that they share with dominant castes.<sup>26</sup> Many report that dominant castes aggressively investigate the caste status of their peers. Oppressed caste workers report experiencing workplaces as minefields where colleagues from privileged castes might probe their backgrounds to find out their origins and where missteps can lead to exposure and stigma.<sup>27</sup>

In 2020, the California Department for Fair Employment and Housing filed suit against the software company Cisco Systems, alleging that the company failed to address caste discrimination against an employee from the Dalit caste by two supervisors from more privileged caste backgrounds.<sup>28</sup> Among other things, the Complaint alleged that one of the supervisors named in the Complaint knew the Plaintiff’s caste because they had attended the same prestigious university in India. According to the Complaint, this Supervisor made it a point to tell other workers that the Plaintiff was Dalit,<sup>29</sup> that Plaintiff was admitted to university based on affirmative action, and falsely implying that Plaintiff did not truly merit his place at a prestigious university.<sup>30</sup> HCL America, another tech giant in the U.S., faced a similar lawsuit from an employee who alleged that he was fired

<sup>23</sup> *Id.*

<sup>24</sup> Gaurav J. Pathania, *Caste should not be part of the ‘American Dream*, THE BOSTON GLOBE, February 17, 2023, <https://www.bostonglobe.com/2023/02/17/opinion/caste-should-not-be-part-american-dream/>.

<sup>25</sup> *Id.*

<sup>26</sup> Nitasha Tikku, *India’s engineers have thrived in Silicon Valley. So has its caste system*, WASH. POST, October 27, 2020, <https://www.washingtonpost.com/technology/2020/10/27/indian-caste-bias-silicon-valley/>.

<sup>27</sup> Rohit Chopra and Ajantha Subramaniam, *Caste Discrimination Exists in the U.S., Too—But a Movement to Outlaw It Is Growing*, TIME MAGAZINE, March 2022, <https://time.com/6146141/caste-discrimination-us-opposition-grows/>; See also Nick Fountain, *Caste Arrives in the Silicon Valley*, NATIONAL PUBLIC RADIO, October 14, 2020, <https://www.npr.org/transcripts/923736245>.

<sup>28</sup> Complaint, *California Department of Fair Employment and Housing v. Cisco Systems, Inc., Sunder Iyer, and Ramana Kompella*, (N.D. California) (No. 5:20-cv-04374), <https://regmedia.co.uk/2020/07/01/cisco.pdf>. See also, J. Edward Moreno and Paige Smith, *Rare Caste Bias Case Advances, Raising Calls for Federal Action*, Bloomberg Law, Aug. 10, 2022, <https://news.bloomberglaw.com/daily-labor-report/rare-caste-bias-case-advances-raising-calls-for-federal-action>.

<sup>29</sup> Associated Press, *California sues Cisco for bias based on Indian caste system*, THE ECON. TIMES, July 2, 2020, <https://economictimes.indiatimes.com/news/international/business/california-sues-cisco-for-bias-based-on-indian-caste-system/articleshow/76751258.cms?from=mdr>.

<sup>30</sup> This case is not the only instance of a caste-based employment lawsuit. HCL America, another tech giant in the U.S., faced a similar lawsuit from an employee who alleges he was fired because of his caste in 2020. See *After Cisco, HCL Faces Lawsuit in US Over Sacking of Indian Employee Based on Caste*, NEWS18, August 5, 2020, <https://www.news18.com/news/business/after-cisco-hcl-in-trouble-over-sacking-indian-employee-based-on-caste-2760295.html>.

because of his caste in 2020.<sup>31</sup> Moreover, in 2020, thirty Dalit women engineers, all of whom self-identify as “first-generation learners,” issued a public statement testifying to their experience with caste bias in “hiring, referrals, and peer review processes” in the American tech sector.<sup>32</sup>

The experience of caste discrimination is not limited to the tech sector. For example, in the food service industry, Prem Periyar, a Dalit restaurant worker in the Bay area has been subjected to caste discrimination. At work he was given tasks considered too “filthy” or “polluting” for dominant caste communities.<sup>33</sup> Equally, in the apartment Periyar shared with other workers, he was barred from sharing a bedroom with dominant caste roommates.<sup>34</sup>

There has been at least one documented case of human trafficking targeting and exploiting Dalits and other oppressed class peoples in the United States. In 2001, dominant caste American Lakireddy Bali Reddy, reportedly California’s second wealthiest landlords at the time,<sup>35</sup> was found guilty of trafficking Dalit girls and young women from his ancestral village in India and forcing them into sexual slavery and forced labor.<sup>36</sup> Reddy brought as many as 99 people, mostly women and girls, to the United States, “ruling over his victims like a feudal lord, imposing his law rather than U.S. law...by importing the rules of the caste system.”<sup>37</sup> In the United States, Reddy raped his Dalit victims, many of whom were underage, and forced them to work for almost no pay.<sup>38</sup>

Notwithstanding a number of high-profile complaints and actions, the likelihood of underreporting incidents of discrimination based on caste remains high as oppressed caste individuals (and Dalits in particular) often have justified fears of retaliation by dominant caste groups, including violence against vulnerable family members in India. The risk of retaliation has a chilling effect on oppressed caste individuals, especially in

<sup>31</sup> *After Cisco, HCL Faces Lawsuit in US Over Sacking of Indian Employee Based on Caste*, NEWS18, August 5, 2020, <https://www.news18.com/news/business/after-cisco-hcl-in-trouble-over-sacking-indian-employee-based-on-caste-2760295.html>.

<sup>32</sup> A Statement on caste bias in Silicon Valley from 30 Dalit Women engineers, Wash. Post, October 27, 2020, [https://www.washingtonpost.com/context/a-statement-on-caste-bias-in-silicon-valley-from-30-dalit-women-engineers/d692b4f8-2710-41c3-9d5f-ea55c13bcc50/?itid=lk\\_interstitial\\_manual\\_16](https://www.washingtonpost.com/context/a-statement-on-caste-bias-in-silicon-valley-from-30-dalit-women-engineers/d692b4f8-2710-41c3-9d5f-ea55c13bcc50/?itid=lk_interstitial_manual_16).

<sup>33</sup> *Caste Discrimination: A Global Concern*, HUMAN RIGHTS WATCH, September 2001, <https://www.hrw.org/reports/2001/globalcaste/caste0801-03.htm>.

<sup>34</sup> Nani Sahra Walker, *Even in the U.S. he couldn’t escape the label ‘untouchable,’* LOS ANGELES TIMES, July 4, 2013, <https://www.latimes.com/world-nation/story/2021-07-04/fight-to-add-caste-as-protected-category-in-us>.

<sup>35</sup> Anita Chabria, *His Own Private Berkeley*, LOS ANGELES TIMES, October 17, 2013.

<sup>36</sup> Prachi Patankar and Kshama Sawant, In the US, a big step against caste discrimination, THE INDIAN EXPRESS, February 19, 2023, <https://indianexpress.com/article/opinion/columns/in-the-us-a-big-step-against-caste-discrimination-8453292/?fbclid=IwAR3kidpUuqBUBaWNme3qR0kPq99G4mN4FZPzNk6wgtP3XsbdD8l0jRy2uk>.

<sup>37</sup> Reddy brought as many as 99 people, mostly women and girls, to the United States. See Anita Chabria, *His Own Private Berkeley*, Los Angeles Times, Nov. 25, 2001. Archived from the original on October 17, 2013.

<sup>38</sup> *Berkeley Landlord Arrested in Sex Scheme / Police say he brought girls from India*, SFGate, January 20, 2000. Archived from the original on May 4, 2016. Retrieved April 18, 2016.

the absence of explicit protections. First-generation students and professionals are especially vulnerable to being silenced, as their family members and friends are likely to be more vulnerable to violence, especially if they live in rural villages in India.<sup>39</sup>

### III. Laws Should Expressly Prohibit Discrimination on the Basis of Caste.

A number of jurisdictions have already explicit laws addressing discrimination on the basis of caste. On February 22, 2023, the Seattle's City Council passed a first-in-the-nation ordinance explicitly adding caste as a protected category under its anti-discrimination law,<sup>40</sup> banning caste-related bias in employment, places of public accommodation, housing, and other settings.<sup>41</sup> The ordinance describes caste as a "system of rigid social stratification characterized by hereditary status, endogamy, and social barriers sanctioned by custom, law, or religion."<sup>42</sup> Internationally, in addition to India and the United Kingdom,<sup>43</sup> the European Parliament passed a resolution in 2013 calling for, amongst other things, the inclusion of caste as a class protected against discrimination in all trade and association agreements and the promotion of non-discriminatory and inclusive policies and procedures in business operations with caste-affected countries."<sup>44</sup> On March 22, 2021, a bill was introduced in the California Senate to explicitly prohibit discrimination on the basis of caste.<sup>45</sup> At the federal level, there are no explicit protections against discrimination on the basis of caste. Protections against caste discrimination can be inferred into various state and federal civil rights statutes, to varying degrees, based on the language and scope of each statute.<sup>46</sup>

<sup>39</sup> See e.g., Shweta Majumdar Adur and Anjana Narayan, *Stories of Dalit Diaspora: Migration, Life Narratives, and Caste in the US*, 40 BIOGRAPHY 244 (2017), <http://www.jstor.org/stable/26405019>.

<sup>40</sup> Seattle, WASH., CB 120511 (2023), <https://tinyurl.com/ny42v9kn>.

<sup>41</sup> Seattle, WASH., CB 120511 (2023), <https://tinyurl.com/ny42v9kn>.

<sup>42</sup> Seattle, WASH., CB 120511 (2023), <https://tinyurl.com/ny42v9kn>. The South Asian Bar Association, the premier national organization representing South Asian Lawyers (whose current President is of Brahman origin) issued a formal letter in support the Seattle Ordinance, stating that "caste discrimination is a deeply entrenched problem and this type of discrimination can prevent people from accessing employment, education, healthcare, and other opportunities, limiting their ability to thrive and reach their full potential." These groups represent a broad swathe of South Asian castes, ethnicities, religions, genders, and age groups—all ready to take on caste. See @DalitDiva, Twitter (Feb. 17, 2023, at 6:48 PM EST), <https://t.co/SpKXsY0vbA>.

<sup>43</sup> See also, Equality Act 2010, § 9 (Eng.) (requiring the Government to introduce secondary legislation to make caste an aspect of race, thereby making caste discrimination a form of race discrimination); *India: Act No. 33 of 1989, Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* [], 30 January 1990, available at: <https://www.refworld.org/docid/3ae6b52a1c.html> [accessed 23 March 2023].

<sup>44</sup> Resolution 2013/2676 (RSP) of the European Parliament of 10 October 2013 on caste-based discrimination (2013), [https://www.europarl.europa.eu/doceo/document/TA-7-2013-0420\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-7-2013-0420_EN.html) (defining caste-based discrimination as "a socio-religious context, as in Asia, where those who fall outside the caste system are considered 'impure' and 'untouchable' by nature, but also, more broadly, a system of rigid social stratification into ranked groups defined by descent and occupation.").

<sup>45</sup> Sakshi Venkataraman, *California could become the 1st state to ban caste discrimination*, NBC, March 22, 2023, <https://www.nbcnews.com/news/asian-america/california-become-1st-us-state-ban-caste-discrimination-rcna76107>.

<sup>46</sup> Kevin Brown, Annapurna Waughray, Lalit Khandare, & Kenneth Dau-Schmidt, *Bostock v. Clayton County Game Changer: US Federal Employment Law Now Covers Caste Discrimination Based on*

Furthermore, the US has clear obligations under international law to prevent discrimination on the basis of caste. Discrimination based on caste is prohibited under the International Convention on the Elimination of Racial Discrimination (ICERD), which the U.S. ratified in 1994.<sup>47</sup> Obligations to achieve racial equality and ensure non-discrimination extends to all areas of governmental policy and influence. All states, including the United States, have an obligation to ensure that racial and ethnic groups, inclusive of those from all caste groups, enjoy the full scope of their human rights, as encompassed in ICERD article 5, as well as other applicable human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), which the US ratified in 1992.

#### IV. The Need for Clear Prohibitions against Caste-based Discrimination

In principle, existing US law, including US obligations under international law, can be interpreted, in many jurisdictions and contexts, to prohibit discrimination on the basis of caste in the United States.<sup>48</sup> Legal actions has already been taken on the basis that caste is prohibited under existing law.<sup>49</sup> However, in the absence of language expressly prohibiting caste-based discrimination, protections against discrimination based on caste remain inconsistent and inadequate. Explicit language in laws, regulations, and agency guidelines are needed to clarify that existing law *should be uniformly interpreted* to include caste as a protected class.<sup>50</sup> Attorneys practicing in the field report a troubling absence of clear guidance that is leading to a lack of clarity and inconsistent results for claimants across different states.<sup>51</sup> Currently, federal workplace civil rights agencies

---

*Untouchability*. 46 N.Y.U. REVIEW OF LAW & SOCIAL CHANGE 117 (2021), <https://socialchangenyu.com/wp-content/uploads/2022/09/1-Brown.pdf>.

<sup>47</sup> See United Nations. 1966. "International Convention on the Elimination of All Forms of Racial Discrimination." Treaty Series 660 (March): 195, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>. See also, Human Rights Watch, Caste Discrimination: A Global Concern, September 2021, <https://www.hrw.org/reports/pdfs/g/general/caste0801.pdf>; "Committee on the Elimination of Racial Discrimination, General Recommendation 29, Discrimination Based on Descent (Sixty-first session, 2002), U.N. Doc. A/57/18 at 111 (2002), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 223 (2003), <http://hrlibrary.umn.edu/cerd/genrec29.html>.

<sup>48</sup> *Id.* See also, *Brown University adds caste to nondiscrimination policy*, Brown University, December 1, 2022, <https://www.brown.edu/news/2022-12-01/caste>.

<sup>49</sup> See, e.g., *Statement on the Interpretation of Caste Within the Brandeis Nondiscrimination Policy*, Brandeis University, November 26, 2019, <https://www.brandeis.edu/human-resources/policies/discrimination/caste-statement.html>. J. Edward Moreno and Paige Smith, *Rare Caste Bias Case Advances, Raising Calls for Federal Action*, Bloomberg Law, Aug. 10, 2022, <https://news.bloomberglaw.com/daily-labor-report/rare-caste-bias-case-advances-raising-calls-for-federal-action>.

<sup>50</sup> See International Commission for Dalit Rights and National Coalition Against Caste Discrimination in the USA, Listening Session with EEOC, OFCCP, DOJ on Caste Based Discrimination, September 17, 2021, <https://www.icdrintl.org/wp-content/uploads/2021/11/EEOC-Listening-Session-final-102521-.pdf>.

<sup>51</sup> International Commission for Dalit Rights and National Coalition Against Caste Discrimination in the USA, Listening Session with EEOC, OFCCP, DOJ on Caste Based Discrimination, September 17, 2021, <https://www.icdrintl.org/wp-content/uploads/2021/11/EEOC-Listening-Session-final-102521-.pdf>.

remain silent on the issue of caste discrimination.<sup>52</sup> This includes U.S. Equal Employment Opportunity Commission subregulatory guidance, decisions, and memoranda of understanding. Clarity that caste discrimination is, in fact, covered by existing discrimination law would provide important protections to caste oppressed peoples.

In U.S. jurisdictions that do not explicitly prohibit discrimination on the basis of caste, caste might be read into existing civil rights protections. A number of municipal ordinances, and state and federal statutes prohibit discrimination based on a person's national origin, race, color, religion, disability, sex, or familial status.<sup>53</sup> Federal laws and some state laws qualify national origin discrimination, making it explicitly illegal to discriminate because of a person's birthplace, ancestry, culture or language.<sup>54</sup> Federal law protects criminal violation of civil rights, for example, physically assaulting someone based on their ancestry.<sup>55</sup> Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against applicants and employees on the basis of race, color, religion, sex, and national origin.<sup>56</sup> The Civil Rights Act of 1866 (Section 1981) protects people of all races from discrimination and harassment.<sup>57</sup> Currently, many state and private actors are creating policy or taking action against caste discrimination by reading caste into pre-existing protected classes named in such and other legislation, including, for example, by reading caste as protected as discrimination on the basis of race and/or national origin.<sup>58</sup>

## V. The Need for Professional and Civic Education on Caste Discrimination

<sup>52</sup> J. Edward Moreno and Paige Smith, *Rare Caste Bias Case Advances, Raising Calls for Federal Action*, Bloomberg Law, Aug. 10, 2022, <https://news.bloomberglaw.com/daily-labor-report/rare-caste-bias-case-advances-raising-calls-for-federal-action>.

<sup>53</sup> See, e.g., NYC Administrative Code 8-107; Washington Amends its Law Against Discrimination to Provide Protections for Hair Textures and Styles as Traits Associated with "Race," National Law Review, April 7, 2020; <https://www.natlawreview.com/article/washington-amends-its-law-against-discrimination-to-provide-protections-hair>; Maryland State Personnel and Pensions Article §2-302;

<sup>54</sup> See, e.g., California Fair Employment and Housing Act (Gov. Code, § 12900 et seq 2018 Maryland Code State Government Title 20; Maryland Governor's Code of Fair Employment Practices (Executive Order 01.01.2007.16).

<sup>55</sup> See, e.g., Federal Protections Against National Origin Discrimination, The United States Department of Justice, <https://www.justice.gov/crt/federal-protections-against-national-origin-discrimination-1>.

<sup>56</sup> Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq., <http://www.justice.gov/crt/about/cor/coord/titlevistat.php>.

<sup>57</sup> Act of April 9, 1866 (Civil Rights Act), Public Law 39-26, 14 STAT 27, (protecting all persons in the United States in their civil rights and furnished the means of their vindication), <https://www.docsteach.org/documents/document/civil-rights-act-1866>.

<sup>58</sup> Kevin Brown, Annapurna Waughray, Lalit Khandare, & Kenneth Dau-Schmidt, *Bostock v. Clayton County Game Changer: US Federal Employment Law Now Covers Caste Discrimination Based on Untouchability*. 46 N.Y.U. REVIEW OF LAW & SOCIAL CHANGE 117 (2021), <https://socialchangenyu.com/wp-content/uploads/2022/09/1-Brown.pdf>. See, e.g., BRANDEIS UNIVERSITY, *Statement on the Interpretation of Caste Within the Brandeis Nondiscrimination Policy*, November 26, 2019, <https://www.brandeis.edu/human-resources/policies/discrimination/caste-statement.html>; *Brown University adds caste to nondiscrimination policy*, Brown University, December 1, 2022, <https://www.brown.edu/news/2022-12-01/caste>; Seattle, WASH., CB 120511 (2023), <https://tinyurl.com/ny42v9kn>.

The challenge presented by the lack of explicit laws and guidance is exacerbated by the lack of professional and civic education on discrimination based on caste. Education on caste-based discrimination is key to combatting caste-based discrimination in the United States. Caste is an issue that affects a discrete minority within a minority. The challenge with caste is that, paradoxically, it is a niche issue that affects millions of people all across the world. It is, therefore, hidden in plain sight. Without fostering adequate understanding about caste and discrimination on the basis of caste, victims of caste discrimination face barriers in coming forward and having their cases heard and truly understood.

In addition to lack of explicit language prohibiting discrimination on the basis of caste, ignorance about caste discrimination is also responsible for inadequate and inconsistent application of protections against discrimination based on caste. Many local and state adjudicators do not possess any clear understanding of caste discrimination and wrongly view issues between, for example, South Asians of different castes, as intra-race issues.

For example, in *EEOC v. Signal International LLC*, the EEOC sued the marine services company for violating federal law by subjecting the class of approximately 500 Indian employees to labor trafficking and a hostile work environment, forcing the men to live in segregated labor camps. Lawyers in the field argue that, given that the case focused on exploitation of Indian workers, caste competency “would have assisted in investigations, in accounting for caste-related aspects of the difficult conditions workers faced, and in supporting adequate rehabilitation for workers.”<sup>59</sup>

In another matter, during the 2005-2006 California textbook controversy, certain interested organizations lobbied the California Department of Education (CDE) to change the content of the sections on Hinduism and ancient India in California’s sixth-grade history-social science textbooks. While there is nothing inherently problematic about organizations purporting to speak on behalf of an affected community petitioning government officials, these commenters sought to explain the caste system in benign terms, as an institution based on a division of labor and wanted the word “Dalit” (the self-given name of groups formerly known as “untouchables”) to be excised from textbooks.<sup>60</sup>

Lacking in caste competence, the CDE appointed a scholar recommended by the complaining caste dominant organizations, Professor Shiva Bajpai, who approved nearly all the complainants’ demands. Ultimately, Bajpai was found to be closely affiliated with the politics of the complainants<sup>61</sup> and his review was discredited.

---

<sup>59</sup> *Id.*

<sup>60</sup> Purnima Bose, *Hindutva Abroad: The California Textbook Controversy*, 2 THE GLOBAL SOUTH 11-12 (2008) (arguing that the demands were not consistent with prevailing scholarship on India).

<sup>61</sup> Nalini Taneja, A saffron assault abroad, FRONTLINE, January 14, 2006, <https://web.archive.org/web/20120220161440/http://www.flonnet.com/fl2301/stories/20060127000807700.htm>. See also, Guichard, Sylvie, THE CONSTRUCTION OF HISTORY AND NATIONALISM IN INDIA. Routledge at 82–85 (2010).

In contrast, by 2017, as California adjudicators started to understand the dynamics surrounding the fight against discrimination on the basis of caste, California Parents for the Equalization of Educational Materials (CAPEEM) filed a civil rights lawsuit in federal court against public school officials at the California Department of Education, State Board of Education, and several school districts throughout the San Francisco Bay Area. CAPEEM is an organization made up of a group of parents residing in California who are “deeply concerned about the indoctrination of Abrahamic religions and the negative descriptions of Hinduism in the History and Social Science textbooks of [California] state.”<sup>62</sup> The 2017 case challenged the treatment of Hinduism in California’s history-social science curriculum and the official endorsement of other religions.<sup>63</sup> There, California courts examined whether an in-class exercise on the caste system violated a Hindu student’s rights under the Establishment Clause by attributing the caste system to Hinduism alone. Plaintiffs alleged discrimination against the Hindu religion—and endorsement of the Abrahamic faiths in the California State Board Education’s “2016 History-Social Science Framework,” adopted for California public schools, Kindergarten through Grade Twelve, arguing that the Framework “unfairly attribut[ed] the caste system to Hinduism” by teaching that it “was a social and cultural structure as well as a religious belief.” Displaying caste competence, the Court disagreed finding that the Framework’s content specifically instructs teachers to “make clear to students that [the caste system] was a social and cultural structure as well as a religious belief.”<sup>64</sup>

## VI. Combatting Caste-Based Discrimination in Educational Settings

Discrimination on the basis of caste has been reported in educational institutions.<sup>65</sup> Recognizing this challenge, in an effort to remove any uncertainty with respect to protections against discrimination on the basis of caste, many institutions, including several universities, have amended their discrimination policies to address caste discrimination explicitly.

---

<sup>62</sup> About, CALIFORNIA PARENTS FOR THE EQUALIZATION OF EDUCATIONAL MATERIALS, <http://capeem.org/about>.

<sup>63</sup> In *California Parents for the Equalization of Educ. Materials v. Torlakson*, 370 F Supp 3d 1057, 1073 [ND Cal 2019], California courts examined whether an in-class exercise on the caste system violated a Hindu student’s rights under the Establishment Clause by attributing the caste system to Hinduism alone. Plaintiffs alleged discrimination against the Hindu religion—and endorsement of the Abrahamic faiths in the California State Board Education’s “2016 History-Social Science Framework,” adopted for California public schools, Kindergarten through Grade Twelve, arguing that the Framework “unfairly attribut[ed] the caste system to Hinduism” by teaching that it “was a social and cultural structure as well as a religious belief.” The Court found that Plaintiff’s rights under the Establishment Clause were not violated as role playing as an exercise to learn about the caste system did not involve the role playing of a devotional act, like taking communion, but rather of a historical social system.

<sup>64</sup> *California Parents for the Equalization of Educ. Materials v. Torlakson*, 267 F Supp 3d 1218, 1231 [ND Cal 2017].

<sup>65</sup> See, e.g., Philip Martin, *Caste discrimination exists on college campuses. Some schools are trying to change that*, WGBH NEWS, March 8, 2019, <https://theworld.org/stories/2019-03-08/caste-discrimination-exists-college-campuses-some-schools-are-trying-change>.

In December 2021, the Harvard Graduate Student Union ratified its collective bargaining agreement, which included caste as a protected category for its members.<sup>66</sup> In December 2022, Brown University “amended the University’s policy on equal opportunity, nondiscrimination and affirmative action to safeguard against the possibility of caste-based discrimination.”<sup>67</sup> Brown’s Vice-President for Institutional Equity and Diversity stated that “[t]he previous policy would have protected people experiencing caste discrimination,” Carey-Butler said. “But we felt it was important to lift this up and explicitly express a position on caste equity.”<sup>68</sup> In late January 2022, California State University, with more than 437,000 students and 44,000 employees statewide, amended its anti-discrimination policy to include caste as a protected category.<sup>69</sup> Brandeis University was one of the first universities to officially prohibit and protect against caste discrimination in 2019.<sup>70</sup> According to Professor Larry Simons at Brandeis’ Heller School of Social Policy and Management and an expert on caste, “[w]e have many students who come from low caste backgrounds and others who come from high caste and other backgrounds, including Dalits, and they bring sometimes a sense of privilege and sometimes a sense of being stigmatized to America, where caste is not a household word.”<sup>71</sup> California Polytech State University passed a resolution to include protections against caste discrimination in its anti-discrimination policy.<sup>72</sup> Additionally, the University of California Davis,<sup>73</sup> Colby College,<sup>74</sup> Colorado College,<sup>75</sup> the Claremont Colleges,<sup>76</sup> and Carleton University<sup>77</sup> have done the same. The California Faculty

<sup>66</sup> Sakshi Venkataraman, *Harvard adds caste bias protections for graduate student workers*, NBC, December 2, 2021, <https://www.nbcnews.com/news/asian-america/harvard-adds-caste-bias-protections-graduate-student-workers-rcna7279>.

<sup>67</sup> *Brown University adds caste to nondiscrimination policy*, Brown University, December 1, 2022, <https://www.brown.edu/news/2022-12-01/caste>.

<sup>68</sup> *Id.*

<sup>69</sup> See CALIFORNIA STATE UNIVERSITY, *Interim CSU Policy Prohibiting Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation*, (effective from January 1, 2020), <https://calstate.policystat.com/policy/10926024/latest/>.

<sup>70</sup> BRANDEIS UNIVERSITY, *Statement on the Interpretation of Caste Within the Brandeis Nondiscrimination Policy*, November 26, 2019, <https://www.brandeis.edu/human-resources/policies/discrimination/caste-statement.html>.

<sup>71</sup> Philip Martin, *Caste discrimination exists on college campuses. Some schools are trying to change that*, THE WORLD, March 8, 2019, <https://theworld.org/stories/2019-03-08/caste-discrimination-exists-college-campuses-some-schools-are-trying-change>.

<sup>72</sup> CALIFORNIA POLYTECHNIC STATE UNIVERSITY, *Resolution #21-01 Calling for Cal Poly and the California State University (CSU) to include Caste in Anti-Discriminatory Policy*, [https://www.asi.calpoly.edu/wp-content/uploads/2021/03/21-01-Resolution-Call-for-CP-and-CSU-to-Include-Caste-in-the-Anti-Discriminatory-Policy\\_BODappr.pdf](https://www.asi.calpoly.edu/wp-content/uploads/2021/03/21-01-Resolution-Call-for-CP-and-CSU-to-Include-Caste-in-the-Anti-Discriminatory-Policy_BODappr.pdf).

<sup>73</sup> *Discrimination*, UCDAVIS.COM, <https://hdapp.ucdavis.edu/discrimination>.

<sup>74</sup> *Caste Added to Colby’s Nondiscrimination Policy*, COLBYNEWS, October 12, 2021, <https://news.colby.edu/story/caste-added-to-colbys-nondiscrimination-policy/>.

<sup>75</sup> See, Colorado College College Notice of Non-Discrimination, Colorado College, <https://www.coloradocollege.edu/basics/welcome/leadership/policies/colorado-college-notice-of-non-discrimination.html>.

<sup>76</sup> Anushe Engineer, *Scripps adds caste as a protected category in discrimination policies*, THE STUDENT LIFE, March 4, 2021, <https://tsl.news/scripps-adds-caste-as-protected-category/>.

<sup>77</sup> RCI, *How prejudice rooted in an ancient social system has migrated from India to Canada*, RCI, May 16, 2022, <https://ici.radio-canada.ca/rci/en/news/1883754/how-prejudice-rooted-in-an-ancient-social-system-has-migrated-from-india-to-canada>.

Association passed a “Resolution in Support of Adding Caste as a Protected Category.”<sup>78</sup> In August 2021, the California Democratic Party added caste as a protected category to their Party Code of Conduct.<sup>79</sup> The Hubert H. Humphrey School of Public Affairs at the University of Minnesota has also added caste to its Diversity, Equity & Inclusion criteria.<sup>80</sup>

This resolution asks the ABA to encourage other educational institutions to follow the example of the institutions to ensure adequate safeguards against discrimination on the basis of caste.

## VII. Preventing Caste Discrimination within the ABA

This Resolution urges the ABA to join the ranks of the numerous institutions by adding caste as a protected class in its Business Conduct Standards (“BCS”). The ABA’s BCS “apply whenever a Member or Employee is performing services or conducting business for or on behalf of the ABA, and whenever a Contractor is performing services, conducting business for or supplying goods to the ABA. All Members, Employees and Contractors must consider and adhere to the BCS whenever they are conducting ABA business. Any Members, Employees or Contractors who find themselves in a situation that may raise legal or ethical issues or that is identified in the BCS shall contact the Ethics Office or a supervisor.”<sup>81</sup>

This report also requests that the House of Delegates instructs the Board of Governors to amend the ABA Business Conduct Standards to include “caste” in its list of protected classes and to prohibit discrimination on the basis of caste. This would mean adding caste as a class to the “Equal Protection” and “Prohibitions Against Discrimination” subsections under Section E on the ABA Environment by reading caste into discrimination on the basis of “race, color, sex, national origin, age, religion, disability, veteran status, sexual orientation or other protected characteristics” or by amending the text to include caste as follows:

“The ABA is dedicated to equal employment opportunity for its workforce and prohibits discrimination on the basis of race, **caste**, color, sex, national origin, age, religion, disability, veteran status, sexual orientation or other protected characteristics.”

## VIII. Conclusion

<sup>78</sup> CALIFORNIA FACULTY ASSOCIATION, Resolution in Support of Adding Caste as a Protected Category, [https://www.calfac.org/wp-content/uploads/2021/10/caste\\_resolution\\_sponsorbyAPIDA\\_revision10.10.21.pdf](https://www.calfac.org/wp-content/uploads/2021/10/caste_resolution_sponsorbyAPIDA_revision10.10.21.pdf).

<sup>79</sup> Rohit Chopra and Ajantha Subramaniam, *Caste Discrimination Exists in the U.S., Too—But a Movement to Outlaw It Is Growing*, TIME MAGAZINE, March 2022, <https://time.com/6146141/caste-discrimination-us-opposition-grows/>.

<sup>80</sup> TNM Staff, *In a first, public affairs school in US adds caste to its non-discrimination policy*, THE NEWS MINUTE, September 7, 2022, <https://www.thenewsminute.com/article/first-public-affairs-school-us-adds-caste-its-non-discrimination-policy-167625>.

<sup>81</sup> ABA Business Conduct Standards, American Bar Association, [https://www.americanbar.org/about\\_the\\_aba/aba-business-conduct-standards/?login](https://www.americanbar.org/about_the_aba/aba-business-conduct-standards/?login).

While caste discrimination has been a long-standing challenge for minorities amongst minorities in the United States, in the past decade people have become more aware of the urgency for creating awareness and legal clarity sufficient to protect oppressed caste peoples from caste discrimination in the United States. In principle, there are already protections against caste discrimination in the United States.<sup>82</sup> However, these protections are proving insufficient in the face of lack of awareness about discrimination on the basis of caste and its impact, the lack of explicit laws and guidelines that clarify prohibitions against caste discrimination, and misinformation campaigns, all of which have created obstacles to preventing caste discrimination in the United States. The ABA should take swift action to address this issue in order to further its important work in this field.

Respectfully submitted,

Juan R. Thomas, Chair  
Section of Civil Rights and Social Justice

August 2023

---

<sup>82</sup> Kevin Brown, Annapurna Waughray, Lalit Khandare, & Kenneth Dau-Schmidt, *Bostock v. Clayton County Game Changer: US Federal Employment Law Now Covers Caste Discrimination Based on Untouchability*, 46 N.Y.U. REVIEW OF LAW & SOCIAL CHANGE 117 (2021), <https://socialchangenyu.com/wp-content/uploads/2022/09/1-Brown.pdf>.

**GENERAL INFORMATION FORM**

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Juan R. Thomas, Chair

1. Summary of the Resolution(s).

The Resolution urges Congress and state, local, territorial and tribal legislatures to adopt or amend laws, regulations, and policies to prohibit discrimination on the basis of caste to protect Dalits and other caste-oppressed communities. It urges federal agencies to specify that caste is included within the meaning of the bases on which discrimination is prohibited. It also encourages the legal profession to engage in civic education to recognize, prevent and address caste-based discrimination, and urges universities and schools to adopt policies to prevent discrimination against faculty, staff, and students on the basis of caste. It requests that the ABA House of Delegates instructs the Board of Governors to amend the ABA Business Conduct Standards and policies to prohibit discrimination on the basis of caste.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The Resolution seeks to advance Goal 3-Eliminate Bias and Enhance Diversity in urging the amendment and/or adoption of laws, regulations, and guidelines that explicitly prohibit discrimination based on caste. The Resolution also seeks to advance Goal 1-Serve our Members, by requesting the HOD to instruct the BOG to amend the ABA Business Conduct Standards to include caste in its lists of protected classes, and Goal 2-Improve our Profession, by encouraging caste equity awareness in the profession to prevent and address caste-based discrimination.

3. Approval by Submitting Entity.

The Resolution was approved by the Council of Section of Civil Rights and Social Justice on April 28, 2023.

4. Has this or a similar resolution been submitted the House or Board previously?

No.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The Association has adopted many policies concerning discrimination against protected classes, but no Association policies specifically address caste discrimination.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

7. Status of Legislation. (If applicable)

Seattle CB 120511—An ordinance relating to human rights; including protections against discrimination based on an individual's caste – was passed by the Seattle City Council on February 22, 2023.

California SB 403 – Discrimination on the basis of caste—recently approved by Senate Judiciary Committee on April 25, 2023, and re-referred to House Committee on Appropriations.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Association will work with relevant stakeholders and the ABA Governmental Affairs Office to ensure implementation of the resolution.

9. Cost to the Association. (Both direct and indirect costs)

None.

10. Disclosure of Interest. (If applicable)

N/A

11. Referrals.

Business Law Section  
Coalition on Racial and Ethnic Justice  
Commission on Disability Rights  
Commission on Hispanic Legal Rights and Responsibilities  
Commission on Racial and Ethnic Diversity in the Profession  
Commission on Sexual Orientation and Gender Identity  
Commission on Women in the Profession  
Council for Diversity in the Educational Pipeline  
Division for Public Education  
Labor and Employment Law Section  
Law Student Division  
Litigation Section

Young Lawyers Division  
National Bar Association  
National Native American Bar Association  
Hispanic National Bar Association  
South Asian Bar Association  
National LGBTQ+ Bar Association

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address).

Paula Shapiro, Section Director  
ABA Section of Civil Rights and Social Justice  
Tel.: (860) 508-5550  
Email: paula.shapiro@americanbar.org

Lakshmi Gopal, CRSJ Economic Justice Committee Vice Chair and Rights of Women  
Committee Vice Chair  
Tel.: (202) 956-8009  
Email: lgopal@muciri.law

Mark I. Schickman, CRSJ Section Delegate  
Tel.: (510) 467-2909  
Email: mark@schickmanlaw.com

13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting.

Mark I. Schickman, CRSJ Section Delegate  
Tel.: (510) 467-2909  
Email: mark@schickmanlaw.com

Wendy K. Mariner, CRSJ Section Delegate  
Tel.: (617) 460-2284  
Email: wmariner@bu.edu

## **EXECUTIVE SUMMARY**

### 1. Summary of the Resolution.

The Resolution urges the adoption or amendment of laws, regulations, and policies to prohibit discrimination on the basis of caste to protect Dalits and other caste-oppressed communities from discrimination based on caste. The Resolution urges federal agencies to adopt regulations and guidelines specifying that caste is included within the meaning of the bases on which discrimination is prohibited. The Resolution encourages civic education within the legal profession to recognize and prevent caste discrimination and urges the adoption of policies preventing caste discrimination in universities and other places of learning. The Resolution requests that the House of Delegates instruct the Board of Governors to amend the ABA Business Conduct Standards to include caste in its list of classes protected from discrimination.

### 2. Summary of the issue that the resolution addresses.

Caste, as a system of rigid social stratification characterized by hereditary status, endogamy, and social barriers sanctioned by custom, law, or religion, is the basis for discrimination in the workplace, social settings, and personal relationships, including marriage.

### 3. Please explain how the proposed policy position will address the issue.

The Resolution intends to recognize caste as a protected class and to prevent discrimination on the basis of caste through the adoption and/or amendment of laws, regulations, and policies, as well as in the creation of caste equity awareness to combat caste discrimination.

### 4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified

Minority and opposing views rest on the argument that implicit protections against caste discrimination suffice, as any explicit protections would target South Asians and/or Hindus and create negative stereotypes about them. As recognized in the report accompanying this resolution and, equally, by US immigration courts, caste systems are not exclusive to South Asia; caste is a global phenomenon that transcends any one religious, racial, or ethnic identity. Invoking principles of rule of law, this resolution urges the creation of explicit protections to avoid inconsistent and opaque reliance on implicit protections.



## CALIFORNIA

## An effort to ban caste discrimination in California has touched a nerve

California would be the first state to explicitly ban the practice, but the process has been divisive.



California state Sen. Aisha Wahab (center) gathers with supporters after a press conference introducing a bill that would outlaw caste discrimination in the state. | José Luis Villegas/AP Photo

By **ERIC HE**

09/04/2023 07:00 AM EDT



SACRAMENTO, Calif. — Caste discrimination wasn't on the radar of many lawmakers in California. Then it showed up on their doorstep.

Hundreds of people mobilized outside the state Capitol in recent months, protesting a bill from first-term state Sen. Aisha Wahab to add caste to the list of protected groups in California — a proposal that many felt was unnecessary and unfairly tarnished the image of the South Asian community. Hearings on the bill got heated.

Advertisement

“Clearly we hit a nerve,” Wahab, who got death threats and is being targeted with a recall for her efforts, said at one hearing.

If the bill passes as expected and Gov. Gavin Newsom signs it into law, California would become the first state to explicitly outlaw caste-based discrimination, though Seattle has done so and other cities are considering it. Caste, a social hierarchy in which one's group is inherited, is historically associated with South Asia and Hindus, and opponents argue such a ban stigmatizes the religious group.

The affair has had repercussions for Wahab in her heavily South Asian district. It's become a bitter lesson in the pitfalls of wading into nuanced cultural issues in an ever-more diverse nation.

Wahab, a progressive tapped by Newsom to highlight his signature gun control effort, appeared to be caught off guard by the vitriolic response to what she views as a straightforward issue.

“This is a civil rights bill,” she said in an interview. “It’s very simple. We’re trying to protect people.”

For her, it began as she campaigned in her San Francisco Bay Area district, hearing about an issue that has emerged in some employment discrimination cases in Silicon Valley as well as a divisive [measure in Seattle](#) and elsewhere. But a bill to explicitly ban caste discrimination hadn’t been introduced in the California Legislature, even from the two members of South Asian descent.

The fact that this subject came up in the first place perhaps isn’t surprising. Indians represent the second-largest U.S. immigrant group after Mexicans, and Wahab’s district has one of the largest populations of Indian Americans. More broadly, South Asians have become more visible in American politics, with Nikki Haley and Vivek Ramaswamy running in the Republican presidential

Advertisement

Wahab’s legislation, Senate Bill 403, is a floor vote away from reaching the governor’s desk, but not before a fractious legislative process in which she received pushback even from fellow progressive Democrats. Newsom’s office would not say whether he supports the bill.

Committee hearings were packed, with lines for public comment stretching out the door. Social media has been ablaze from both sides, and lawmakers have received tens of thousands of calls and emails. When the city council in Cupertino [passed a resolution](#) opposing the bill, city officials said it was the most-attended public meeting they've ever seen in the majority-Asian suburb.

## A progressive split

Backlash from constituents and local officials prompted two Democratic state lawmakers whose districts overlap with Wahab's, Assemblymembers Evan Low (D-Campbell) and Alex Lee (D-San Jose), to take the unusual step of openly disagreeing with their progressive colleague, suggesting amendments that ultimately watered down the legislation. All three are also in the Legislature's Asian American and Pacific Islander caucus.

"It's not politically expedient, but it's the right thing to do," Low said in an interview. "It's my genuine interest, because it breaks my heart to see members of our AAPI community being split."

Lee's office, which typically logs about 10 constituents providing a stance on a bill, received over 600 messages on SB 403. Just 26 were in support, according to a spokesperson. Low said that the ratio of opposition to support was "99 to 1."

The pair met with Wahab to share their concerns. Eventually, Wahab agreed to place caste under "ancestry" rather than list it as a standalone category such as race, gender identity and age, ensuring that the word remained in the bill, but less prominently.

Low did not take a vote on the proposal. But the amendments won over Lee, who gave a floor speech explaining why he was supporting the bill — and noting that he tried to ensure the ban "doesn't unfairly single out anyone."

Low and another Bay Area legislator, state Sen. Josh Becker (D-Menlo Park), said caste hadn't come up as an issue in decades of being around Silicon Valley tech circles, where there have been accusations of caste discrimination.

Activists on both sides of the debate have focused on educating lawmakers about caste.

“A lot of staff asked, ‘What is caste?’” Wahab said of the reaction when she first considered introducing the bill. “They had to Google it.”



Activists on opposing sides of a California bill to ban discrimination by caste demonstrate in July outside the state Capitol. | Eric He/POLITICO

Suhag Shukla, executive director of the Hindu American Foundation — one of the groups opposing the bill — said that the term “caste” is unlike the state’s other protected categories.

“Everyone has a race. Everyone has an ancestry. Everyone has a gender.

Everyone has an age ” Shukla said. “Not everyone has a caste ”  
Advertisement

Shukla believes the bill has sailed through the Legislature because nobody wants to be seen as being against an anti-discrimination bill.

The issue hits home for Assemblymember Ash Kalra (D-San Jose), the first Indian American elected to the state Legislature and one of two South Asian lawmakers serving in either house. Kalra voted for the proposal but said it was an emotional issue for him. He lamented during a committee hearing about seeing his community “tear each other apart on social media,” and hoped that both sides would make a “commitment to healing.”

## **Heart of the movement**

Silicon Valley, home to a large South Asian population and some of the world’s largest tech companies, has been at the heart of a movement to combat caste-based discrimination.

A 2020 lawsuit by the California Civil Rights Department — believed to be the first in the state to be filed on the grounds of caste-based discrimination — accused two Cisco supervisors of discriminating against and harassing an employee who identified as Dalit, the lowest class in the caste hierarchy. The

case against Cisco is ongoing, though complaints against the two supervisors were dropped earlier this year.

The bill's supporters see the lawsuit as a milestone that has enabled more caste-oppressed people to come forward.

"Right now, it's such a gray area," said Tanuja Gupta, who in 2021 quit her job as a senior manager at Google News in a [highly publicized exit](#) after an event she had organized about caste issues was postponed.

Gupta is now in law school in New York. She said that one of the most frustrating parts of advocating for SB 403 has been the argument that caste discrimination isn't occurring because there have been so few documented cases, calling it a "chicken and egg argument."

Using a different surname to protect against discrimination is not uncommon, said Prem Pariyar, a delegate for the National Association of Social Workers and Cal State East Bay alum who helped lead a successful push last year for the CSU school system to include caste in its [anti-discrimination policy](#).

Advertisement

Pariyar was born into a Dalit family in Nepal and came to California in 2015 to escape caste discrimination. Friends told him that the state was progressive, friendly to immigrants and accepting of different cultures. Instead, he recalled being alienated by his Nepalese coworkers, who refused to room in shared

housing with him because of his caste. Pariyar said he was forced to live out of a van for a month, an experience he called depressing and scary.

“I thought they would not repeat those kinds of practices here,” Pariyar said.

## Talking points

In mid-July, about 250 people gathered at an events center in Fremont, an East Bay suburb in Wahab’s district, for “Caste Con,” a full day of programming against the bill. Several Fremont city officials attended, as well as Palo Alto Mayor Lydia Kou. Fremont Mayor Lily Mei, who lost to Wahab in last year’s race for the local state Senate seat, was given a standing ovation when she was introduced.

The event was moderated by Satish Sharma, chair of the Global Hindu Federation based in the United Kingdom. Copies of Sharma’s book “Caste, Conversion: A Colonial Conspiracy” were available for free in the lobby.

At one point, Sharma asked ChatGPT to define “caste,” and then pointed out the number of times that the word “Hindu” appeared in the computer’s response. “That’s not an accident,” Sharma later said in an interview. “It’s been seeded for such a long time. The word is a hate brand.”

Later, attendees heard talking points on how to defend their stance in the state Capitol. Salvatore Babones, a sociologist and associate professor at the University of Sydney, said people have to “accept the debate” over caste, noting that simple arguments such as “I’m not a Nazi” and “I’m not a white supremacist” do not work in the United States.

“You have to fight it on American terms,” Babones said. “If you don’t fight it on American terms, you’re going to lose.”

**FILED UNDER:** DISCRIMINATION, LEGISLATION, CALIFORNIA, GAVIN NEWSOM, 

## As Democrats push to ban caste discrimination, some Indian Americans object

November 22, 2023

🔊 15 min    ➦    📖    📅 2011



Supporters and opponents of a proposal to add caste to Seattle's anti-discrimination laws shout at each other during a rally at City Hall in February. (John Froschauer/AP)



By [Kimberly Kindy](#)

Shortly after Democratic lawmakers in California this fall passed the first state ban on discrimination by caste, a prominent Indian American party fundraiser says, he confronted Gov. Gavin Newsom with a stark warning.

If Newsom signed the bill, he would alienate and lose the support of Indian American donors and voters, Ajay Jain Bhutoria, a former deputy co-chair of the Democratic National Committee, said he cautioned Newsom.

"We used very strong words ... telling him that definitely he has a bright future in the national politics and he has a bright, bigger ambitions and the community would love to support him," Bhutoria said in an Oct. 8 interview on X Spaces, formerly Twitter Spaces, the day after the veto. "But at the same time, if there's a mistake made on his side, he loses the support of the community. And I think he got the message very loud and clear."

Newsom vetoed the bill on Oct. 7, weeks after Bhutoria and another high-profile Indian American Democratic donor, Ramesh Kapur, spoke to him at a Democratic National Committee retreat in Chicago, they said.

The governor's decision has cast into stark relief a growing rift within the Democratic Party among Indian Americans — an increasingly important demographic in the party — over the movement to prohibit discrimination by castes, the rigid system of social hierarchy traditionally linked to Hinduism.

California's caste anti-discrimination bill was the culmination of a recent wave of bans across the country, mostly pushed by Democratic lawmakers and liberal activists. Two cities, Seattle and Fresno, Calif., made caste a protected class this year, and several universities, including the 23-campus California State University System, have also created special caste-based protections for students and faculty.

Caste is a fixed social group that people are assigned at birth and that traditionally dictates opportunities for jobs, education and marriage. In India, the caste system originally applied to Hindus but now covers people of various religions. Because of this, the California bill ultimately took out all references to Hinduism.

Newsom's office said that in addition to meeting with Bhutoria and other opponents, he also met with bill supporters, and that he believed that the state's anti-discrimination laws already covered castes.

"The Governor met with a number of people on both sides of this issue," said Erin Mellon, a Newsom spokesperson. "He made his decision because it would be duplicative with existing state law, as stated in the veto message."

But supporters of the measures, including the American Bar Association and some Hindu civil rights groups, say that Newsom is incorrect and that people from lower castes are routinely losing educational, housing and job opportunities when someone from an upper caste learns of their status.

"Current laws do not provide adequate protections against discrimination that follows people from a lower caste," said Tarina Mand, a lawyer and past president of the South Asian Bar Association of San Diego. "The beauty of America is that we pride ourselves on the notion that if you work hard enough, you can work your way up, but caste is not something you can shed."

The rise of the caste bills has led to a nascent opposition movement within the party, culminating in Newsom's veto and the formation this year of a mostly Democratic 27-member congressional caucus, led by politicians who have publicly opposed caste discrimination bans at the state and federal level.

Detractors of caste anti-discrimination laws — including many Indian American big-money donors and political power players — say the bills could fuel rather than curtail discrimination against South Asians, particularly Indian Hindus, because they are most often associated with caste hierarchy. They argue that the measures could falsely characterize all Hindus in America as inherently biased against members of their own community. They also said the laws could make people who belong to an upper caste — or whose surnames suggest they do — targets of frivolous lawsuits.

"They are trying to divide us among different castes and different classes," said Romesh Japra, who founded the Americans 4 Hindus super PAC and recruited Bhutoria and other Democratic Indian American donors to fight the bill. "We came here to this country, to America, and we did not think that we'll have to face this again."

Japra said that during his 50 years in the United States, he has never experienced or seen any caste discrimination. "It doesn't exist," he said.

Ananya Chakravarti, a Georgetown University history professor and expert on the caste system, said this is a common refrain from wealthy American Hindus who are not from a lower caste.

"It would be a lot like White people standing up and saying they have never experienced race discrimination," said Chakravarti, who is from an upper caste. "It's literally a case of the upper caste trying to speak for the entire community."

The measures, which are in part dividing Indian Americans along socioeconomic lines, present a challenge for the Democratic Party. Indian Americans have been a reliable voting bloc for the party, backing President Biden by 74 percent in the 2020 election, but the GOP has seen an opening with two Indian American presidential contenders this year in Nikki Haley and Vivek Ramaswamy.

"The politicians are trying to navigate something that is complex," said Guha Krishnamurthi, a law professor at the University of Maryland who is an expert on the caste system. "They want to do the progressive liberal thing, but at the same time, they don't want to alienate groups that believe this may denigrate Hinduism."

Donors like Kapur said they are committed to working with Democrats who backed the anti-caste discrimination bills to ensure there is no party fracturing over the issue. Kapur pledged to speak to liberal Democrats, who supported the bill and similar caste discrimination measures, in defense of Newsom to help them see "the bigger picture." He said he has promised to raise funds for the governor.

But Fatima Iqbal-Zubair, chairman of the California Democratic Party's progressive caucus, said Newsom's veto was a disheartening blow for the state party, which endorsed the bill. Pictures of Newsom meeting with the wealthy Indian donors who were fighting the bill have infuriated members of the caucus and grass-roots supporters, she said.

"Not surprisingly, those with money, with privilege in the community, who risk losing access to that privilege, were the ones fighting the bill," said Iqbal-Zubair, who is South Asian. "The caste system is very real and, ironically, this dynamic played out here. It wasn't people at the bottom he was meeting with; it was people at the top. He listened to them, to the wealthy donors."

## Clashes over castes

Debates over caste discrimination in the United States began to surface in the 1980s and 1990s, in part because of affirmative action laws in India that allowed people from lower castes to secure college educations, often in technology fields, which prompted many to immigrate to America for work.

"These weren't people who came over to drive taxis," said Deelip Mhaske, whose nonprofit, Foundation for Human Horizon, works against caste discrimination. "These were highly educated people who thought they escaped caste discrimination, but it followed them."

Many found that their bosses in America were upper-caste Indian immigrants who sometimes discriminated against them, said Mhaske, who is a Dalit, a lower Indian caste whose members historically were called "untouchables."

The California Civil Rights Department filed a lawsuit in 2020 in state superior court against the technology company Cisco Systems after two high-caste Indian managers allegedly discriminated against a low-caste engineer. Cisco has denied the claims. The case, which could create case law that provides caste-based protections, is pending.

Some lawmakers and college boards began to take notice, particularly in locations where the technology sector and the South Asian population were large and growing.

California state Sen. Aisha Wahab (D) heard last year on the campaign trail from members of the Dalit caste telling her they were facing workplace discrimination. She introduced a bill in February to add caste to the list of characteristics protected by state civil rights, fair housing and education laws.

"This bill is about workers' rights, women's rights and civil rights," she said. "This bill is about ensuring the American Dream is accessible to all those who pursue it."

Dalits and groups representing them testified and staged a 30-day hunger strike in front of the California Capitol. Hundreds submitted written testimony, including Prem Pariyar, a social worker from Nepal. Pariyar said he came to the United States in 2015 to escape caste violence, finding work at a South Asian restaurant. However, he said, he soon faced retaliation.

"I faced casteist slurs from my co-workers, harassment, wage theft, and ended up being homeless living in a windowless van," Pariyar said in his written testimony.

Pushback to the bill was immediate from some moderate and conservative Hindu American advocacy groups. Wahab and her staff say she received racist messages and violent threats. And the hours-long legislative hearings that followed became heated as proponents argued that the bill was an important civil rights measure while opponents argued that it was racist and discriminatory.

"Everyone has a race. Everyone has a color. Everyone has an age," said Rakhi Israni, a lawyer and an executive director at the Hindu Policy Research and Advocacy Collective USA, which argued that the law would be discriminatory. "Not everyone has a caste."

The bill overwhelmingly passed the State Assembly, 55-3, in August and the Senate, 31-5, in September. Republicans who voted for the bill spoke of their own families' immigration stories and the prejudice they faced. "My family changed their name at Ellis island when they came over to avoid discrimination," said state Sen. Scott Thomas Wilk Sr. "In America, we are supposed to all be created equal."

Wahab and her allies celebrated the victory. But as the bill headed to Newsom's desk, a group of wealthy Indian Americans began a pressure campaign focused on the governor.

Kapur, a member of the Biden-Harris National Finance Committee in 2020, said he wasn't following the bill closely until it passed the legislature. "I was just concentrating on raising money for Biden, for his reelection," Kapur said in an interview.

Speaking on a Hindu television show [broadcast on YouTube](#), Kapur said Japra pulled him into the debate. Kapur said he then reached out to Vice President Harris, whose mother was Indian American.

"The White House played a little part in also supporting this," Kapur said in the interview on YouTube. "If Japra did not send me that information and I didn't go to Kamala D. Harris ... this bill would have been signed."

In an interview with The Washington Post, Kapur backed away from the claim that he solicited and secured Harris's help, saying, "If I said that, I misspoke." A Harris spokesperson did not respond to calls and texts seeking comment.

Then in September, Kapur and Bhutoria said, they approached Newsom at a Democratic National Committee meeting in Chicago and told him their concerns about the bill. In interviews with The Post, both men said they misspoke in their later claims that they directly threatened Newsom with a loss of donations if he signed the bill. Instead, Kapur said, "I let him know he has competition. He can't take our support for granted."

Kapur said Newsom pointed out to him that the bill had passed with almost unanimous support of the Assembly and Senate. "I said, 'I know that, but I would like you to veto it,'" Kapur said in an interview. "He said some would go after him in large numbers. I told him I would have his back."

In his interview with The Post, Kapur said that he exchanged emails with Newsom after he spoke with him in Chicago and that Newsom emailed him hours before the veto.

"He is a good politician, so he emailed me: 'Will veto and just watch my back,'" Kapur said describing the email, which he would not share with The Post. Newsom's office did not respond to questions about whether he emailed with the men. "He is moving away from all the fringe bills that are before him because he wants to move into middle left as opposed to far left," Kapur said. "Now he has a big supporter in us."

Bhutoria posted a picture of Newsom and himself at the DNC event in Chicago hours after the veto, saying, "Thank you Gov. Newsom for listening to my recommendation."

Although Newsom's office said he met with people on both sides of the issue, officials from Equality Labs — a bill sponsor that organized testimony from lower-caste Dalits and led the hunger strike — said they repeatedly asked and were never given a meeting with Newsom. Newsom's office did not directly respond to questions about whether it met with Equality Labs or Dalit activists. Wahab and her aides met with Newsom's staff but were not given a one-on-one with Newsom, Equality Labs said.

"It is apparent that the governor vetoed the bill due to political pressure by Hindu organizations and financial donors," said Ann Ravel, a California lawyer who served on the Federal Election Commission during the Obama administration and who supported the bill.

Meanwhile, Japra said, the California bill and the success of Seattle's and Fresno's anti-discrimination caste measures prompted him to take his work against such laws to Congress. Japra and his PAC — which formed in 2019 and exclusively supported Republican candidates until last year — helped organize a "Hindu-American Summit for Political Engagement" at the U.S. Capitol in June.

By this fall, his group had helped organize the new Hindu, Jain, Buddhist and Sikh American Congressional Caucus, which claims 27 members, all but two of them Democrats. In an interview, Japra said the group is sympathetic to his concerns about a possible federal caste discrimination law, adding that caucus members will now serve as "our mouthpieces and spokesmen" to block such actions.

Rep. Richard McCormick (R-Ga.), a leader in the new caucus, said in a statement against the California bill that he believed “it’s racist and it classifies people in a divisive way.” McCormick did not return calls seeking comment. The head of the caucus, Rep. Shri Thanedar (D-Mich.), said in a statement to The Post that “any legislation based around caste unfairly stigmatizes the South Asian and Indian American community.”

A group of mainstream Hindu and Sikh organizations protested the new caucus, saying it was formed without “input from the full spectrum of Hindu American civil society, including Dalit” organizations.

“Any caucus without inclusive representation from the Indian diaspora will serve as nothing more than a vehicle for Hindu nationalist policies that will inevitably harm the entire South Asian American community,” the group, which includes Hindus for Human Rights and the Sikh Coalition, said in an Oct. 3 statement.

In a statement to The Post, Thanedar defended the caucus, saying it would promote the interests of Hindus, Buddhists and Sikhs across the nation. “These communities often face discrimination, cultural misunderstandings, and limited access to resources, all factors that hinder their complete integration in American society.”

It’s unclear where efforts to ban caste discrimination will go in California after the veto. Wahab’s office said it is no longer commenting on the bill.

Dalit activists that supported the measure said violent threats from opponents have caused Wahab and others who are pushing for caste discrimination measures to retreat.

Last month, a conference in Berkeley, Calif. — where speakers were scheduled to talk about caste discrimination in the United States — was canceled by event organizers because “those pushing for caste equity, including our guests, have been met with threats and harassment.”

Against this backdrop, several state legislators in New Jersey, which has the largest South Asian population in the nation, are planning to introduce bills early next year to address caste discrimination, according to some grass-roots organizations involved in the planning. “There are firm plans in place but, given the current climate, they want to wait until January to make any announcements,” Mhaske said.

It’s unclear whether a congressional bill will be introduced. The latest action on Capitol Hill was a resolution that denounced caste discrimination, introduced by Rep. Ilhan Omar (D-Minn.) in June when Indian Prime Minister Narendra Modi visited the Capitol. It did not pass.

*Alice Crites contributed to this report.*

## **CORRECTION**

This story has been updated to reflect that Equality Labs was given a meeting with staff for California Gov. Gavin Newsom but not with the governor, as they had sought.

### **What readers are saying**

The comments reflect a strong opposition to the caste system and the idea of caste discrimination being brought into the United States. Many commenters argue that caste discrimination should be outlawed, similar to other forms of discrimination, and criticize California Governor... [Show more](#)

This summary is AI-generated. AI can make mistakes and this summary is not a replacement for reading the comments.

≡ Sections

# The San Diego Union-Tribune

COMMENTARY

# Opinion: Unprecedented California caste discrimination bill would address an important problem



Sacramento California outside the Capitol building. (DustyPixel/Getty Images )

The lawsuit against Cisco is the perfect example of why we need to expressly enumerate caste.

**By Tarina Mand**

July 20, 2023 6:21 PM PT

*Mand is past president of the South Asian Bar Association of San Diego, a board member of California Asian Pacific American Bar Association and an attorney at The Dixon Law Firm. She lives in San Diego.*

Discrimination based on caste has long plagued societies around the world, and the United States is no exception. With the rise of globalization and multiculturalism, it is disheartening to witness caste-based prejudices persist within our communities.



COMMENTARY

## **Opinion: Unprecedented California caste discrimination bill would increase discrimination, not end it**

July 20, 2023

Caste is an individual's perceived position in a system of social stratification on the basis of inherited status. Caste discrimination can manifest as employment and housing discrimination, human trafficking, and gender-based violence and sexual abuse. The need for a robust legal framework to combat this form of discrimination is evident, and Senate Bill 403 by state Sen. Aisha Wahab, D-Fremont, presents a crucial opportunity to address this issue head-on. The bill has been [approved](#) by the

Senate and the Assembly Judiciary Committee. California Assembly members will vote on the bill before October of this year.

It is essential to acknowledge that South Asian Americans are not the sole victims of this injustice. Individuals of Japanese, Somali, Nigerian, Oaxacan and other backgrounds also face the repercussions of caste-based prejudice.

Netflix's popular documentary series, "[Indian Matchmaking](#)," provides a disturbing portrayal of caste discrimination within the Indian diaspora in the United States. The show highlights instances where individuals are judged based on their caste, perpetuating the unjust notion that one's worth is predetermined by birth.

The case of caste discrimination at Cisco Systems serves as another poignant example of the pervasive nature of this issue. The California Civil Rights Department filed a [lawsuit](#) against the tech giant alleging that upper-caste employees had created a hostile work environment for their lower-caste counterparts. The suit alleged the prevalence of discriminatory practices, such as exclusion from meetings, biased performance evaluations and derogatory remarks, which severely impacted the victims' professional growth and psychological well-being. This demonstrates that caste discrimination can not only affect individuals' personal lives but also have severe economic repercussions. Access to opportunity is a hallmark of the American ethos. To deny any group of people because of the status they were born into and cannot control is the antithesis of the American spirit.

The lawsuit against Cisco is the perfect example of why we need to expressly enumerate caste. After successfully avoiding defendant Cisco's request for arbitration, Cisco was sued for discrimination on the basis of religion, ancestry,

national origin and race. The judge in the case denied the admission of evidence related to caste. This ruling serves as an example that courts would be reluctant to admit evidence related to caste, even if it is relevant to the case. This would make it more difficult for victims to prove they were discriminated against on the basis of caste.

Opponents of Senate Bill 403 argue that it disproportionately affects South Asians, particularly those belonging to higher castes. However, this argument fails to recognize the fundamental purpose of anti-discrimination laws. Supporting the bill is akin to supporting anti-race discrimination laws, which safeguard individuals from various racial backgrounds. Just as anti-gender discrimination laws protect both women and men from bias, the measure aims to shield all Americans from the damaging effects of caste discrimination. Everyone suffers in a system that pits groups against each other and limits opportunity. The bill serves as a powerful statement that discrimination in any form is unacceptable, regardless of who the victims or perpetrators may be.

Proponents of the opposition's viewpoint often overlook the dual protection of the bill. It is a shield against discrimination that benefits all individuals, regardless of their caste background. While the focus may be on protecting historically marginalized communities, it is important to note that the legislation would also extend its protection to high-caste individuals who might experience discrimination from someone belonging to a different caste. The shield works both ways.

Efforts to combat caste discrimination require a collective commitment to education, awareness and dismantling oppressive systems. Unfortunately, the Hindu American Foundation has taken a different approach. Instead of using its power and influence

to promote understanding and dismantling of the caste system, the foundation's efforts have focused on filing [lawsuits](#) to revise school curricula and stifling dissenting voices through [lawsuits](#) alleging defamation. By attempting to remove the term "caste" from educational discourse, it risks perpetuating ignorance and impeding progress in addressing the deeply rooted problem of caste discrimination. True progress lies in acknowledging and confronting the realities of prejudice, rather than perpetuating them through revisionist efforts or attempts to silence dissent.

It is imperative that Californians support the passage of Senate Bill 403, recognizing that it is in everyone's best interest to foster an inclusive society that embraces diversity and ensures equal opportunities for all. By doing so, we take a crucial step towards creating a future where individuals are valued for their abilities, character and contributions, rather than being confined by the chains of an archaic and discriminatory system.

# DOES U.S. FEDERAL EMPLOYMENT LAW NOW COVER CASTE DISCRIMINATION BASED ON UNTOUCHABILITY?: IF ALL ELSE FAILS THERE IS THE POSSIBLE APPLICATION OF *BOSTOCK V. CLAYTON COUNTY*

KEVIN BROWN, LALIT KHANDARE, ANNAPURNA WAUGHRAI, KENNETH DAU-  
SCHMIDT, & THEODORE M. SHAW<sup>∞</sup>

## ABSTRACT

*This article discusses the issue of whether a victim of caste discrimination based on untouchability can assert a claim of intentional employment*

---

<sup>∞</sup> Kevin Brown, Richard S. Melvin Professor, Indiana University Maurer School of Law, B.S. 1978, Indiana University, J.D. 1982, Yale Law School; Lalit Khandare, Assistant Professor, School of Social Work, Pacific University Oregon, B.S. 1999, Amravati University in India, M.S., Commerce, 2001, Amravati University in India, M.A., Social Work, 2003, Tata Institute of Social Sciences-Mumbai, PG Diploma, Human Rights and Law, 2005, The National Law School of India University-Bangalore, M. Phil., Planning and Development, 2006, Indian Institute of Technology-Bombay, Ph.D., Social Work, 2017, Indiana University; Annapurna Waughray, Professor of Human Rights Law, Manchester Law School, Manchester Metropolitan University, Manchester, U.K., B.A. (Hons.) 1983, Cambridge University, M.A. 1986, Cambridge University, Solicitor 1994, Law Society of England and Wales, LL.M., International and European Law, 2000, Liverpool University, Ph.D. 2013, Liverpool University; Kenneth Dau-Schmidt, Willard and Margaret Carr Professor of Labor and Employment Law, Indiana University Maurer School of Law, B.A. 1978, University of Wisconsin, M.A., Economics, and J.D. 1981, University of Michigan-Ann Arbor, Ph.D., Economics, 1984, University of Michigan-Ann Arbor; Theodore M. Shaw, Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights at the University of North Carolina School of Law, B.A. 1976, Wesleyan University, J.D. 1979, Columbia University School of Law. We would like to acknowledge and express our appreciation to colleagues and other friends whose support and suggestions have been so valuable to this Article. Special thanks to Michael Dodson, Melvin Felton, Steve Fulmer, Guha Krishnamurthi, Timothy Lovelace, Purvi Mehta, Anthony Prather, Garav Pathania, Sukhadeo Thoratt, and Deborah Widiss. The substance of this article was discussed at the following: Zoom Conference entitled the Practice of Caste in USA organized by the Ambedkar King Study Circle of California in August 2020; Zoom Conference entitled Caste in the Valley: Experiencing Discrimination on Foreign Land organized by the International Dalit Solidarity Network in August 2020; Confronting Racism: Zoom Conference Global Solidarities Sponsored by the Center for Race and Ethnic Studies at Indiana University, Bloomington in August 2020; Zoom Conference Strategic Approaches to Collaborate and Combat Racial Injustice and Caste Discrimination sponsored by International Commission for Dalit Rights in September 2020; and Zoom Conference Sustaining Solidarities: Dalit, Black & Muslim Lives in an Era of Uncertainty organized by the Dhar India Studies Department of Indiana University, Bloomington, Indiana October 2020. Caste Discrimination Under US Federal Employment Discrimination Law Keynote Address at the Conference entitled International Connections and Solidarity, sponsored by Discrimination Law Association of United Kingdom, Zoom Webinar Feb 17, 2021; World Bank Series on Race and Caste sponsored by Social Inclusion Global Solutions Group and the SAR Sustainable Development Working Group on Racism of the World Bank, Zoom Conference April 27, 2021; Decolonising the Law Discussion Group at the Faculty of Law delivered at Oxford University, Oxford, United Kingdom Zoom Conference May 13, 2021; Presentation to the faculty of the University of South Carolina Law School on March 28, 2022; and Presentation to the faculty

*discrimination under Title VII or Section 1981. This article contends that there are legitimate arguments that this form of discrimination is a form of religious discrimination under Title VII. The question of whether caste discrimination is a form of race or national origin discrimination under Title VII or Section 1981 depends upon how the courts apply these definitions to caste discrimination based on untouchability. There are legitimate arguments that this form of discrimination is recognized within the concept of race discrimination or national origin discrimination under Title VII or race discrimination under Section 1981. However, if courts reject these conclusions, the approach adopted by the Supreme Court in its June 2020 decision in Bostock v. Clayton County would provide another potent legal argument for recognizing such discrimination.*

*The Bostock approach avoids the question of whether caste discrimination based on untouchability is a form of national origin or racial discrimination. This approach draws on the Supreme Court's recognition that the "but-for" causation standard applies under both Title VII and Section 1981. The but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause. And multiple but-for causes can exist. Applying this approach to intentional employment discrimination against gays, lesbians, or transgender individuals, the Supreme Court pointed out that such a person's sex is inextricably intertwined with their other status. The Court concluded that discrimination against a person because they are gay, lesbian, or transgender means that you are discriminating against such a person based on that status, which is not protected, and their sex, which is. Thus, under the Bostock approach, because all of those who are victims of caste discrimination based on untouchability are from Asia, their caste is inextricably intertwined with their race. As a result, when Dalits are victims of intentional discrimination based on untouchability, the discriminator is motivated to discriminate against them because of their caste, which is not a protected trait, and their race, which is. Thus, intentional caste discrimination inevitably also involves race discrimination under both Title VII and Section 1981.*

I. INTRODUCTION.....	120
II. CASTE SUBORDINATION OF DALITS IN SOUTH ASIA AND THE U.S. ....	127
A. Brief History of South Asian Immigration to the U.S. ....	128
B. The Five-Fold Caste System.....	130
C. Discrimination Dalits Experience Under the Caste System.....	134
III. CASTE DISCRIMINATION CAN GENERATE RACE DISCRIMINATION EMPLOYMENT CLAIMS UNDER 42 U.S.C. § 1981.....	137
A. Application of Section 1981 to Employment Discrimination .....	138
B. Americans of the 19th Century Understood Caste Discrimination as Included Within Race Discrimination .....	140
1. Supreme Court's Opinion in <i>Saint Francis College v Al Khazraji</i> .....	140
2. Common Practice of Analogizing Racial Discrimination Against Black Americans to Caste Discrimination During the 19th Century .....	142
3. Aryan Origin Theory and Race.....	145
4. Congressional Debates During the Passage of the Civil Rights Act of 1866.....	148
5. Conclusion .....	152
IV. IS CASTE DISCRIMINATION COVERED BY ONE OF THE PROTECTED TRAITS OF TITLE VII? .....	152
A. Is Caste Discrimination Based on Untouchability a Form of Religious Discrimination? .....	154
B. Is Caste Discrimination Based on Untouchability Covered Under the Protected Trait of Race? .....	156
1. Determining Whether Caste Discrimination is Race Discrimination Using the Federal Government's Definitions of Race.....	157
2. Defining Race for Purposes of Title VII as it Was Defined by Section 1981.....	159
3. Congressional Debates During Passage of the Civil Rights Act of 1964.....	160
4. Contemporary Sources Defining Race .....	161
C. Is Caste Discrimination Based on Untouchability Covered Under the Protected Trait of National Origin Discrimination? .....	162
1. Dalits as a National Origin Group Due to Stigmatization by Caste Members .....	164
2. Dalits as a National Origin Group Based on Ancestry Analogy to U.K. Treatment of Caste Discrimination .....	164
3. Aryan Origin Theory and National Origin Discrimination.....	165
4. Dalits as a National Origin Group Based on Applying Section 1981's Definition .....	167
V. CHANGE THE PROTECTED TRAIT APPROACH ARTICULATED IN <i>BOSTOCK</i> ...	167
A. <i>Bostock v. Clayton County</i> .....	168
B. Application of the <i>Bostock</i> Approach to Caste Discrimination Under Title VII.....	171
1. Does the <i>Bostock</i> Approach Using Religion Work for Dalits?.....	172

2. Does the <i>Bostock</i> Approach Using National Origin Work for Dalits? ..	172
3. Does the <i>Bostock</i> Approach Using Race Work for Dalits? .....	172
B. Application of the <i>Bostock</i> Approach to Caste Discrimination Under Section 1981 .....	173
VI. CONCLUSION .....	174

## I.

### INTRODUCTION

Untouchability stems from the over 3,000-year-old caste system of the Indian subcontinent, a hierarchical system that stratifies individuals into groups based on birth.<sup>1</sup> For simplification, the “caste system” consists of four distinct hierarchically ranked ‘varnas’ or major occupational groupings (we will refer to all of those in these groups, collectively, as “Caste Hindus”). Dalits constitute a sort of fifth caste outside the four-fold system. Dalits were also known as “outcastes” or “untouchables” to illustrate that they, religiously, fell outside the four-fold Hindu caste system.<sup>2</sup> These five broad caste groups can be broken down into thousands of hierarchically ranked subcastes or “jatis”—the indigenous Indian word.<sup>3</sup> In traditional Hindu society, occupations were allocated among different social groups according to Hindu law and custom that reflected the “classic expression of inequality, viz., caste.”<sup>4</sup> Thus, to a certain extent, employment discrimination based on caste is a way of life. Caste also ensured that there was little concern in Indian society for the rights of individuals. The functioning of the caste system excluded whole segments of society from positions of respect and responsibility without consideration of individual talents, abilities, or interests.<sup>5</sup> Every individual’s social position in Indian society was (and to a large extent, particularly in rural India where three-fourths of Dalits reside,<sup>6</sup> still is) defined by the jati into which he or she is born.

Historically, Dalits were forced into the occupations regarded as ritually “impure”, such as leather workers, manual scavenging (manually clearing human feces from public and private latrines using hand-held implements, without mechanization or protective equipment), disposing of dead animal carcasses and

---

1. See *infra* notes 84–85. For a detailed discussion of the caste system, see LOUIS DUMONT, *HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS* (1972).

2. See *infra* note 84.

3. Varna is a Hindu concept whereas jati is a cross-religious cultural phenomenon. Thus, not all jatis are subsumed into one of the four varnas.

4. M. N. SRINIVAS, *CASTE IN MODERN INDIA* 88 (1962).

5. See generally DUMONT, *supra* note 1.

6. *India: Official Dalit Population Exceeds 200 Million*, INT’L DALIT SOLIDARITY NETWORK (May 29, 2013), <https://idsn.org/india-official-dalit-population-exceeds-200-million/> [https://perma.cc/NHR4-S97W].

temple prostitution (devadasi).<sup>7</sup> Hindus believe that engaging in these activities is religiously polluting to the individuals who perform them and that this spiritual pollution is contagious.<sup>8</sup> Since this spiritual pollution stemmed from birth, even today Dalits cannot escape it by deed, attainment of highly valued educational credentials, or rise in social or economic standing.<sup>9</sup> Because of this religious pollution, Caste Hindus took elaborate precautions to prevent even incidental contact between themselves and Dalits.<sup>10</sup> Like the concept of social distancing that has developed in response to Covid-19 and its variants, when it came to avoiding contact with Dalits, Caste Hindus engaged in extreme social distancing. They commonly banned and segregated Dalits from full participation in Hindu social life and required them to maintain a discrete distance.<sup>11</sup>

Caste discrimination based on untouchability in the employment context has generally been a hidden form of discrimination in the U.S., until recently. Even though the caste system has existed for thousands of years, caste discrimination based on untouchability was rarely recognized as an issue on American soil due to the historically low numbers of South Asians in the U.S., of which only the tiniest fraction were Dalits. As late as 1960, there were less than 13,000 people of Indian origin in the country.<sup>12</sup> Over the past thirty years, however, the number of South Asian immigrants in the U.S. has skyrocketed. According to the Census Bureau, there were more than 5.4 million people of South Asian descent in the U.S. in 2018.<sup>13</sup> But, a 2003 University of Pennsylvania study revealed that only 1.5% of Indian immigrants in the U.S. were Dalits or members of the lower

---

7. SMITA NARULA, *BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA'S "UNTOUCHABLES"* 141 (1999).

8. N. K. BOSE, *THE STRUCTURE OF HINDU SOCIETY* 28 (1975).

9. As a Dalit surgeon emphatically put it:

It is India's most shameful paradox—this country has made almost unimaginable progress in nearly every sphere of human life, but the one thing unchanged is the condition of its dalits and backward communities. I am a microsurgeon specialising in hand and spinal reconstruction, and am [a Member of the Legislative Assembly] from Bihar, but I still remain very much a dalit—a dhobi ("washerman"), to be precise, open to routine humiliation from the upper castes.

Smita Narula, *Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective*, 26 WIS. INT'L L.J. 255, 266 (2008).

10. See DEVANESAN NESIAH, *DISCRIMINATION WITH REASON? THE POLICY OF RESERVATIONS IN THE UNITED STATES, INDIA AND MALAYSIA* 38 (1997). Despite the doctrinal denunciations of caste and their espousal of equality, Sikhs, Muslims, and Christians also engage in social distancing practices with respect to Dalits. See *infra* note 128 and accompanying text.

11. See *infra* note 122.

12. SANJOY CHAKRAVORTY, DEVESH KAPUR, & NIRKVIKAR SINGH, *THE OTHER ONE PERCENT: INDIANS IN AMERICA* 24 (2017).

13. *American Community Survey, Asian Alone or in Any Combination by Selected Groups*, U.S. CENSUS BUREAU (2018), <https://data.census.gov/cedsci/table?q=B02018&tid=ACSDT1Y2019.B02018&hidePreview=true> [https://perma.cc/8R84-ACL4]. There were 4,605,550 Asian Indians, 208,200 Bangladeshi, 24,143, Bhutanese, 197,880 Nepalese, 554,202 Pakistanis, and 55,812 Sri Lankans. *Id.*

castes.<sup>14</sup> Like all immigrants, South Asians brought their beliefs with them, including those about the caste system.

As a result of more immigration from South Asia, more employment discrimination claims based on caste can be expected. For example, Cisco Systems, Inc. (“Cisco”), is engaged in an employment discrimination litigation initially commenced in June 2020 by the California Department of Fair Employment and Housing (“DFEH”).<sup>15</sup> In the case, DFEH alleges that Cisco engaged in caste discrimination based on untouchability against John Doe, a Dalit, in violation of the California Fair Employment and Housing Act (“FEHA”).<sup>16</sup> Equality Labs, a nonprofit advocacy organization for Dalits,<sup>17</sup> received complaints of caste discrimination from almost 260 U.S. tech workers in a three-week period in the fall of 2020.<sup>18</sup> In addition, in October 2020, the Washington Post published a statement from a group of 30 Dalit female Indian engineers employed by Google, Apple, Microsoft, Cisco, and other tech companies.<sup>19</sup> The statement thanked John Doe for filing his complaint and discussed the caste bias they have encountered both in educational institutions in India and in the U.S. tech sector.<sup>20</sup> In May 2021, a labor trafficking case was filed in the U.S. District Court of New Jersey on behalf of 200 Indian nationals recruited from India to work on construction of the largest Hindu temple in the U.S.<sup>21</sup> They were placed in a state of total dependence on their employers.<sup>22</sup> Their employers took their passports away and imprisoned them in a compound.<sup>23</sup> They were subjected to casteist

---

14. Tinku Ray, *The US Isn't Safe from the Trauma of Caste Bias*, WORLD (Mar. 8, 2019, 9:00 AM), <https://www.pri.org/stories/2019-03-08/us-isn-t-safe-trauma-caste-bias> [https://perma.cc/8W5Y-B8LE].

15. Cal. Dep’t of Fair Emp. & Hous. v. Cisco Sys. Inc., No. 20CV372366 (Santa Clara Cnty. Super. Ct. Oct. 16, 2020). The claim was originally filed on June 30, 2020 in the United States District Court of the Northern District of California. DFEH brought suit against Cisco regarding its discriminatory treatment of John Doe, in violation of Title VII of the Civil Rights Act of 1964 and the California Fair Employment and Housing Act (FEHA). DFEH, however, dismissed the filing in the US District Court on October 16, 2020 and refiled in the Superior Court of California, Santa Clara County, the same day, resting its claims solely on FEHA.

16. California Fair Employment and Housing Act (FEHA), CAL. GOV’T CODE § 12900 (West 2022). The complaint filed by DFEH alleges that Cisco engaged in unlawful employment practices based on religion, ancestry, national origin/ethnicity, and race/color against John Doe, a Dalit.

17. EQUALITY LABS, <https://www.equalitylabs.org> [https://perma.cc/7CHN-Z3XQ] (last visited Feb. 3, 2021).

18. Nitasha Tikku, *India’s Engineers Have Thrived in Silicon Valley. So Has Its Caste System.*, WASH. POST (Oct. 27, 2020), <https://www.washingtonpost.com/technology/2020/10/27/indian-caste-bias-silicon-valley/> [https://perma.cc/2SVG-HZPL].

19. *Dalit Women Technologists’ Statement About Caste in Silicon Valley*, WASH. POST (Oct. 27, 2020), <https://www.washingtonpost.com/context/a-statement-on-caste-bias-in-silicon-valley-from-30-dalit-women-engineers/d692b4f8-2710-41c3-9d5f-ea55c13bcc50/> [https://perma.cc/VF6A-K42V].

20. *Id.*

21. Complaint, *Kumar v. Bochasawasi Shri Akshar Purushottam Swaminarayan Sanstha*, Inc., No. 3:21-CV-11048 (D. N.J. May 11, 2021).

22. *Id.* at § 104.

23. *Id.* at § 4.

insults and humiliations.<sup>24</sup> Their status as Dalits was the reason why they were recruited, exploited, and mistreated in this way.<sup>25</sup> In fact, the U.S. State Department has consistently noted caste-based trafficking, sexual, and labor exploitation from India disproportionately impacts Dalits.<sup>26</sup>

If we propose the normative question in the context of American society, should caste discrimination based on untouchability, if it is practiced, be a form of employment discrimination, the answer must be a resounding yes! The comparison between caste and other forms of discrimination was made in the U.S. by abolitionists in the 1830s, who expressed their disgust at the caste system.<sup>27</sup> Before the Civil War, abolitionists analogized the treatment of enslaved Black people in the U.S. to the Indian caste system in order to argue against the horrors of slavery in the south and for better treatment of formerly enslaved persons in the north.<sup>28</sup>

U.S. courts have rarely addressed the issue of whether anti-discrimination employment measures ban caste discrimination.<sup>29</sup> For purposes of discussing caste discrimination in employment, the most appropriate federal laws are 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964. Section 1981, which originated with the Civil Rights Act of 1866, only applies to race discrimination.<sup>30</sup> Title VII makes it “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>31</sup>

This article is limited to federal employment claims for intentional caste discrimination based on untouchability under Section 1981 and Title VII. Because Section 1981 provides a basis for claims of discrimination for police misconduct, housing, zoning, and education, the article is also suggesting that federal law provides other important legal remedies for Dalits beyond the employment

---

24. *Id.* at § 7 (People in the Scheduled Caste in India, for example, were formerly considered “untouchables” and “endure near complete social ostracization.” At the temple in New Jersey, temple leadership did what they could to remind these marginalized workers of their place in the social hierarchy. Defendant Swami Prasanand, for example, called the workers “worms,” thus exacerbating the psychological coercion the workers experienced.)

25. *Id.*

26. *See, e.g.*, OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERS., U.S. DEP’T OF STATE, 2021 TRAFFICKING IN PERSONS REPORT: INDIA, <https://www.state.gov/reports/2021-trafficking-in-persons-report/india/> [<https://perma.cc/P2AC-UQ7K>] (last visited Feb. 26, 2022).

27. *See infra* notes 172–73.

28. *Id.*

29. *See, e.g.*, *Mazumder v. Univ. of Mich.*, 195 F. App’x 320, 323 (6th Cir. 2005). The caste discrimination issue was raised, but not fully litigated, and the Court expressed an unfamiliarity with the concept through their use of quotation marks around the term.

30. *See* 42 U.S.C. § 1981(a) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens.”) (emphasis added).

31. 42 U.S.C.A. § 2000e–2(a)(1).

context.<sup>32</sup> In this article, we will contend that there is a legitimate argument that caste discrimination is a form of religious discrimination under Title VII. However, the strongest arguments involve the assertions that caste discrimination based on untouchability are included within race and/or national origin discrimination.

The question of whether caste discrimination is a form of race or national origin discrimination under Title VII or race discrimination under Section 1981 comes down to whether caste fits within the definition of those protected traits under the respective statutory frameworks. Title VII does not include a definition for “race,” and the Supreme Court has not yet elaborated on the term for purposes of Title VII. Though Section 1981 doesn’t use the word “race,” within a decade of the passage of the Civil Rights Act of 1866, the Supreme Court confirmed that it “is intended for the protection of citizens of the United States in their enjoyment of certain rights without discrimination on account of race, color, or previous condition of servitude.”<sup>33</sup>

In addressing what groups constitute a race under Section 1981, the Supreme Court stated in *Saint Francis College v. Al Khazraji* that the definition of race was to be drawn from how it was understood in the 19th century.<sup>34</sup> The number of groups recognized as different races was far more expansive in the 19th century than is commonly thought today. The prevailing conceptions of race in the U.S. have been strongly influenced by the federal government’s definitions of different races that first went into effect in 1977.<sup>35</sup> In *Saint Francis College*, the Court reviewed several 19th-century sources defining race, specifically listing several races from those sources; these included Finns, Romani, Basques, Hebrews, Swedes, Norwegians, Germans, Greeks, Italians, Spanish, Mongolians, Russians, and Jews.<sup>36</sup> As one can see, the concept of race also includes what today we might think of as ethnic or national origin groups. What is also of particular importance is that the Romani are one of the listed “racial” groups.<sup>37</sup> The Roma, however, are believed to be Dalits who migrated from India into Persia, the near East and, finally, into Eastern and Central Europe beginning around A.D. 600.<sup>38</sup> There are other compelling reasons to assert that Americans of the 19th century viewed

---

32. While the largest percentage of actions filed under 42 U.S.C.A. § 1981 are employment discrimination claims, § 1981 causes of action include race discrimination for police misconduct, housing, zoning, and schools. See, e.g., Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 601 (1988).

33. *United States v. Cruikshank*, 92 U.S. 542, 555 (1875).

34. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 (1987).

35. See *infra* note 293 and accompanying text.

36. *Saint Francis Coll.*, 481 U.S. at 611.

37. *Id.*

38. Palash Ghosh, *Centuries of Discrimination: European Roma Linked to India's 'Untouchables'*, INT’L BUS. TIMES (Dec. 4, 2012), <https://www.ibtimes.com/centuries-discrimination-european-roma-linked-indias-untouchables-917965> [https://perma.cc/2UR8-QCG2].

different Indian castes as separate races.<sup>39</sup> Further, while Section 1981 and Title VII are from two different Civil Rights Acts, whose initial passages were almost 100 years apart, courts often analyze intentional employment discrimination claims involving race and national origin under the two statutes in a very similar, if not identical, way. “[T]he facts necessary to support a claim for relief under Title VII are nearly identical to the facts which support a claim under Section 1981.”<sup>40</sup>

There are, therefore, several arguments that caste discrimination fits within the concept of race discrimination under Section 1981 and the protected traits of religion, race, and national origin under Title VII. However, the greatest strength of the argument that caste discrimination is covered by federal employment discrimination law is the fact that if courts reject the argument that caste discrimination fits within any of the protected categories of those two provisions, the analysis used by the Supreme Court in *Bostock v. Clayton County*,<sup>41</sup> a major Title VII case decided in 2020, would come into play.

The approach taken by the Supreme Court in *Bostock* would, if applied to a claim of caste discrimination, avoid the difficult question of whether caste fits in the definition of race or national origin. In *Bostock*, the Court addressed whether discrimination against gay, lesbian, and transgendered individuals constitutes sex discrimination under Title VII. In addressing the question, Justice Neil Gorsuch explained that, in Title VII claims, “a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”<sup>42</sup> There can be multiple but-for causes. Gorsuch noted that although a person’s sexual orientation and gender identity are separate and distinct from a person’s sex, their sex is nevertheless inextricably linked to their other status.<sup>43</sup> Even if an

---

39. See remarks made in particular by Senator Charles Sumner. In his discussion during the passage of the Civil Rights Act of 1866, Sumner compares the Indian caste system with Brahmans and Shudras to the U.S. race situation with blacks and whites. See *infra* notes 177–82 and accompanying text; see also CHARLES SUMNER, EQUALITY BEFORE THE LAW PROTECTED BY NATIONAL STATUTE: SPEECHES OF HON. CHAS. SUMNER 15 (1874), <https://tile.loc.gov/storage-services/service/rbc/lcrbmrp/t2415/t2415.pdf> [<https://perma.cc/MV2K-ZXK7>] (“Religion and reason condemn Caste as impious and unchristian, making republican institutions and equal laws impossible; but here is Caste not unlike that which separates the Sudra from the Brahmin.”). This analogy was meant to demonstrate that racism in the United States is similar to the caste system of the South Asian continent. Thus, the framers of the Civil Rights Act of 1866 would have viewed discrimination against Dalits as interracial discrimination as opposed to intra-racial discrimination.

40. *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1186 (5th Cir. 1980). See also *Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016) (“[W]e analyze claims of racial discrimination identically under Title VII and § 1981 in other respects, and we see no reason why we should not do the same with respect to how we define race with for purposes of those statutes.”).

41. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

42. *Id.* at 1739. He also noted that Congress amended Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait was a “motivating factor” in an adverse employment action. *Id.* Thus, “under this more forgiving standard, liability can sometimes follow even if sex wasn’t a but-for cause of the employer’s challenged decision.” *Id.* However, the motivating factor test is not the issue in *Bostock*.

43. *Id.* at 1746–47.

employer's goal is only to discriminate against a person because they are gay, lesbian, or a transgender individual, it is not possible without also discriminating against the person because of their sex. To demonstrate this, Gorsuch noted that if you changed the gay, lesbian, or transgender individual's sex, say a gay man to a woman, would that change lead to a different outcome by the employer? If the answer is yes, then the discrimination is also based on sex.<sup>44</sup> Clearly the answer is yes, because the change would eliminate the gay, lesbian, or transgender status that was the motivation for the adverse employment treatment. Although an individual's status as gay, lesbian, or transgender is not a listed protected trait, *Bostock* holds, it is equivalent to discrimination based on the protected trait of sex.<sup>45</sup>

The *Bostock* approach should apply to claims of caste discrimination based on untouchability. Since all Dalits in the U.S. originated in South Asia,<sup>46</sup> caste is inextricably linked to being a member of the Asian race. When a person discriminates against a Dalit based on untouchability, they are discriminating against that person based both on caste, which is not a protected category, and race, which is. But it is important to note that this *Bostock* argument is only legally necessary if courts first conclude that caste discrimination based on untouchability is not a form of race or national origin discrimination under Title VII or race discrimination under Section 1981.

Dalits have legal protection under the 1989 Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act against discriminatory and abusive behavior by high-caste communities.<sup>47</sup> In addition, the Protection of Civil Rights Act 1955 specifically prohibits discrimination and offences related to business, trade, employment, healthcare, religion, and various other civil spheres.<sup>48</sup> However, these provisions are under criminal law and do not provide civil remedies to meet the holistic needs of caste-related employment discrimination in private companies. Until the mid-1990s, caste discrimination was neither recognized in international human rights law nor included in human rights discourse.<sup>49</sup> This changed due to Dalit activists and their supporters throughout the world advocating for global recognition of the discrimination they face not just in India, but throughout the South Asian diaspora.<sup>50</sup> They have succeeded in getting caste

---

44. *Id.* at 1741.

45. *Id.*

46. See, e.g., GAIL OMVEDT, DALITS AND THE DEMOCRATIC REVOLUTION 31 (1994) ("The caste system exists in the South Asian subcontinent and there only.").

47. The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (Act. No. 33/1989) (India), <https://tribal.nic.in/actRules/preventionofAtrocities.pdf> [<https://perma.cc/LZ7Z-D4BR>] (last visited July 10, 2022).

48. See generally The Protection of Civil Rights Act, 1955 (Act. 22/1955) (India), <https://www.indiacode.nic.in/handle/123456789/1544?locale=en> [<https://perma.cc/9WDF-NEYF>].

49. Annapurna Waughray, *Caste Discrimination: A Twenty-First Century Challenge for UK Discrimination Law*, 72 MODERN L. REV. 182, 191 (2009).

50. *Id.*

discrimination declared a violation of international human rights law.<sup>51</sup> However, because of the prodigious international weight of U.S. law, for the 200 million Dalits in India alone and the Dalit diaspora,<sup>52</sup> a determination that U.S. federal employment discrimination law banned caste discrimination based on untouchability by private employers would have incalculable global ramifications.

This article is written in four parts. The first part discusses the immigration of South Asians to the U.S., including their dramatic increase in numbers over the past thirty years. It also provides an explanation of the caste system and the discrimination that Dalits have endured and continue to experience.<sup>53</sup> The second part will focus on employment discrimination claims for caste discrimination based on untouchability under Section 1981.<sup>54</sup> The third part will discuss Title VII claims of caste discrimination based on untouchability.<sup>55</sup> The fourth part will provide the argument that is derived from *Bostock v. Clayton County* that caste discrimination is intertwined with race discrimination.<sup>56</sup> It will discuss the *Bostock* case, and how this approach applies under Title VII, as well as *Comcast Corporation v. National Association of African American Owned Media*,<sup>57</sup> another Supreme Court case in 2020 in which the Court applied the same approach to a Section 1981 claim.

## II.

### CASTE SUBORDINATION OF DALITS IN SOUTH ASIA AND THE U.S.

Over the past thirty years, the number of South Asian immigrants in the U.S. has skyrocketed. The first section of this part will discuss the history of immigration to the U.S. from South Asia, including its recent dramatic rise. As the number of South Asians in the U.S. increased, the number of incidents of caste

---

51. Specifically, caste discrimination is viewed as a violation of the International Convention on the Elimination of all Forms of Racial Discrimination as a sub-category of racial discrimination based on descent, and separately as a category of discrimination based on work and descent, a broader form of discrimination condemned by the U.N. *Id.* One of the Dalit activists' and supporters' most highly publicized efforts, however, occurred when they unsuccessfully lobbied to have caste discrimination officially recognized as a form of racial discrimination at the 2001 U.N. World Conference against Racism, Racial Discrimination, Xenophobia and other related forms of Intolerance held in Durban, South Africa. They were unsuccessful, but as a result caste acquired global visibility as a ground of discrimination. *Id.* at 193.

52. Gautham Subramanyam, *In India, Dalits Still Feel Bottom of the Caste Ladder*, NBC NEWS (Sept. 13, 2020), <https://www.nbcnews.com/news/world/india-dalits-still-feel-bottom-caste-ladder-n1239846> [<https://perma.cc/3T3Y-M7FS>]; *see also* Larry Simon & Sukhdeo Thorat, *Editorial*, 2 CASTE: A GLOBAL JOURNAL ON SOCIAL EXCLUSION vi, viii (2021); *India: Official Dalit population exceeds 200 million*, INT'L DALIT SOLIDARITY NETWORK (May 29, 2013), <https://idsn.org/india-official-dalit-population-exceeds-200-million/> [<https://perma.cc/73DL-X2ZH>].

53. *See infra* notes 58–142 and accompanying text.

54. *See infra* notes 143–253 and accompanying text.

55. *See infra* notes 254–350 and accompanying text.

56. *See infra* notes 351–94 and accompanying text.

57. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020).

discrimination based on untouchability increased as well. The second section of this part will discuss the 3,500-year-old five-fold caste system. The third section will discuss the discrimination Dalits experience due to the concept of untouchability that exists within South Asian and American societies today.

#### *A. Brief History of South Asian Immigration to the U.S.*

South Asians did not start to migrate in large numbers until the British Empire outlawed slavery in the 1833 and created a new demand for replacement labor.<sup>58</sup> Subjects of the British Empire, South Asians coming to the west coast of the Americas in the latter half of the 19th century also tended to head to British Columbia, especially Vancouver.<sup>59</sup> A few South Asians immigrated to the U.S. in the 19th century. In 1870, there were only 586 reported India-born individuals in the U.S. and 2031 in 1900.<sup>60</sup>

Congress enacted several measures aimed at stemming immigration from Asia, beginning with the Page Act in 1875.<sup>61</sup> For South Asians, this culminated in 1917. Congress adopted legislation that banned anyone born within a geographical area that included most of Asia and all of South Asia.<sup>62</sup> The area was known as the Asiatic Barred Zone.<sup>63</sup>

According to the 1920 census, fewer than 5,000 Indians resided in the U.S. at the time.<sup>64</sup> Some lived in the Northeast and Midwest and became parts of working-class neighborhoods from New York to Baltimore to Detroit, but most resided in California.<sup>65</sup> With restrictions on immigration in place, the numbers of South Asians declined. As late as 1940, there were only 2,405 South Asians in the US.<sup>66</sup> The U.S. gradually lifted restrictions on immigration from South Asia after World War II.<sup>67</sup> According to the Census Bureau figures in 1960, fewer than 13,000 people of Indian origin lived in the U.S.<sup>68</sup> In 1965, Congress enacted the

58. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 5.

59. Maia Ramnath, *Two Resolutions: The Ghadar Movement and India's Radical Diaspora, 1913–1918*, 92 RADICAL HIST. REV. 7, 10–11 (2005).

60. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 6.

61. Page Act, Pub. L. No. 41-141, 18 Stat. 477 (1875); Geary Act, Pub. L. 52-60, 27 Stat. 25 (1892) (repealed 1943); Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882) (repealed 1943).

62. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, 875. The 1917 Act also included a requirement that barred aliens over the age of 16 who could not read English or some other dialect or language and who were incapable of reading.

63. See CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 11.

64. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 6.

65. Ramnath, *supra* note 59, at 11. (“Even through the 1920s there were never more than a few thousand Indians in the United States, the vast majority of whom lived on the West Coast, over three-fourths of them in California.”). See also VIVEK BALD, *BENGALI HARLEM AND THE LOST HISTORIES OF SOUTH ASIAN AMERICA* 7 (2013) (describing the roots South Asian immigrants put down in New York, Baltimore, and Detroit, noting that the “greatest number appear to have settled in Harlem”).

66. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 14.

67. *Id.* at 22–23.

68. *Id.* at 24.

Family Reunification and Refugee Law, also known as the Hart-Cellar Act,<sup>69</sup> which fundamentally changed U.S. immigration law. The Act and subsequent immigration reforms reshaped American immigration policies. Among the changes were provisions that led to significant increases in immigration from South Asia.<sup>70</sup> According to a report by the Migration Policy Institute, in 2019 there were almost 2.7 million Indian immigrants in the country, up from 450,000 in 1990.<sup>71</sup> South Asian Americans Leading Together, a national movement strategy and advocacy organization, estimates that in 2017 there were nearly 4.1 million people of Indian ancestry residing in the U.S., up 40% since 2010.<sup>72</sup> Many Indian students also seek American higher education. During the academic year that began in 2015, nearly 166,000 Indian immigrants were enrolled in U.S. higher education institutions, making up about one-sixth of the international students in the country.<sup>73</sup> About 20% of Indian immigrants live in California; Texas and New Jersey are home to about 10% each, with the next three most populous states being New York, Illinois, and Georgia, collectively accounting for another 17%.<sup>74</sup> The Indian population in the U.S. is both well-educated and prosperous. In 2019, almost 80% of Indian immigrants ages 25 and older had at least a bachelor's degree, in contrast to about 33% of the adult U.S. population overall.<sup>75</sup> In addition, Indian households' 2019 median income of \$132,000 was double that of U.S. born households.<sup>76</sup>

Commentators have generally credited the Y2K problem, also known as the "millennium bug," as the catalyst for the upsurge in immigration from India.<sup>77</sup> When the Y2K problem became apparent, India had a sizable and appropriate labor force to address the issue. While attacking the Y2K problem, tech companies in the West, including in the U.S., recognized that Indian firms offered not just cheap labor, but highly skilled services at a low cost.<sup>78</sup> As a result, multi-national information technology companies became aware of this vast pool of skilled

---

69. Immigration and Nationality Act of 1965, 8 U.S.C. § 1151.

70. See, e.g., *id.*; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978.

71. Mary Hanna & Jean Batalova, *Indian Immigrants in the United States*, MIGRATION POL'Y INST. (Oct. 16, 2020), <https://www.migrationpolicy.org/article/indian-immigrants-united-states-2019> [<https://perma.cc/J727-QDHA>].

72. *Demographic Snapshot of South Asians in the United States*, S. ASIAN AMS. LEADING TOGETHER (Apr. 2019), <https://saalt.org/wp-content/uploads/2019/04/SAALT-Demographic-Snapshot-2019.pdf> [<https://perma.cc/2B6Y-9QY8>].

73. Jie Zong & Jeanne Batalova, *Indian Immigrants in the United States in 2015*, MIGRATION POL'Y INST. (Aug. 31, 2017), <https://www.migrationpolicy.org/article/indian-immigrants-united-states-2015> [<https://perma.cc/S2QL-QWPA>].

74. Hanna & Batalova, *supra* note 71.

75. *Id.*

76. *Id.*

77. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 53.

78. ANNALEE SAXENIAN, THE NEW ARGONAUTS: REGIONAL ADVANTAGE IN A GLOBAL ECONOMY 276 (2006).

workers. This created a huge demand for their services.<sup>79</sup> Around 1995, the Indian Y2K cohort started entering the US in large numbers to help fill the growing demands for information technology workers.<sup>80</sup>

Even though there have been South Asians in the U.S. for over 170 years, very few of them have been Dalits.<sup>81</sup> Thus, while Dalits make up about 16.5% of the population in India,<sup>82</sup> in 2003, a University of Pennsylvania study noted that only 1.5% of Indian immigrants in the United States were Dalits or members of lower castes.<sup>83</sup> Due to discrimination in South Asia, few Dalits have had the money or requisite skills to participate in immigration to North America in either the past or recent immigration waves.

### *B. The Five-Fold Caste System*

There is some debate, but scholars typically agree that the caste system is thousands of years old.<sup>84</sup> For example, Prakash Louis asserts that the caste system is at least 3,000 years old.<sup>85</sup> The Buddha, who lived about 2,500 years ago, preached against it.<sup>86</sup> For simplification, the caste system can be broken down into four distinct ‘varnas,’ or major occupational groupings, plus the Dalits as a sort of fifth caste.<sup>87</sup> The Bhagavad Gita, which is one of the most revered Hindu texts, mentions the four-fold division.<sup>88</sup> More importantly, one of the most sacred Hindu creation myths contained in the Rigveda sanctions the caste system.<sup>89</sup> According

79. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 52–56.

80. *Id.* at 30. A tangible result of this increased demand was a substantial increase in annual remittance flows into India from just around 6 billion dollars in 1995 to over 70 billion by 2012. *See id.* at 54; *see also* Hanna & Batalova, *supra* note 71.

81. *See supra* note 14 and accompanying text.

82. DR. C. CHANDRAMOULI, OFF. OF THE REGISTRAR GEN. & CENSUS COMM’R, INDIA, MINISTRY OF HOME AFFS., *Census of India 2011: Release of Primary Census Abstract Data Highlights* (2013), [https://idsn.org/wp-content/uploads/user\\_folder/pdf/New\\_files/India/2013/INDIA\\_CENSUS\\_ABSTRACT-2011-Data\\_on\\_SC-STs.pdf](https://idsn.org/wp-content/uploads/user_folder/pdf/New_files/India/2013/INDIA_CENSUS_ABSTRACT-2011-Data_on_SC-STs.pdf) [<https://perma.cc/8MSZ-5DGD>].

83. Ray, *supra* note 14.

84. OLIVER MENDELSON & MARIKA VICZANY, *THE UNTOUCHABLES* 5–7 (1998). There has also been criticism that the four-fold caste system was created by British colonial thinkers and was never recognized in South Asia in the way the four-fold division suggests. *See* SANJOY CHAKRAVORTY, *THE TRUTH ABOUT US: THE POLITICS OF INFORMATION FROM MANU TO MODI* (2019). *See also*, Sanjoy Chakravorty, *Viewpoint: How the British Reshaped India’s Caste System*, BBC NEWS (June 19, 2019), <https://www.bbc.com/news/world-asia-india-48619734> [<https://perma.cc/U9UC-ZGAF>].

85. PRAKASH LOUIS, *CASTEISM IS HORRENDOUS THAN RACISM: DURBAN AND DALIT DISCOURSE* 21–22 (2001).

86. *See, e.g.*, OMVEDT, *supra* note 46; *see also* DR. B. R. AMBEDKAR, *THE BUDDHA & HIS DHAMMA* 172 (2010); OMVEDT, *BUDDHISM IN INDIA: CHALLENGING BRAHMANISM AND CASTE* (2003).

87. B. R. AMBEDKAR, *THE ESSENTIAL WRITINGS OF B. R. AMBEDKAR* (Valerian Rodrigues ed., 2002). For an explanation of the Shudra caste and its relationship to the Dalit caste, *see infra* notes 108–13 and accompanying text.

88. *Id.* at 198.

89. B. R. Ambedkar, *Riddles in Hinduism*, in 4 BABASAHEB AMBEDKAR WRITING & SPEECHES 190 (1974).

to this revered text, all existence derived from the division of an original primal man known as Purusha.<sup>90</sup> Three-quarters of Purusha transcended the world we perceive and one-quarter came to Earth.<sup>91</sup> From the part that came to Earth, his head became the Brahmins, the priestly caste.<sup>92</sup> His arms became the Kshatriyas, the princely and warrior caste.<sup>93</sup> The stomach or the thighs of Purusha became the Vaishyas, the business and merchant caste.<sup>94</sup> Because of their dominance in the caste system, these three groups are collectively referred to as “high-caste” or “forward-caste” Hindus.<sup>95</sup> Members of these three upper castes undergo special initiation religious ceremonies that make them “twice born.”<sup>96</sup>

The caste system embodies the message that the advantage accorded to high-caste Hindus is the result of divine privilege attributable to the good karma these individuals accumulated over many prior lives. In other words, the spiritual advantage of high-caste Hindus in this current life is a form of self-executing justice accumulated through their various prior rounds of existence.

Though the caste system reaches far back in history, various studies conducted in the past decade have illuminated the effects the caste system continues to have today. High-caste Hindus still dominate India’s political, judicial, economic, financial, educational, and religious institutions. Even though an Economist article estimated that only 3.6% of India’s 1.4 billion population are Brahmins,<sup>97</sup> experts estimate that they hold more than 70% of government posts.<sup>98</sup> In addition, Brahmins hold 78% of the judicial positions and approximately half of parliamentary seats in India.<sup>99</sup> A 2010 study found that about 93% of board members of India’s top 1000 businesses were members of the upper castes.<sup>100</sup> A 2019 U.S. study of 4,005 leading Indian firms revealed that only three out of 35,000 directorships belonged to Dalits and other marginalized

---

90. See also 1 J. MUIR, ORIGINAL SANSKRIT ON THE ORIGIN AND HISTORY OF THE PEOPLE OF INDIA TEXTS 7–11 (1868), [https://www.forgottenbooks.com/en/readbook/OriginalSanskritTexts\\_10020220](https://www.forgottenbooks.com/en/readbook/OriginalSanskritTexts_10020220) [<https://perma.cc/L9PQ-WZWL>].

91. *Id.* at 10.

92. See NESIAH, *supra* note 10, at 37.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Why Brahmins Lead Western Firms but Rarely Indian Ones*, ECONOMIST (Jan. 1, 2022), <https://www.economist.com/asia/2022/01/01/why-brahmins-lead-western-firms-but-rarely-indian-ones> [<https://perma.cc/Y7WP-C8CP>]. There are 50 million Brahmins. *Id.*

98. See Henry Chu, *A Gift for India’s Inter-Caste Couples*, L.A. TIMES (Nov. 4, 2007), at A6.

99. Kevin D. Brown & Vinay Sitapati, *Lessons Learned from Comparing the Application of Constitutional Law and Federal Anti-Discrimination Law to African-Americans in the U.S. and Dalits in India in the Context of Higher Education*, 24 HARV. BLACKLETTER L.J. 3, 16 n.78 (2008).

100. D Ajit, Han Donker, & Ravi Saxena, *Corporate Boards in India: Blocked by Caste?*, ECON. & POL. WKLY., Aug. 11, 2012, at 39, 41. Of the board members of the top 1000 businesses, 46% were Vaishyas and 44% were Brahmins. *Id.*

groups.<sup>101</sup> In a study conducted by the Savitribai Phule Pune University, Jawaharlal Nehru University, and Indian Institute of Dalit Studies from 2015 to 2017, high-caste Hindus “boast[ed] four times more wealth than those classified as Scheduled Castes.”<sup>102</sup> The study also noted that high-caste Hindus held roughly 41% of the total wealth in the country, almost double their population size.<sup>103</sup> Another study found that a large percentage of mergers and acquisitions in India “occur between businesses where the directors belong to the same caste group.”<sup>104</sup> The study looked at 1200 merger and acquisition deals in India that took place between the years 2000 and 2017.<sup>105</sup> When Brahmins had a maximum representation on the Board of the acquiring company, nearly half of the targeted firms had majority Brahmin boards.<sup>106</sup> For Vaishyas, the percentage was even higher. Where the acquiring firm had a Board controlled by Vaishyas, the targeted firm had a board dominated by Vaishyas 55% of the time.<sup>107</sup>

In contrast to the auspicious spiritual origins of the high-caste Hindus, Purusha’s feet became the peasants and farmers.<sup>108</sup> This group, known as the Shudras, are commonly referred to as low-caste Hindus.<sup>109</sup> The legal term used for them is “Other Backwards Classes” (OBCs).<sup>110</sup> The religiously imposed duty of Shudras is to serve the high castes. They are also the largest population caste,

---

101. Ammu Kannampilly, *Caste Discrimination Taints Corporate India*, YAHOO MONEY (Nov. 5, 2020), [https://money.yahoo.com/caste-discrimination-taints-corporate-india-035606381.html?soc\\_src=social-sh&soc\\_trk=ma](https://money.yahoo.com/caste-discrimination-taints-corporate-india-035606381.html?soc_src=social-sh&soc_trk=ma) [https://perma.cc/8JV9-HVR5].

102. *Upper Caste Hindus Own 41 Per Cent of India’s Total Wealth: Study*, BUSINESS TODAY.IN (Feb. 14, 2019), <https://www.businesstoday.in/current/economy-politics/upper-caste-hindus-own-41-per-cent-india-total-wealth-study/story/318727.html> [https://perma.cc/4U6Q-6JD3].

103. *Id.* High-caste Hindus, or HHCs, make up about 22.28% of the total population in India. The next big chunk of the country’s wealth is held by Hindu Other Backward Classes at 31%, Muslims own 8% of the country’s wealth, and the two lowest castes own 11.3% combined of the total wealth, even though their population size is over 27% of the country. *Id.*

104. Manaswini Bhalla & Manisha Goel, *The Caste Is Alive and Kicking in Corporate India*, FORBES INDIA (Apr. 18, 2019), <https://www.forbesindia.com/article/iim-bangalore/the-caste-is-alive-and-kicking-in-corporate-india/53059/1> [https://perma.cc/5A2T-Q2YN]. The results of the study were published in a paper entitled *Firms of a Feather Merge Together: Cultural Proximity and Firms Outcome*. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* The study found the same for Kshatriya- and Shudra-dominated firms. *Id.*

108. B. R. AMBEDKAR, *Who Were the Shudras?*, in 7 BABASAHEB AMBEDKAR WRITING & SPEECHES 21, 22–24 (1979).

109. MANORANJAN MOHANTY, CLASS, CASTE, GENDER 20 (2004).

110. *Id.* at 209.

making up around 52% of India's population according to the Mandal Commission<sup>111</sup> and around 41% by National Sample Survey 2004-5.<sup>112</sup>

Beneath the four main castes are the Dalits. The origins of untouchability are lost in the long-ago past. Dalits are not mentioned in the Purusha Sukta, noted above.<sup>113</sup> The *Laws of Manu* is an ancient Hindu text that describes the caste duties and obligations a person has towards himself and to others, including moral and legal codes that govern caste order, but it does not mention Dalits either.<sup>114</sup> The legendary Dalit leader, Dr. B. R. Ambedkar, argues that untouchability was the consequence of a struggle between Buddhists and the Brahmins, which the latter won.<sup>115</sup> He places the origin of untouchability at around A.D. 400.<sup>116</sup>

These five broad castes can be broken down into thousands of subcastes or "jatis."<sup>117</sup> Every individual's social position in Indian society was, and, to a large extent—particularly in rural India—still is, defined by the jati into which he or she is born. Caste rankings and rules vary depending on the context and the region of India.<sup>118</sup> The hierarchy of the caste system places each of the thousands of subcastes into its appropriate relative position. As Ambedkar puts it, "Hindu society was just like a tower which had several storeys [sic] without a ladder or an entrance. One was to die in the storey [sic] in which one was born."<sup>119</sup> And, as pointed out by Clark Cunningham and Dr. Madhava Menon:

The historic caste system in India was truly systemic: everyone had a place within it. As a result, the caste system not only drastically exploited and disadvantaged certain groups, such as the erstwhile untouchables; it also concentrated advantage in

---

111. See Aparna Alluri & Zoya Mateen, *Caste Census: Clamour to Count India Social Groups Grows*, BBC NEWS (Aug. 24, 2021), <https://www.bbc.com/news/world-asia-india-58141993> [<https://perma.cc/E7P3-UAQC>]. This is an estimate, independent India's decadal census only counts the castes of Dalits and Adivasis. *Id.* For caste percentage population estimates, see also Roshan Kishore, *Decoding the Purpose and Politics of Caste Census*, HINDUSTAN TIMES (Aug. 24, 2021, 5:47 AM), <https://www.hindustantimes.com/india-news/decoding-the-purpose-and-politics-of-caste-census-101629741365130.html> [<https://perma.cc/9WRR-D8TY>]. For percentages of school children by caste, see Rema Nagarajan, *School Enrolment Data Indicates 45% OBCs, 19% Dalits in India*, TIMES INDIA (July 30, 2021, 12:03 PM), <https://timesofindia.indiatimes.com/india/school-enrolment-data-indicates-45-obcs-19-dalits-in-india/articleshow/84877162.cms> [<https://perma.cc/RF3U-Z3K6>].

112. Sonalde Desai, *Caste and Census: A Forward-Looking Strategy*, ECON. & POL. WKLY., July 17, 2010, at 10.

113. See *supra* note 89 and accompanying text.

114. B. R. AMBEDKAR, *Why Lawlessness Is Lawful*, in 5 BABASAHEB AMBEDKAR WRITING & SPEECHES 62, 64 (1989).

115. B. R. AMBEDKAR, *Who Were They and Why They Became Untouchables*, in 7 BABASAHEB AMBEDKAR WRITING & SPEECHES 379 (1979).

116. *Id.*

117. See NESIAH, *supra* note 10, at 36–37.

118. *Id.* at 38.

119. S. D. Kapoor, *B. R. Ambedkar, W. E. B. DuBois and the Process of Liberation*, ECON. & POL. WKLY., Dec. 27, 2003, at 5344, 5346 (quoting DHANANJAYA KEER, DR. B. R. AMBEDKAR: LIFE AND MISSION 41 (3d ed. 1994)).

other groups, such as the Brahmins. *Both* suffering and success were largely attributable to where one was born into the social hierarchy rather than individual effort and virtue.<sup>120</sup>

Caste ensured its continued viability through the practice of endogamy and social separation. In any hierarchical society, the social order is structured in terms of privileges and disabilities of groups rather than the rights of individuals. The common history and experience of being a member of a jati experiencing oppression by the subcastes higher in the hierarchy and oppressing the subcastes lower in the hierarchy generated a strong sense of group identity. Caste also ensured that there was little concern in Indian society for the rights of individuals. Thus, the functioning of the caste system excluded whole segments of society from positions of respect and responsibility, without consideration of individual talents, abilities, or interests.<sup>121</sup>

### *C. Discrimination Dalits Experience Under the Caste System*

While low-caste Hindus suffered due to their position in the caste system, they did not suffer from oppression resulting from religious impurity, as Dalits did. Thus, Dalits experienced far worse forms of subordination than low-caste members. Caste Hindus maintained enough distance between themselves and Dalits to prevent the shadows of Dalits (six feet) from touching them.<sup>122</sup> Historically, Dalits were banned from Hindu temples, formal education, public wells (often ones the Dalits themselves had dug), walking on roads in broad daylight, and wearing clean clothes.<sup>123</sup> Caste Hindus not only refused to allow Dalits in their homes, but their communities too; Dalit housing was segregated, and they were relegated to the outskirts of towns.<sup>124</sup> Historically, the status of the Dalits was associated with occupations regarded as ritually impure. Dalits took care of trash and body disposal, maintained the sewage system, cleaned toilets, worked with dead animals, collected cow manure and turned it into cooking fuel,

---

120. Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1302 (1999).

121. SUKHADEO THORAT & KATHERINE NEUMAN, *BLOCKED BY CASTE: ECONOMIC DISCRIMINATION IN MODERN INDIA* 5 (2012).

122. B. R. AMBEDKAR, *From Millions to Fractions*, in 5 AMBEDKAR WRITING & SPEECHES 242 (1979).

123. Brown & Sitapati, *supra* note 99, at 4; *see also* B. R. AMBEDKAR, *Untouchables or The Children of India's Ghetto*, in 5 AMBEDKAR WRITING & SPEECHES 22, 59, 108 (1979); AMBEDKAR, *supra* note 122, at 242.

124. Brown & Sitapati, *supra* note 99, at 4. *See generally* Sukhadeo Thorat, Anuradha Banerjee, Vinod K Mishra, & Firdaus Rizvi, *Urban Rental Housing Market: Caste and Religion Matters in Access*, ECON. & POL. WKLY, June 27, 2015, at 47 (providing an empirical study of anti-Dalit bias in private home sales and rentals).

labored in the fields, worked on leather, and dug the wells for water.<sup>125</sup> Hindu religious caste practices also excluded Dalits from engaging in business activities, owning property and housing, attending educational institutions, and accessing healthcare.<sup>126</sup> If Dalits violated caste laws, they were subjected to violent punishments.<sup>127</sup>

While untouchability is a product of the Hindu religion, it is not strictly a problem for just Hindus. As Human Rights Watch notes, untouchability “is a characteristic determined by one’s birth into a particular caste, irrespective of the faith practiced by the individual.”<sup>128</sup> On the Indian sub-continent, distinctions and discrimination on the basis of caste have penetrated other religions, including Buddhism, Christianity, Islam and Sikhism, despite the fact that the doctrinal bases for these religions reject caste.<sup>129</sup> Thus, while Hindu religion may be the original source of Dalit oppression, conversion to other religions is not a solution.<sup>130</sup>

Perhaps the best example of demonstrating that changing religions does not eliminate discrimination based on untouchability is the mass conversion of Dalits to Buddhism led by Dr. Ambedkar. No one has done more to liberate Dalits and the Dalit mind from the oppressive mentality presented to it by the Hindu religion than Dr. Ambedkar. It may be impossible to convey to the average American how significant of a figure Dr. Ambedkar is in the Dalit struggle. As Dalit activist Anand Teltumbde put it, for the Dalit masses, Dr. Ambedkar is everything

---

125. See generally B. R. AMBEDKAR, PERSPECTIVES ON SOCIAL EXCLUSION AND INCLUSIVE POLICIES (Sukhadeo Thorat & Narendra Kumar eds., 2008) (describing the historic treatment of Dalits); GHANSHYAM SHAH, HARSH MANDER, SUKHADEO THORAT, SATISH DESHPANDE, & AMITA BAVISKAR, UNTOUCHABILITY IN RURAL INDIA (2006); GOV’T OF INDIA, 1 REPORT OF THE INDIA BACKWARD CLASSES COMMISSION (1955).

126. Sukhadeo Thorat & Katherine Neuman, *Introduction* to BLOCKED BY CASTE: ECONOMIC DISCRIMINATION IN MODERN INDIA (2012).

127. A. Ramaiah, *Growing Crimes Against Dalits in India Despite Special Laws: Relevance of Ambedkar’s Demand for ‘Separate Settlement,’* 3 J. L. & CONFLICT RESOL. 151, 164 (2011), <https://academicjournals.org/journal/JLCR/article-full-text-pdf/2F95A1F7733> [https://perma.cc/QKY2-VQG3].

128. HUMAN RIGHTS WATCH, HIDDEN APARTHEID: CASTE DISCRIMINATION AGAINST INDIA’S “UNTOUCHABLES” 2 (2007), [https://www.hrw.org/sites/default/files/reports/india0207webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/india0207webwcover_0.pdf) [https://perma.cc/6KBF-QCJE].

129. See J. Tharamangalam, *Caste Among Christians in India*, in CASTE: ITS TWENTIETH CENTURY AVATAR, 263 (M. N. Srinivas ed., 1996) (Christianity); DAVID G. MANDELBAUM, 2 SOCIETY IN INDIA: CHANGE & CONTINUITY 569, 571 (1970) (same); Roger Ballard, *Differentiation and Disjunction Among the Sikhs*, in DESK PARDESH: THE SOUTH ASIAN PRESENCE IN BRITAIN 88, 91 (Roger Ballard ed., 1994) (discussing the role of caste distinctions among some Sikhs); Marcus Banks, *Jain Ways of Being*, in PARDESH, *supra*, at 231, 250 (Jainism); John R. Hinnells, *Parsi Zoroastrians in London*, in PARDESH, *supra*, at 250–51, 271 (Parsis (Indian Zoroastrians) as a caste-like group). See generally CASTE AND SOCIAL STRATIFICATION AMONG MUSLIMS IN INDIA (Imtiaz Ahmad ed., 1978) (collecting studies about social stratification in some Islamic communities and how it is influenced by the Hindu concept of caste); Zarina Bhatti, *Social Stratification Among Muslims in India*, in CASTE: ITS TWENTIETH CENTURY AVATAR, *supra* (Islam).

130. D. Shyam Babu & Chandra Bhan Prasad, *Six Dalit Paradoxes*, ECON. & POL. WKLY., June 6, 2009, at 22, 23.

together: a first-rate scholar, a Moses who led his people out of bondage, a Bodhisattva in the Buddhist pantheon—he is like a god.<sup>131</sup> One important Dalit slogan epitomizes Ambedkar’s significance: “We Are, Because He Was.”<sup>132</sup> In 1935, Dr. Ambedkar famously declared, “Even though I was born in the Hindu religion, I will not die in the Hindu religion.”<sup>133</sup> On October 14, 1956,<sup>134</sup> near the end of his life, Dr. Ambedkar led a mass conversion of over 500,000 Dalits to Buddhism.<sup>135</sup> Following this lead, millions of Dalits have converted to Buddhism.<sup>136</sup> While Buddhists make up only a small proportion of the overall population of India, only about 8.4 million in a population of 1.2 billion, 87% of them are Ambedkarites or new converts.<sup>137</sup> However, Caste Hindus continue to treat Dalits who convert to Buddhism the same way. Thus, this religious conversion did not allow them to escape caste discrimination, even if it allowed them to shift their personal mindset.

---

131. ANAND TELTUMBDE, ‘AMBEDKAR’ IN AND FOR THE POST-AMBEDKAR DALIT MOVEMENT (1997). Teltumbde is the grandson-in-law of Dr. Ambedkar. See Parth MN, *India Arrests Activist Anand Teltumbde over 2018 Caste Violence*, AL JAZEERA (Apr. 14, 2020), <https://www.aljazeera.com/news/2020/04/india-arrests-activist-anand-teltumbde-2018-dalit-event-200414112452191.html> [<https://perma.cc/7EVW-T3GA>].

132. See Sanghapali Aruna Lohitakshi, *New Series: Dalit History Month—We Are Because He Was*, CRUNK FEMINIST COLLECTIVE, <https://www.crunkfeministcollective.com/2015/04/21/new-series-dalit-history-month-we-are-because-he-was/> [<https://perma.cc/JMX5-H83D>]. One can purchase such a bumper sticker today from Amazon. See *PEACOCKRIDE Vinyl Dr. Ambedkar We Are Because He was Car Bumper Decal (Blue)*, AMAZON, <https://www.amazon.in/Ambedkar-because-Bumper-Decal-Blue/dp/B06XBVJ2PK> [<https://perma.cc/2N4R-PT8X>] (last visited Oct. 4, 2021).

133. Tarun Vijay, *An Ambedkar Speech No Hindu Should Ever Forget*, TIMES INDIA (Apr. 16, 2019), <https://timesofindia.indiatimes.com/blogs/indus-calling/an-ambedkar-speech-every-hindu-must-not-forget/> [<https://perma.cc/DL5B-3FW2>].

134. As a strange coincidence or a matter of fate, if you adjust for the time difference between the U.S. and India, one of the authors of this article Kevin Brown was born on the very day that Dr. Ambedkar led this mass conversion and another author, Ken Dau-Schmidt, was born the day before.

135. AMBEDKAR, *supra* note 86, at 5; ELEANOR ZELLIOT, FROM UNTOUCHABLE TO DALIT: ESSAYS ON THE AMBEDKAR MOVEMENT 207–08 (3d ed. 2001) (“The following day he converted the half million of his followers who had responded to his call to convert.”). See also OMVEDT, *supra* note 86, at 2–3.

136. Krithika Varagur, *Converting to Buddhism as a Form of Political Protest: Low-Caste Indians are Leaving Hinduism En Masse—Partly to Stick It to Their Prime Minister*, ATLANTIC (Apr. 11, 2018), <https://www.theatlantic.com/international/archive/2018/04/dalit-buddhism-conversion-india-modi/557570/> [<https://perma.cc/54KV-JGH4>].

137. *Id.* See also Manu Moudgil, *Dalits Are Still Converting to Buddhism, but at a Dwindling Rate*, BUS. STANDARD (June 17, 2017), [https://www.business-standard.com/article/current-affairs/dalits-are-still-converting-to-buddhism-but-at-a-dwindling-rate-117061700355\\_1.html#:~:text=After%201956%2C%20the%20number%20of,major%20Dalit%2Dcentric%20political%20party](https://www.business-standard.com/article/current-affairs/dalits-are-still-converting-to-buddhism-but-at-a-dwindling-rate-117061700355_1.html#:~:text=After%201956%2C%20the%20number%20of,major%20Dalit%2Dcentric%20political%20party) [<https://perma.cc/B3NW-TU4S>].

In 2018, Equality Labs conducted a first-of-its-kind survey of 1500 individuals from South Asia living in the U.S., 24% of whom were Dalits.<sup>138</sup> The study revealed the existence of significant caste discrimination in the U.S.<sup>139</sup> The survey exposed that while no Vaishyas, one percent of Brahmins, five percent of Kshatriyas, and 25% of Shudras worry about others finding out their castes, over half of the Dalits have this fear.<sup>140</sup> In addition, 41% of Dalit students surveyed reported facing discrimination in educational institutions.<sup>141</sup> The most striking result was that while high-caste Hindus experienced almost no discrimination in employment, over two-thirds of Dalits said they experienced unfair treatment in the workplace.<sup>142</sup>

### III.

#### CASTE DISCRIMINATION CAN GENERATE RACE DISCRIMINATION EMPLOYMENT CLAIMS UNDER 42 U.S.C. § 1981

Title VII applies to five different protected traits.<sup>143</sup> In contrast, Section 1981, which originated with the Civil Rights Act of 1866, only forbids intentional “racial” discrimination in the making, enforcing, and carrying out of both private and public contracts.<sup>144</sup> However, courts analyze intentional employment discrimination claims under Section 1981 and race and national origin claims under Title VII in much the same way.<sup>145</sup> Thus, aggrieved individuals pursuing disparate treatment employment claims for race or national origin discrimination may<sup>146</sup> invoke both Section 1981 and Title VII.

---

138. Maari Zwick-Maitreyi, Thenmozhi Soundararajan, Natasha Dar, Ralph F. Bheel, & Prathap Balakrishnan, CASTE IN THE UNITED STATES: A SURVEY OF CASTE AMONG SOUTH ASIAN AMERICANS 16 (2018), [https://static1.squarespace.com/static/58347d04bebafbb1e66df84c/t/603ae9f4cfad7f515281e9bf/1614473732034/Caste\\_report\\_2018.pdf](https://static1.squarespace.com/static/58347d04bebafbb1e66df84c/t/603ae9f4cfad7f515281e9bf/1614473732034/Caste_report_2018.pdf) [https://perma.cc/RT47-AWFF].

139. *Id.* (“The results of our 2016 survey definitively find that all of the inequalities associated with Caste status, ritual purity, and social exclusion have become embedded within . . . American mainstream institutions.”).

140. *Id.* at 17 fig.8.

141. *Id.* at 18.

142. *Id.* at 20 fig.10. For Shudras, 12% of Shudra respondents experienced discrimination in employment. *Id.*

143. 42 U.S.C. § 2000e–2(a)(1).

144. *Runyon v. McCrary*, 427 U.S. 160, 168 (1976). Although Section 1981 does not itself use the word “race,” the Court has construed the section to forbid all “racial” discrimination in the making of private as well as public contracts.

145. *See Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1186 (5th Cir. 1980) (“[T]he facts necessary to support a claim for relief under Title VII are nearly identical to the facts which support a claim under § 1981 . . . .”); *see also Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016) (“[W]e analyze claims of racial discrimination identically under Title VII and § 1981 in [some] . . . respects.”).

146. Eric Bachman, *5 Differences Between Title VII and Section 1981 That Can Help Your Employment Race Discrimination Case*, NAT’L L. REV. (June 12, 2017), <https://www.natlawreview.com/article/5-differences-between-title-vii-and-section-1981-can-help-your-employment-race> [https://perma.cc/MR9W-5X8R].

The first section of this part will discuss the broad application of Section 1981 to race discrimination claims. The second section addresses the question of whether caste discrimination based on untouchability is a form of race discrimination under Section 1981. Neither Section 1981 nor Title VII define race. However, for purposes of Section 1981, the Supreme Court has stated that the definition of race comes from how it was understood in the 19th.<sup>147</sup> Thus, this section will focus on how Americans of the 19th century understood caste discrimination to show that there are several arguments that they viewed it as a form of race discrimination.

#### *A. Application of Section 1981 to Employment Discrimination*

Though Section 1981 does not use the word “race,” within a decade of the passage of the Civil Rights Act of 1866, the Supreme Court interpreted it to be “intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude.”<sup>148</sup> The Court’s interpretation of the Act includes the prohibition of all “racial” discrimination in the making of both public and private contracts.<sup>149</sup> The Court has thus limited applications of Section 1981 to cases of racial discrimination. Title VII claims differ from Section 1981 claims in this way, as well as several others. Section 1981 claims can be brought against any employer, whereas Title VII claims must be brought against those who have at least 15 employees.<sup>150</sup> Title VII claims are limited to employers, but an aggrieved party raising a Section 1981 claim can also sue individuals, such as harassing supervisors. Whereas Title VII has damage caps that depend on the size of the employer, there are no damage caps under Section 1981.<sup>151</sup> Nor does a litigant have to exhaust administrative procedures, including filing an employment discrimination claim with the Equal Employment Opportunity Commission (EEOC), under Section 1981 in order to file a court claim.<sup>152</sup> And, for many types of suits, Section 1981 will have a longer statute of limitation.<sup>153</sup>

The current provisions of Section 1981 state in relevant part the following:

##### (a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be

---

147. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

148. *United States v. Cruikshank*, 92 U.S. 542, 555 (1875).

149. *Runyon v. McCrary*, 427 U.S. 160, 168, 174–75 (1976).

150. Title VII of the Civil Rights Act (Title VII) of 1964 § 701, 42 U.S.C.A. § 2000e (b).

151. *Bachman*, *supra* note 146, at 3.

152. *Id.*

153. *Id.*

subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) “Make and enforce contracts” defined

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.<sup>154</sup>

The language of Section 1981 would seem to exclude white plaintiffs from its coverage. However, in *McDonald v. Santa Fe Trial Transp. Corp.*,<sup>155</sup> Justice Thurgood Marshall, writing for the Court, concluded that the section can protect white complainants who suffer racial discrimination as well:

Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves. And while the statutory language has been somewhat streamlined in re-enactment and codification, there is no indication that Section 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons. Thus, we conclude that the District Court erred in dismissing petitioners’ claims

---

154. 42 U.S.C. § 1981(a)–(b). Note that this is not the precise wording in the original Civil Rights Act. In response to concerns that it was not authorized by the Thirteenth Amendment, Congress reenacted the provision after the Fourteenth Amendment’s ratification in the Enforcement Act of 1870, Ch. 114, §§ 16–18, 16 Stat. 140, 144. The 1870 reenactment differed from the original 1866 act in two important respects: it substituted the words “all persons” for “citizens, of every race and color,” and it omitted the language about equal property rights, which was reenacted separately in what is now 42 U.S.C. § 1982. *See id.*; *Doe v. Kamehameha Sch.*, 416 F.3d 1025, 1031 (9th Cir. 2005).

155. *McDonald v. Santa Fe Trial Transp. Corp.*, 427 U.S. 273, 295–96 (1976).

under Section 1981 on the ground that the protections of that provision are unavailable to white persons.<sup>156</sup>

*B. Americans of the 19th Century Understood Caste Discrimination as Included Within Race Discrimination*

Although Section 1981 does not define race, in *Saint Francis College v. Al Khazraji*, the Supreme Court relied on 19th century dictionaries & encyclopedias in an attempt to understand its meaning.<sup>157</sup> The Court noted that the concept of race was much broader then than it is today.<sup>158</sup> This section will focus on how, at that time, Americans understood caste discrimination as a form of race discrimination. The first subsection will first discuss the Court's decision in the *Saint Francis College* case and its significant inclusion of the Romani as a group considered to be a racial group in the 19th century. In order to fully comprehend how Americans viewed caste discrimination as a form of race discrimination in the 19th century, the second section will discuss the comparison of treatment of Black people in the U.S. to the caste system in India. The third subsection will discuss what is known as the "Aryan Origin Theory," a theory developed by scholars in the latter half of the 19th century which gained wide acceptance at that time. The fourth subsection will point to indications by the framers of the Civil Rights Act of 1866 that they viewed the measure as an anti-caste measure. If the framers of the Civil Rights Act of 1866 believed that outlawing discrimination against Black people was an anti-caste measure, *a fortiori*, they would have also felt their measure should prohibit caste discrimination on American soil practiced by those from the place in which caste originated.

*1. Supreme Court's Opinion in Saint Francis College v. Al Khazraji*

In the *Saint Francis College* case, the Supreme Court faced the question of whether an American citizen of Arabian ancestry was protected from racial discrimination under Section 1981.<sup>159</sup> The District Court concluded that the plaintiff's claim was one of national origin and, thus, outside the scope of Section

---

156. *Id.* One constant question about § 1981 is: "Does it cover discrimination based on national origin?" In *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011), the plaintiff was a Native American, but his complaint stated, "Defendant has discriminated . . . against Plaintiff in the formation of an employment contract on the basis of his *national origin*, in violation of 42 U.S.C. § 1981." *Id.* at 1053 (emphasis added). The Eighth Circuit noted that § 1981 protects "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Id.* at 1052 (quoting *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987)). Thus, the Eighth Circuit agreed that a claim of discrimination based on Native American status could be raised as a race claim. See *Torgerson*, at 1053 (citing *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1119 (9th Cir. 1198)). However, *Torgerson* never amended his complaint to include race discrimination and the Eighth Circuit in an *en banc* decision upheld the dismissal. *Id.*

157. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987).

158. *Id.*

159. *Id.* at 607.

1981.<sup>160</sup> The Court of Appeals held that the plaintiff had alleged a discrimination claim based on race even though under current racial classifications Arabs were viewed as Caucasians.<sup>161</sup> Congress had not limited Section 1981 claims to those filed by members of a different race from the defendant.<sup>162</sup>

The Supreme Court agreed with the Court of Appeals that Section 1981 was not limited to claims of racial discrimination by those of different races.<sup>163</sup> The Court went on to note that the defendant's argument rested on the assumption

that all those who might be deemed Caucasians today were thought to be of the same race when Section 1981 became law in the 19th century; and it may be that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race. The understanding of "race" in the 19th century, however, was different. Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law.<sup>164</sup>

The Court reviewed several 19th-century sources on the definition of race, and specifically listed several "races" from those sources including Finns, Romani, Basques, Hebrews, Swedes, Norwegians, Germans, Greeks, Italians, Spanish, Mongolians, Russians, and Jews.<sup>165</sup> The Court went on to note that "it is clear that [these 19th-century sources defining race] do not support the claim that for the purposes of §1981 that Arabs, Englishmen, Germans, and certain other ethnic groups are to be considered a single race."<sup>166</sup> To bolster its conclusion, the Court noted remarks by several Congressmen to the effect that their concept of race was broad.<sup>167</sup> The Court went on to hold that

[b]ased on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that

---

160. *Id.* at 606. The plaintiff's Title VII claim was dismissed because it was not timely filed.

161. *Id.* at 607. In a 2015 Census Bureau study, researchers found it may be beneficial to include a dedicated Middle Eastern or North African category in the 2020 census. *See Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 81 Fed. Reg. 67,398 (Sept. 30, 2016). However, in 2018, officials in the Trump Administration decided not to add the category. Yousef H. Alshammari, *Why Is There No MENA Category on the 2020 US Census?*, AL JAZEERA (Apr. 1, 2020), <https://www.aljazeera.com/news/2020/4/1/why-is-there-no-mena-category-on-the-2020-us-census> [https://perma.cc/WF7X-2CA3]. They viewed the category as about ethnicity, not about race. *Id.*

162. *Saint Francis Coll.*, 481 U.S. at 607.

163. *Id.* at 609–10.

164. *Id.* at 610.

165. *Id.* at 611.

166. *Id.* at 612.

167. These remarks will be discussed in detail later in this section. *See infra* notes 225–33 and accompanying text.

Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.<sup>168</sup>

The Court's inclusion of Romani in its list of racial groups drawn from contemporary sources is particularly significant. The Romani are believed to be Dalits who migrated from India into Persia, the near East and, finally, into Eastern and Central Europe beginning around A.D. 600.<sup>169</sup> Thus, perhaps, the Supreme Court has already endorsed the notion that Dalits are a separate race under Section 1981.

## 2. *Common Practice of Analogizing Racial Discrimination Against Black Americans to Caste Discrimination During the 19th Century*

In order to fully comprehend the importance of caste discrimination in discussions during the enactment of Section 1981, it is necessary to understand the importance of the use of anti-caste legal arguments in American law and politics during the pre-Civil War period. That discussion will show that by analogizing race discrimination against Black people to the Indian caste system, Americans in the 19th century viewed caste as a form of race.

By the early 1830s, antislavery societies in New England had identified the clear connection between slavery and the denial of civil liberties in the North.<sup>170</sup> Even though only a few South Asians immigrated to the U.S. before 1870,<sup>171</sup> to help demonstrate that both slavery and discrimination against free blacks were contrary to core principals of American society, some abolitionist proponents of Black equality, including Frederick Douglass, Thomas Dalton, William Lloyd Garrison, Harriet Beecher Stowe, and Charles Sumner, compared the treatment of Black people to the Hindu caste system.<sup>172</sup>

---

168. Saint Francis Coll., 481 U.S. at 613.

169. Palash Ghosh, *Centuries of Discrimination: European Roma Linked to India's "Untouchables,"* INT'L BUS. TIMES (Dec. 4, 2012), <https://www.ibtimes.com/centuries-discrimination-european-roma-linked-indias-untouchables-917965> [https://perma.cc/8N6R-6DCN]; Niraj Rai, Gyaneshwer Chaubey, Rakesh Tamang, Ajai Kumar Pathak, Vipin Kumar Singh, Monika Karmin, Manvendra Singh, Deepa Selvi Rani, Sharath Anugula, Brijesh Kumar Yadav, Ashish Singh, Ramkumar Srinivasagan, Anita Yadav, Manjua Kashyap, Sapna Narvariya, Alla G. Reddy, George van Driem, Peter A. Underhill, Richard Villems, Toomas Kivisild, Lalji Singh, & Kumarasamy Thangaraj, *The Phylogeography of Y-Chromosome Haplogroup H1a1a-M82 Reveals the Likely Indian Origin of the European Romani Populations*, 7 PLOS ONE 1 (2012), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0048477> [https://perma.cc/CAL8-HT5C]; Horolma Pamjav, Andrea Zalán, Judit Béres, Melinda Nagy, & Yuet Meng Chang, *Genetic Structure of the Paternal Lineage of the Roma People*, 145 AM. J. PHYSICAL ANTHROPOLOGY 21–29 (2011), <https://onlinelibrary.wiley.com/doi/full/10.1002/ajpa.21454> [https://perma.cc/SQV3-AY4Q].

170. See, e.g., J. Morgan Kousser, *The Supremacy of Equal Rights: The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 NW. U. L. REV. 941, 953–55 (1988).

171. See *supra* note 64 and accompanying text.

172. Daniel Immerwahr, *Caste or Colony? Indianizing Race in the United States*, 4 MOD. INTELL. 275, 277 (2007).

The *Anti-Slavery Record*, an abolitionist series published from 1835 to 1837 by the leading abolitionist organization, the American Anti-Slavery Movement, contained frequent references to the prevention of caste. For example, one article discussing the right to end slavery in the District of Columbia argued that

By the most express sanctions of the [C]onstitution, [C]ongress has the power to abolish [slavery] at the seat of the national government, and in [C]ongress a majority of forty are from free states. . . To bring the North up to this work, it is necessary that the spirit of slavery at the North be met and conquered. The prejudice of *caste* must be killed and buried.<sup>173</sup>

An 1842 article in Garrison's *The Liberator*, another abolitionist publication, described a meeting of the British India Society where a free Black person spoke of race relations in the U.S.<sup>174</sup> The writer noted that even though the speaker was not a slave, the spirit of caste leads the white race to insult all of those of African descent.<sup>175</sup>

Perhaps the most thorough and complete discussion of the caste analogy to the condition of enslaved people during the antebellum period occurred as part of the legal arguments in the first major school segregation case in American history. In *Roberts v. Boston*,<sup>176</sup> Sarah Roberts sought to attend the nearest school to her home, which at the time excluded Black students. Sarah was represented by Robert Morris, one of the first Black attorneys in the U.S., and Charles Sumner, who would go on to become one of the most influential leaders of the Radical Republicans in the Senate during the Civil War and Reconstruction.<sup>177</sup> In his arguments before the Court, Sumner fully developed the analogy of the treatment of enslaved persons to the caste system in India, an analogy that he constantly repeated throughout his advocacy of the Civil Rights Act of 1866, as well as the Fourteenth Amendment.<sup>178</sup>

For Sumner, "[t]he separation of children in the Schools, on account of race or color, is in the nature of caste, and, on this account, a violation of Equality."<sup>179</sup> In his brief, Sumner drew a direct analogy of caste in India to the U.S. "This will be apparent from the very definition of Caste. This term is borrowed from the Portuguese word *casta*, which signifies family, breed, race. It has become

---

173. *The Right of Northern Interference*, ANTI-SLAVERY REC. 6 (1837) (emphasis added).

174. *American Slavery and the Prejudice Against Color*, LIBERATOR 3 (Jan. 7, 1842).

175. *Id.* For more examples, see Scott Grinsell, "The Prejudice of Caste": The Misreading of Justice Harlan and the Ascendency of Anticlassification, 15 MICH. J. RACE & L. 317, 340–42 (2010).

176. *Roberts v. Boston*, 59 Mass. 198 (1849).

177. Charles Sumner, 1849 Charles Sumner, "Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts," BLACKPAST, <https://www.blackpast.org/african-american-history/1849-charles-sumner-equality-law-unconstitutionality-separate-colored-schools-massachusetts-2/> [https://perma.cc/WUF8-ZLGV].

178. *Id.*

179. Brief of Plaintiff, *Roberts v. Boston*, 59 Mass. 198 (1849), in ABOLITIONISTS IN THE NORTHERN COURTS: THE PAMPHLET LITERATURE 493, 508 (Paul Finkelman ed. 2007).

generally used to designate any hereditary distinction, particularly of race. It is in India that it is most often applied.”<sup>180</sup> Sumner went on:

In India, Brahmins and Sudras, from generation to generation, were kept apart. If a Sudra presumed to sit upon a Brahmin’s carpet his punishment was banishment. With similar inhumanity here, the black child, who goes to sit on the same benches with the white child, is banished, not from the country, but from the school. In both cases it is the triumph of Caste. But the offense is greater with us, because, unlike the Hindoos, we acknowledge that *men are born equal*.<sup>181</sup>

Sumner concludes, “We abjure all inequality before law; but here is an inequality which touches not an individual, but a race. We revolt at the relation of caste; but here is a caste which is established under a Constitution, declaring that *all men are born equal*.”<sup>182</sup>

The Massachusetts Supreme Judicial Court complimented Sumner on his advocacy.<sup>183</sup> However, the Court rejected the legal argument of the plaintiffs that the “maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion.”<sup>184</sup>

As Gunnar Myrdal points out in his epic book about American race relations, the Emancipation Proclamation stopped the common practice of referring to Black Americans as “slaves.”<sup>185</sup> Instead, the terms “freedmen” and “ex-slaves” came into popular use.<sup>186</sup> Americans sought a term to describe Black people whom, as a society, they continued to view as inferior.<sup>187</sup> As a result, the use of the term “caste” increased significantly.<sup>188</sup>

The caste analogy remained central to legal arguments regarding the treatment of Black people until the end of the century. Perhaps the best example of the legal importance of the caste analogy is in the arguments advanced by the plaintiff in the Supreme Court’s 1896 decision in *Plessy v. Ferguson*.<sup>189</sup> The brief, filed on behalf of Homer Plessy by James Walker and Albion Tourgee, argued that slavery was a caste system because it tended “to reduce the colored people of the country to the condition of a subject race” and imposed upon them the inequality of rights.<sup>190</sup> Segregation has the same effect. The effect of the law that

---

180. *Id.*

181. *Id.* at 509.

182. *Id.* at 512.

183. *Roberts v. Boston*, 59 Mass 198, 206 (1849).

184. *Id.* at 209.

185. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 667 (1944).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

190. Brief for Plaintiff in Error at 23, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

distinguishes citizens based on race is to legalize caste; as such, it is inconsistent with the concept of one equal citizenship for all of the United States and each state.<sup>191</sup> Their caste argument was endorsed by Justice John Marshall Harlan in his dissent. As virtually every American law student learns in Constitutional Law, Justice Harlan wrote a separate dissenting opinion in *Plessy*.<sup>192</sup> In what may very well be the most renowned passage from any opinion ever written by a justice of the US Supreme Court, Harlan wrote:

[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. *There is no caste here.* Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.<sup>193</sup>

### 3. Aryan Origin Theory and Race

The view of caste as a form of race derived in part from the “Aryan Origin Theory.” Indian historian and Professor Emerita of Jawaharlal Nehru University, Romila Thapar, called the “Aryan question . . . probably the most complex, complicated question in the Indian history.”<sup>194</sup> By the late 19th century, the Aryan Origin Theory had gained wide acceptance in India and become a foundational lens for interpreting Indian history.<sup>195</sup> The Aryan Origin Theory remains controversial today and has been refuted by a number of scholars.<sup>196</sup> However, for the purposes of determining whether caste was understood as a form of race in 19th-century America, the relevant question is not whether the Aryan Origin Theory is accepted today, but whether Americans then considered differences in caste to correspond with their broad definition of race.

There were different versions of the theory. One was developed primarily between 1849 and 1874 by German-born philologist and Orientalist Friedrich Max Müller.<sup>197</sup> According to Müller, a group of people of shared “Aryan” origin in Central Asia divided into two groups, one of which migrated to Europe while the other went to Iran.<sup>198</sup> From Iran, another group travelled into northern India, where they conquered the indigenous people there and brought the language of Sanskrit with them.<sup>199</sup> These Aryans fashioned the caste system to maintain their

---

191. *Id.*

192. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

193. *Id.* at 559 (Harlan, J., dissenting) (emphasis added).

194. Romila Thapar, *The Aryan Question Revisited*, ACAD. STAFF C., JAWAHARLAL NEHRU U. (Oct. 11 1999), <http://members.tripod.com/ascjnu/aryan.html> [<https://perma.cc/9TWW-R6ZY>].

195. See Romila Thapar, *The Theory of Aryan Race and India: History and Politics*, 24 SOC. SCIENTIST 3, 7 (1996).

196. See T. R. S. Prasanna, *There Is No Scientific Basis for the Aryan Invasion Theory*, 103 CURRENT SCI. 216, 221 (2012).

197. See Thapar, *supra* note 195.

198. *Id.*

199. *Id.* at 5, 9.

dominance. As Müller developed the theory, the indigenous people were the Dravidian race and became the Shudras and Dalits.<sup>200</sup> Thus, high-caste Hindus, especially the Brahmins, descended from white foreign invaders who migrated from Central Asia and conquered the northern part of India. Müller referred to these two different groups using terms that included nation, people, blood, and race.<sup>201</sup>

Another version of the theory was endorsed by Bal Gangadhar Tilak, an influential Indian Freedom Fighter.<sup>202</sup> His version differed from Müller's, but due to Tilak's influence, his theory should be considered to have the same relevance to the question of whether Americans of the 19th century would have considered differences in caste to be differences in race. Rather than Müller's Central Asian origins, the theory Tilak endorsed traced the Aryans back to a Nordic homeland and suggested they had migrated from the Arctic regions in the post-glacial age.<sup>203</sup> One group branched off and went into Europe, but lapsed into barbarism, while a different group migrated into India and maintained their superior civilization.<sup>204</sup> Müller disagreed with this version of the theory, but he was supportive enough of Tilak to help in getting him released from jail when he was incarcerated by the British government for his nationalist activities.<sup>205</sup>

For decades, the Aryan Origin Theory was accepted by many upper-caste members of South Asia who used the theory "to argue the superiority of the upper castes and promote their self-esteem by maintaining that not only were the upper-castes the lineal descendants of the Aryans but that they were also racially related to the European Aryan."<sup>206</sup> The theory also allowed the upper-caste Hindus to argue not only that they were the creators of the Indian civilization, but as Keshab Chandra Sen noted, high-caste Indians could assert to their British colonizers that they were actually "parted cousins."<sup>207</sup>

The Aryan Origin Theory is no stranger to U.S. courts. Not long after the ratification of the U.S. Constitution, the First Congress passed a restrictive

200. ROMILA THAPAR, *THE ARYAN: RECASTING CONSTRUCTS* 33–34 (2008).

201. *Id.* at 34.

202. *See* Thapar, *supra* note 195. *See also* Sukeshi Karma, *Bal Gangadhar Tilak* in OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/view/document/obo-9780195399318/obo-9780195399318-0214.xml> [<https://perma.cc/MZ2E-X433>]. Bal Gangadhar Tilak (b. 1856–d. 1920) has been one of the Indian freedom movement's more contentious leaders.

203. *See* Thapar, *supra* note 195, at 4; *see also* LOKAMANYA BÂL GANGÂDHAR TILAK, *THE ARCTIC HOME IN THE VEDAS: BEING ALSO A NEW KEY TO THE INTERPRETATION OF MANY VEDIC TEXTS AND LEGENDS* vi–vii (1903).

204. Thapar, *supra* note 195, at 4.

205. *Id.*

206. *Id.* at 8. *See also* Varsha Ayyar & Lalit Khandare, *Mapping Color and Caste Discrimination in Indian Society*, in *THE MELANIN MILLENNIUM: SKIN COLOR AS 21ST CENTURY INTERNATIONAL DISCOURSE* 71, 79 (Ronald E. Hall ed., 2013).

207. THAPAR, *supra* note 200, at 7.

citizenship measure, the Naturalization Act of 1790.<sup>208</sup> This measure limited naturalized citizenship to “free white persons.”<sup>209</sup> From 1909 to 1923, South Asian plaintiffs brought a series of naturalization cases asserting that they were Caucasian and, accordingly, eligible for naturalized U.S. citizenship.<sup>210</sup> Courts initially granted their petitions but were confused about how to handle the racial status of South Asians.<sup>211</sup>

For U.S. legal purposes, though, the Supreme Court delivered the final word to the Aryan Origin Theory in its unanimous 1923 decision in *U.S. v. Bhagat Singh Thind*.<sup>212</sup> Thind argued that, as a high-caste Hindu of full Indian blood, born at Amritsar, Punjab, India, he was an Aryan descendant and was therefore Caucasian and entitled to naturalized citizenship.<sup>213</sup> The Supreme Court rejected Thind’s argument.<sup>214</sup> In doing so, the Court noted that to determine the meaning of the words “white persons,” its meaning must be taken from what the original framers of the 1790 statute thought the words meant in common ordinary speech and not scientific origin.<sup>215</sup> Thus, the Court held, “[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them to-day.”<sup>216</sup> The Court went on to reject the notion that Indian people at the time had preserved their racial integrity, but had instead clearly intermarried with the local people.<sup>217</sup> The Court concluded its opinion by stating, “It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white.”<sup>218</sup>

---

208. See IAN F. HANEY-LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 42–46 (1996) (citing Naturalization Act, Ch. 3, 1 Stat. 103 (1790)). After the Civil War, Congress amended this Act to expand coverage to those of African nativity or African descent. *Id.*

209. *Id.*

210. For a discussion of these cases, see Taunya L. Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 *ASIAN L. REV.* 7, 19–20 (1998).

211. *Id.*

212. *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).

213. *Id.* at 210. Interestingly, Dr. Bhagat Singh Thind was actually a Sikh. Doug Coulson, *British Imperialism, the Indian Independence Movement, and the Racial Eligibility Provisions of the Naturalization Act: United States v. Thind Revisited*, 7 *GEO. J. L. MOD. CRIT. RACE PERSP.* 1, 3 n.6 (2015).

214. *Thind*, 261 U.S. at 213.

215. *Id.*

216. *Id.* at 209.

217. *Id.* at 212–13.

218. *Id.* at 215.

#### 4. *Congressional Debates During the Passage of the Civil Rights Act of 1866*

In discussing the legislative history of Section 1981, it is important to note that the Congress that adopted the Civil Rights Act of 1866 had to respond to claims that the Act exceeded legislative authority under the Thirteenth Amendment.<sup>219</sup> Scholars agree that one of the purposes of enacting the Fourteenth Amendment, adopted by the same Congress two months after overriding President Johnson's veto of the Civil Rights Act of 1866, was to constitutionalize the provisions of the Act.<sup>220</sup> After the Fourteenth Amendment was ratified, Congress re-enacted the Civil Rights Act of 1866 in the Enforcement Act of 1870, also known as the Voting Rights Act of 1870.<sup>221</sup> Thus, when thinking about the legislative history of Section 1981, not only is the Civil Rights Act of 1866 relevant, but so are the Congressional discussions regarding the enactment of the Fourteenth Amendment.

The ratification process of the Thirteenth Amendment banning slavery concluded on December 6, 1865. This was about the time that Congress was beginning its session. Section 2 of that Amendment provided, "Congress shall have power to enforce this article by appropriate legislation."<sup>222</sup>

Slavery was more than physical bondage. The U.S. legal system did not consider enslaved people to have legal personhood.<sup>223</sup> Thus, they did not have legal rights that would allow them to enter into contracts, own or lease property, be a witness in legal proceedings, sue or be sued in Court, or perform other legal functions.<sup>224</sup> The Supreme Court famously affirmed this lack of legal status in *Dred Scott v. Sandford*,<sup>225</sup> decided four years before the start of the Civil War, which held that no Black person, enslaved or free, could be a citizen of the United States.<sup>226</sup>

---

219. See *infra* notes 234–39 and accompanying text.

220. RAOUL BERGER, *SELECTED WRITINGS ON THE CONSTITUTION* 185 (1987) ("[T]he uncontroverted evidence, confirmed in these pages, is that the framers [of the Fourteenth Amendment] repeatedly stated that the amendment and the Civil Rights Act of 1866 were 'identical' . . . ."); see also ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 75 (1992) ("It was the demonstrable consensus of the Thirty-ninth Congress that section 1 of the Fourteenth Amendment 'constitutionalized' the Civil Rights Act of 1866."); MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 72 (1999) ("Recall that whatever else it did, the second sentence of section one constitutionalized the 1866 Civil Rights Act."); RALPH A. ROSSUM & G. ALAN TARR, *AMERICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS* 53 (8th ed. 2010) ("The Fourteenth Amendment was obviously designed to constitutionalize the Civil Rights Act of 1866.").

221. Enforcement Act of 1870, Ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. §§ 1981–82 (2000)).

222. U.S. CONST. amend. XIII, § 2.

223. *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857) (holding that Scott, an enslaved Black man, was property).

224. *Id.* at 427 (holding that Scott, as a noncitizen, could not bring a suit in federal court).

225. *Id.*

226. *Id.*

As evidenced by the passage of the Civil Rights Act of 1866, most members of Congress believed that Section Two of the Thirteenth Amendment gave it the authority to legislate to eliminate not just physical bondage, but the badges and incidents of slavery as well. After Congress came back into session, Republicans began to work on measures that would protect the basic civil rights of all citizens, especially those who were Black.<sup>227</sup> Needless to say, Congress had never passed a measure to protect the rights of Black Americans in its history. Thus, the Act proved to be Congress' first anti-discrimination measure.

During one Senate debate, in response to the argument that the government was organized in the interest of the white race, Senator Justin Morrill argued that the Declaration of Independence's language precluded the idea of a country being based on any such distinction between races, colors, or castes.<sup>228</sup> Five days later, Sumner spoke during the Senate debate on the topic of the perpetual dominance of the white race.<sup>229</sup> He noted that this idea creates "nothing less than a Caste, which is at once irreligious and unrepugnant. A Caste cannot exist except in defiance of the first principles of Christianity and the first principles of a Republic."<sup>230</sup> Sumner went on to note that Brahmins and Sudras had been separated generationally in India in the same way black and white people were separated in the U.S.<sup>231</sup> Agreeing with Sumner that a "caste exclusion is entirely contrary to the spirit of our Government," Senator William Fessenden nonetheless expressed the view that he felt such a measure eliminating all distinctions of color between people would not pass.<sup>232</sup> In March, Representative John Martin Broomall argued,

[T]he government of the United States above all other duties owes it to itself and to humanity to guard the rights of those who in the midst of rebellion periled their lives and fortunes for its honor, of whatever caste or lineage they may be . . . and . . . no system of reconstruction ought to be considered unless it shall effectually guaranty [sic] the rights of Union men of the South.<sup>233</sup>

Framers of the Civil Rights Act of 1866 had to contend with detractors who claimed it was an unconstitutional intrusion on state sovereignty that went beyond the scope of the authority granted by the Thirteenth Amendment. Indeed, one of the criticisms that President Johnson leveled against the Act in his veto message

---

227. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 243 (2014).

228. CONG. GLOBE, 39th Cong., 1st Sess. 570–71 (1866).

229. *Id.* at 683.

230. *Id.*

231. *Id.*

232. *Id.* at 704.

233. *Id.* at 1262.

was that it exceeded Congress's powers under the Thirteenth Amendment.<sup>234</sup> John Bingham, a principal drafter of Section One of the Fourteenth Amendment, also believed that prior to the passage of the Amendment, Congress lacked power for the 1866 Act.<sup>235</sup> As the opponents put it, the power of Congress to legislate against slavery did not contain the power to provide equal civil rights or prohibit private acts of discrimination.<sup>236</sup> Passing the Fourteenth Amendment allowed the Act's proponents to defend against the possibility that the courts might agree with Johnson's conclusion and the risk that, even if the Act survived judicial scrutiny, a subsequent Congress could decide to repeal it.<sup>237</sup> Thus, Congress sought to ensure the validity and permanency of the rights granted in the Act by enacting the Fourteenth Amendment.<sup>238</sup> Congress passed the Fourteenth Amendment and sent it to the states for ratification on June 13, 1866, just two months after overriding Johnson's veto of the 1866 Act.<sup>239</sup>

Some Constitutional scholars have argued that the Fourteenth Amendment was intended to ban all systems of caste or class legislation.<sup>240</sup> Americans understood class and caste as nearly interchangeable terms<sup>241</sup> during these times, which were before the publication of *Das Kapital* that popularized the use of "class" conflicts in the writings of Karl Marx.<sup>242</sup> For example, in the debate on the Fourteenth Amendment on May 23, 1866, Senator Jacob Howard stated that

234. President Andrew Johnson, *March 27, 1866: Veto Message on Civil Rights Legislation* (1866), <https://millercenter.org/the-presidency/presidential-speeches/march-27-1866-veto-message-civil-rights-legislation> [<https://perma.cc/XC7U-R4W6>] (last visited Sept. 10, 2021) (writing that "the bill undoubtedly comprehends cases and authorizes the exercise of powers that are not, by the Constitution, within the jurisdiction of the courts of the United States").

235. MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 80 (Duke Univ. Press, 1986). Bingham was one of a small group of Republicans who subscribed to this argument. *Id.*

236. See EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* 75 (Washington, James J. Chapman, 3d ed. 1880).

237. See George Rutherglen, *The Improbable History of Section 1981: CLIO Still Bemused and Confused*, 9 SUP. CT. REV. 303, 312 (2003).

238. See *supra* note 220 and accompanying text. See also *Hurd v. Hodge*, 334 U.S. 24, 847, 852 (1948) ("Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land.").

239. FONER, *supra* note 227, at 247, 254.

240. Steven Calabresi & Julia T. Ricker, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4. Professor Melissa L. Saunders has argued that the Amendment goes beyond just banning systems of caste based on hereditary and social stigmatization. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247–48 (1997). See also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1413 (1992) (arguing that the Fourteenth Amendment was specifically geared toward ending the injustice inherent in caste systems).

241. Calabresi & Ricker, *supra* note 240, at 17, 19. See also *Slaughter-House Cases* 83 U.S. 36, 410 (1872) (discussing the Equal Protection Clause) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.") (emphasis added).

242. *Das Kapital* was published in 1867. 1 KARL MARX, *DAS KAPITAL, DER PRODUKTIONSPROCESS DES KAPITALS* (Hamburg, Meissner, 1867).

the Fourteenth Amendment would “abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another.”<sup>243</sup> He acknowledged the caste-like system that existed between Black and white people in the U.S. and went on to note the different ways this amendment would end the legally sanctioned system as it existed then.<sup>244</sup> In explaining the meaning of Section One, Representative Thomas Eliot said:

I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.<sup>245</sup>

After Congress passed the Fourteenth Amendment, the Republican National Party published a bulletin championing it as an anti-caste measure. Published in August of 1866, the bulletin read, “The Republicans in Congress tried to the extent of their powers to abolish throughout the bounds of the republic the evils of caste, as second only to those of slavery.”<sup>246</sup>

The Fourteenth Amendment was ratified in July of 1868, followed 18 months later by the Fifteenth Amendment, which prohibited any state or the United States from denying or abridging the right of citizens to vote on account of race, color, or previous condition of servitude.<sup>247</sup> Two months before the ratification of the Fifteenth Amendment, Sumner published an essay entitled *The Question of Caste*, which was the substance of remarks he made at speeches he delivered in a dozen cities in the Northeast.<sup>248</sup> In his essay, Sumner once again fully discussed the caste analogy, making several of the same points that he first made in his arguments in *Roberts v. Boston*.<sup>249</sup> After the ratification by the states of the Fourteenth and Fifteenth Amendments, the Republican-controlled Congress reenacted the Civil

---

243. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

244. *Id.*

245. CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

246. Calabresi & Ricker, *supra* note 240, at 35 (quoting *Who Did It?*, PHILA. N. AM. & U.S. GAZETTE, Aug. 18, 1866, at 1).

247. U.S. CONST. amend. XIV; U.S. CONST. amend. XV. The Fifteenth Amendment was ratified on February 3, 1870.

248. HON. CHARLES SUMNER, QUESTION OF CASTE 3, 9 (1869), [https://ia800901.us.archive.org/29/items/questionofcaste00sumn/questionofcaste00sumn\\_bw.pdf](https://ia800901.us.archive.org/29/items/questionofcaste00sumn/questionofcaste00sumn_bw.pdf) [<https://perma.cc/7NQK-EZV3>].

249. Sumner connects the caste system to the feudal system in Europe where the son was to engage in the same occupation as his father. He describes the four major Hindu castes, which he notes have their origins in the Laws of Manu and are called “varnas” in Sanskrit, which translates to “colors.” Sumner says the Brahmins proceed from the mouth of the Creator, the Kshatriya from the arm, the Vaishya from the thigh, and the Shudra from the foot. Sumner points out that below the Shudra is the Pariah (Dalit). *See id.*

Rights Act of 1866 in 1870.<sup>250</sup> Congress would also split parts of Section One of the Act into Sections 1981 and 1982. However, both Sections used nearly identical language, and the Supreme Court has construed them similarly.<sup>251</sup> The former section dealt primarily with most of the rights covered under the original act, while the latter section dealt with property rights.<sup>252</sup>

The purpose of discussing the history of the Civil Rights Act of 1866 and the Fourteenth Amendment is not to resolve the jurisprudential dispute regarding the proper interpretation of these measures. Rather, it is to demonstrate that as Congress considered enacting Section 1981, it also had in mind that the measure could combat the maintenance of a caste system on American soil. Thus, the caste system on the Indian subcontinent was in the background of the anti-caste thinking in pursuit of eliminating discrimination suffered by Black people in the U.S.

### 5. Conclusion

The Supreme Court has interpreted the meaning of race within the context of Section 1981 based upon its understanding in the 19th century.<sup>253</sup> Since, in the 19th century, caste differences were viewed as race differences, it could very well be that courts will view caste discrimination based on untouchability as a form of racial discrimination under Section 1981.

## IV.

### IS CASTE DISCRIMINATION COVERED BY ONE OF THE PROTECTED TRAITS OF TITLE VII?

Title VII applies to employers with 15 or more employees, and it operates during hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment.<sup>254</sup> As the Supreme Court has interpreted the law, “[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.”<sup>255</sup>

Employers may be held liable under Title VII based on several theories including disparate treatment, which is likely to be the most applicable to an

250. Enforcement Act of 1870, Ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. §§ 1981–82 (2000)). Congress revised and codified the United States Code in 1874.

251. *Id.*; *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 447 (2008) (noting that the Court’s precedents have long “construe[d] §§ 1981 and 1982 similarly”).

252. Congress also enacted its first codification of federal law in 1874. *Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1975) (“The commissioners who prepared the 1874 draft revision were . . . given authority to ‘revise, simplify, arrange, and consolidate all statutes of the United States.’”).

253. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 (1987). *See supra* note 147 and accompanying text.

254. 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw through P.L. 116-259).

255. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971)).

individual Dalit employee. Disparate treatment discrimination includes harassment claims and occurs when an employer is motivated to treat one employee differently because of a protected trait. Title VII also provides for retaliation claims that apply when the employer discriminates against an employee for engaging in protected activities. Thus, if caste discrimination based on untouchability is covered by Title VII, employees who suffer adverse employment actions because they complain, either internally or externally, would have retaliation claims to pursue distinct from their underlying employment discrimination claim. Protection from retaliation is also critical for Dalits and could encourage more of them to come forward and reveal the discrimination they suffer on the job.

Dalits are vulnerable to discrimination by employers on several bases: their Asian ethnicity, their color, the religion they practice, their sex, or their country of origin. However, if the discrimination is based on these characteristics, their caste is irrelevant to their claim. Thus, instead of focusing on any of those claims, this part will address the question of whether caste discrimination based on untouchability fits within any of the protected traits.

It is clear that caste discrimination does not fit into the protected trait of sex. Many South Asians feel that there is a correlation between color and caste.<sup>256</sup> In addition, the Sanskrit term of “varna” translates to color. But this refers to spiritual color as opposed to physical color.<sup>257</sup> Like people of all races and ethnicities, Dalits come in a large array of skin colors. The experiences of Asian, Black, and Latinx individuals in the U.S. demonstrate that discrimination based on color is separate from discrimination based on race or national origin. For caste discrimination based on untouchability, the source is not color, it is caste.<sup>258</sup>

There is the possibility that a Dalit claimant could assert a “religious non-adherence discrimination claim,” also referred to as a “reverse religious discrimination claim,” that would fit within the protected trait of religion. The first section will address whether caste discrimination fits as a form of religious discrimination. The second section will discuss whether caste discrimination fits within the concept of race discrimination. In doing so, the second section will present four different legal analyses. The third subsection will address whether courts could recognize caste discrimination based on untouchability as a form of national origin discrimination. In doing so it discusses four different legal arguments that caste discrimination fits within national origin discrimination.

---

256. For a discussion of colorism among South Asians, see Taunya Lovell Banks, *Colorism Among South Asians: Title VII and Skin Tone Discrimination*, 14 WASH. U. GLOB. STUD. L. REV. 665 (2014); Varsha Ayyar & Lalit Khandare, *Mapping Color and Caste Discrimination in Indian Society*, in *THE MELANIN MILLENNIUM: SKIN COLOR AS 21ST CENTURY INTERNATIONAL DISCOURSE* 71–95 (Ronald E. Hall ed. 2013).

257. Ayyar & Khandare, *supra* note 256, at 74; *See also* MOHANTY, *supra* note 109, at 151.

258. *See* Smita Narula, *supra* note 9, at 259 (“To begin, the visual cues that accompanied apartheid in South Africa, or racial discrimination in other parts of the world, are lacking in India. Caste is like oxygen—it is both invisible and indispensable.”).

*A. Is Caste Discrimination Based on Untouchability a Form of Religious Discrimination?*

Title VII provides a definition of religion that includes “all aspects of religious observance and practice, as well as belief.”<sup>259</sup> The EEOC “define[s] religious practices to include moral or ethical beliefs about what is right and wrong which are sincerely held with the strength of traditional religious views.”<sup>260</sup> Employers are required to accommodate their employees’ religious beliefs, unless the employer demonstrates that they are unable to reasonably do so without undue hardship on the conduct of their business.<sup>261</sup> The problem with arguing that caste fits within this definition of religious discrimination is that being a Dalit is determined at birth.<sup>262</sup> Thus, the discrimination that Dalits face is not the result of what they believe or the practices of their beliefs. On the contrary, the discrimination tends to stem from the discriminators’ own religious beliefs which include negative views about Dalits. Discriminating against someone due to their caste does not appear to fit neatly within this aspect of discriminating against a Dalit because of the Dalit’s religion.<sup>263</sup>

Several courts, however, have recognized the validity of religious non-adherence discrimination claims.<sup>264</sup> In a religious non-adherence claim, an employee argues that their employer discriminated against them because the employee did not share the employer’s religious beliefs.<sup>265</sup> Thus, the employee’s specific religious beliefs do not matter as much as the employer’s religious beliefs in motivating the taking of adverse employment action beyond the simple fact that they diverge.<sup>266</sup> In the case of *Noyes v. Kelley Services, Inc.*, the plaintiff’s supervisor and recently promoted co-worker belonged to a small religious sect known as the Fellowship that had around 2000 members.<sup>267</sup> A third of the Fellowship members lived together in a compound in Apollo, California.<sup>268</sup> The

259. 42 U.S.C. § 2000e(j).

260. 29 C.F.R. § 1605.1.

261. 42 U.S.C. § 2000e.

262. *See supra* notes 128–130 and accompanying text.

263. As was discussed earlier (*see supra* notes 135–37, and accompanying text), many Dalits have become Ambedkarite Buddhists. While there may be a plausible argument that religion is a motivating factor, generally speaking, it is not that they practice Buddhism, but that they are Dalits that motivates the discriminator. A discriminator against an Ambedkarite Buddhist is not likely to manifest the same discriminating motives regarding a Buddhist who was born into a high caste or a Japanese Buddhist, for example. *See* Waughray, *supra* note 49, at 214 (2009).

264. Alex Reed, *Religious Nonadherence Claims as a Means of Contesting LGB-Related Employment Bias*, 40 BERKLEY J. EMP. & LAB. L. 340 (2020). *See, e.g.*, *Shapolia v. Los Alamos Nat’l Lab’y*, 992 F.2d 1033, 1038 (10th Cir. 1993); *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997); *Noyes v. Kelly Servs.*, 488 F.3d 1163 (9th Cir. 2007); *Magden v. Easterday Farms*, No. 2:16-CV-00068-JLQ, 2017 WL 1731705, at \*6–7 (E.D. Wash. May 3, 2017).

265. Harold M. Brody & Catherine Brito, *Reversing Claims of Reverse Religious Discrimination*, 34 EMP. REL. TODAY 77, 77 (2007).

266. *Venters*, 123 F.3d at 972.

267. *Noyes*, 488 F.3d at 1166.

268. *Id.*

sect members abided by strict rules that governed their way of life.<sup>269</sup> The plaintiff believed her supervisor passed her over for a promotion in order to give it to a co-Fellowship member and perceived a general pattern at work of Fellowship members receiving favorable treatment.<sup>270</sup> The Ninth Circuit found that the plaintiff established triable issues of fact.<sup>271</sup> Interpreting an earlier decision by the Tenth Circuit in *Shapolia v. Los Alamos National Laboratories*,<sup>272</sup> the Ninth Circuit in *Noyes* stated,

The court reasoned that the “protected class” showing required in a traditional race or sex discrimination claim does not apply to this type of non-adherence or reverse religious discrimination claim because “it is the religious beliefs of the employer, and the fact that [the employee] does not share them, that constitute the basis of the [religious discrimination] claim.”<sup>273</sup>

The Seventh Circuit also addressed a religious non-adherence claim decision in *Venters v. City of Delphi*.<sup>274</sup> The plaintiff, Jennifer Venters, was appointed the head dispatcher for the City of Delphi police department by an outgoing Chief of Police.<sup>275</sup> The new Chief of Police, Larry Ives, made it clear from the beginning that “he was a born-again Christian who believed that his decisions as police chief should be guided by the principles of his faith, and that he had been sent by God to Delphi to save as many people from damnation as possible.”<sup>276</sup> Venters did not share the Chief’s religious beliefs, but took a while to tell him so because she was afraid.<sup>277</sup> After suffering through a number of efforts by the Chief to “save her soul” over the next three years, Venters was fired by Ives, who claimed that Venters had demonstrated poor work performance.<sup>278</sup> Venters believed she was terminated for failing to “measure up to [Ives’] religious expectations.”<sup>279</sup> In concluding that Venters had successfully raised a Title VII claim, the Court noted that Venters “need only show that her perceived religious shortcomings (her unwillingness to strive for salvation as Ives understood it, for example) played a motivating role in her discharge.”<sup>280</sup> In response to Ives’s claim that he had provided non-discriminatory reasons for the decision to fire Venters, the Court

---

269. *Id.*

270. *Id.* at 1171.

271. *Id.* at 1172.

272. *Shapolia v. Los Alamos Nat’l Lab’y*, 992 F.2d 1033, 1038 (10th Cir. 1993).

273. *Noyes*, 488 F.3d at 1168–69 (citing *Shapolia*, 992 F.2d at 1038).

274. *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997).

275. *Id.* at 962.

276. *Id.*

277. *Id.* at 963.

278. *Id.* at 963–64.

279. *Id.* at 970.

280. *Id.* at 972; *see also* *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 708–09 (6th Cir. 1985) (explaining that employer’s willingness to give special consideration to those who shared his religious views and his withholding of same consideration from those who did not constitutes direct evidence that religion played role in plaintiff’s discharge).

held that, when there is direct evidence of discrimination, the “pertinent question is whether the city’s evidence as to the legitimate reasons for terminating Venters eliminates any doubt as to whether religion played at least a motivation role in her discharge.”<sup>281</sup>

The focus of religious non-adherence claims is the discriminator’s beliefs. Thus, a Dalit victim of caste discrimination based on untouchability may be able to establish a question of triable fact. Effectively, what the Dalit victim would assert is that, by not following the discriminator’s religious beliefs that Dalits should act and behave in certain ways, they are refusing to share the perpetrator’s religious beliefs.

*B. Is Caste Discrimination Based on Untouchability Covered Under the Protected Trait of Race?*

Is caste discrimination race discrimination? This is a perplexing question that has received significant attention in the international legal context.<sup>282</sup> Title VII does not define the term “race” and the EEOC has not done so either.<sup>283</sup> Courts, too, are uncertain about its definition for the purposes of Title VII claims.<sup>284</sup> The claims based on race and national origin “may substantially overlap or even be indistinguishable depending on the specific facts of a case.”<sup>285</sup>

There seem to be four available legal analyses to consider in determining if the definition of “race” includes caste. One is to look to the definitions of the various racial groups adopted by the federal government to determine if caste fits in the definition of a racial category. The second starts with the recognition that the federal courts have generally treated race discrimination under Section 1981 the same as under Title VII, meaning they have applied a definition of race as understood in the 19th century.<sup>286</sup> The third route is based on the legislative history of the Civil Rights Act of 1964. The fourth is looking at contemporary sources of the 1960s to see how race was defined.

---

281. *Venters*, 123 F.3d at 972.

282. *See supra* notes 49–51 and accompanying text.

283. *Equal Emp. Opportunity Comm’n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016). *See also* 42 U.S.C.A. § 2000e (West 2021).

284. *Salas v. Wis. Dep’t of Corrs.*, 493 F.3d 913, 923 (7th Cir. 2007) (“In the federal courts, there is uncertainty about what constitutes race versus national origin discrimination under Title VII.”)

285. *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003). *See also Garcia v. Hatch City Pub. Schs.*, 458 P.3d 378, 385 (N.M. 2018) (“[T]he takeaway from these cases is that terms like race and national origin, as well as related terms like ancestry and ethnicity, often overlap, even to the point of being factually indistinguishable.”)

286. *See, e.g., Walker v. Sec. of the Treasury, Internal Revenue Serv.*, 713 F. Supp. 403, 405 (N.D. Ga. 1989); *Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016). *See also supra* notes 145–47 and accompanying text.

*1. Determining Whether Caste Discrimination is Race Discrimination  
Using the Federal Government's Definitions of Race*

Each year, certain employers subject to Title VII are required to submit an EEO-1 Report to the Joint Reporting Committee, which consists of the EEOC and Office of Federal Contract Compliance Programs.<sup>287</sup> Data requested on the EEO-1 Report tracks employees by race, ethnicity, sex, and job classification.<sup>288</sup> The EEO-1 Reports provide useful data on the race and ethnicity of employees, using the definitions mandated by the federal government, which first became required for employers in 1980.<sup>289</sup>

Even though the federal government has collected racial data for over 200 years as part of the census process, no federal standards for the collection of data on race and ethnicity applied across all federal agencies until the 1970s.<sup>290</sup> Federal agencies were increasingly collecting racial and ethnic data at the time because of civil rights laws enacted in the 1960s.<sup>291</sup> In 1976, Congress passed Public Law 94-311, which required federal agencies to provide a separate count of the Latinx population.<sup>292</sup>

On May 12, 1977, the Race and Ethnic Standards for Federal Statistics and Administrative Reporting (“Directive 15”) became effective for all federal government agencies, including the EEOC.<sup>293</sup> The federal government undertook a review of Directive 15 from 1993 to 1997.<sup>294</sup> The 1997 Revisions also provided that other federal programs adopt its standards.<sup>295</sup> The 1997 Revisions were first

---

287. See U.S. Equal Emp. Opportunity Comm’n, *EEO-1 Data Collection*, <https://www.eeoc.gov/employers/eo-1-data-collection> [<https://perma.cc/6PFK-KET5>] (last visited Mar. 27, 2022). Employers who must file include those with at least one hundred employees and federal government contractors with at least fifty employees and meeting certain criteria. *Id.*

288. See U.S. Equal Emp. Opportunity Comm’n, *EEO-1 Component 1 Fact Sheet: Report Types*, [https://www.eeocdata.org/pdfs/EEO-1\\_Fact\\_Sheet.pdf](https://www.eeocdata.org/pdfs/EEO-1_Fact_Sheet.pdf) [<https://perma.cc/Q468-3S6N>] (last visited Mar. 27, 2022).

289. For a discussion of the history of the creation of the federal government’s definitions for race and ethnicity, see KEVIN BROWN, *BECAUSE OF OUR SUCCESS: THE CHANGING RACIAL AND ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION* 43–60 (2014).

290. See Katherine K. Wallman, Suzann Evinger, & Susan Schechter, *Measuring Our Nation’s Diversity: Developing a Common Language for Data on Race/Ethnicity*, 90 AM. J. PUB. HEALTH 1704, 1704 (2000).

291. *Id.*

292. *Id.*

293. OFFICE OF MGMT. & BUDGET, DIRECTIVE NO. 15, RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (as adopted on May 12, 1977). In 1978, the standards were renamed “Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting,” or Directive 15. For a more complete retelling of the change of the name of Directive No. 15, see RAINER SPENCER, *SPURIOUS ISSUES: RACE AND MULTIRACIAL IDENTITY POLITICS IN THE UNITED STATES* 70–71 (1999).

294. For a list of the steps taken, see Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. No. 210 58,782–83 (Oct. 30, 1997), <https://www.govinfo.gov/content/pkg/FR-1997-10-30/pdf/97-28653.pdf> [<https://perma.cc/SE5B-4SGD>].

295. *Id.* at 58,789.

utilized for the 2000 census and were incorporated into the EEOC's regulations in time for the 2007 EEO-1 Reports.<sup>296</sup>

The 1997 Revisions, as well as the EEOC regulations, which are still currently in use, classified Hispanic or Latinx status as an ethnicity, not a race.<sup>297</sup> The term Hispanic or Latinx "refers to persons who trace their origin or descent to Mexico, Puerto Rico, Cuba, Central or South American or some other Spanish culture."<sup>298</sup> The definitions for the five racial categories contained in the 1997 Revisions are as follows:

- a. American Indian or Alaska Native—A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.
- b. Asian—A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.
- c. Black or African American—A person having origins in any of the black racial groups of Africa.
- d. Native Hawaiian or Other Pacific Islander—A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.
- e. White—A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.<sup>299</sup>

While South Asians have started to spread throughout the world, adherents of the caste system originally hail from Bangladesh, Bhutan, India, Maldives, Nepal,

---

296. For a discussion of this process, see BROWN, *supra* note 289, at 43–60.

297. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. No. 210 58,789 (Oct. 30, 1997), <https://www.govinfo.gov/content/pkg/FR-1997-10-30/pdf/97-28653.pdf> [<https://perma.cc/V9GA-VVJB>]. For the EEO-1 reports, the ethnicity issue is limited to whether a person is Hispanic or not. Thus, they are of no help in determining a person's ethnic origin for purposes of a Title VII claim.

298. Agency Information Collection Activities, Notice of Submission for OMB Review; Final Comment Request to the Equal Employment Opportunity Commission, 70 Fed. Reg. 71,295, 71,301 (Nov. 28, 2005). The definition of Asian from Directive 15 was "Asian or Pacific Islander—A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa." The 1997 Revisions removed Pacific Islanders from this category and combined them with Native Hawaiians into a new racial category of "Native Hawaiian or Other Pacific Islander." *Id.* at 58,786; OFFICE OF MGMT. & BUDGET, DIRECTIVE NO. 15, RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (as adopted on May 12, 1977). For a discussion of the EEOC guidelines, see BROWN, *supra* note 296.

299. *Id.*

Pakistan, Sri Lanka, Tibet, and other countries in Asia.<sup>300</sup> Although the racial categories listed in the 1997 Revisions would consider all of those with a caste to be Asian, since caste alone would not be considered a race, caste discrimination would not equate to race discrimination.

## 2. Defining Race for Purposes of Title VII as it Was Defined by Section 1981

Although employers must use the above racial categories when reporting their employees to the EEOC, this definition of race should not necessarily be used to determine what is “race discrimination” under Title VII. Section 1981 is the historical predecessor of Title VII with regard to recognizing claims of race discrimination in employment.<sup>301</sup> Courts have also treated race discrimination under Section 1981 the same as under Title VII.<sup>302</sup>

The Second Circuit’s decision in *Village of Freeport v Barrella*,<sup>303</sup> which recently addressed the issue of whether Hispanics are a race or a national origin group under Title VII, is particularly instructive.<sup>304</sup> The Second Circuit noted that the District Court had struggled to determine whether the term “Hispanic” fell within the legal definition of race, partly due to the federal government’s “less-than-straightforward use of those terms.”<sup>305</sup> The Court noted that, considering merely those federal definitions discussed above, Hispanic/Latinx is considered an ethnicity, not a race.<sup>306</sup>

From the standpoint of Title VII, the issue of whether Hispanic status is considered a race has long been controversial.<sup>307</sup> But, in Section 1981 claims, courts have a history of finding that it fits within the definition of race discrimination.<sup>308</sup> Many courts assumed that people who were Hispanic formed a

300. See, e.g., OMVEDT, *supra* note 46, at 31 (“Caste system exists in South Asian subcontinent and there only.”)

301. See, e.g., Walker v. Fulton Cnty. Sch. Dist., 713 F. Supp. 403, 405 (N.D. Ga. 1989).

302. See, e.g., *id.* (“[T]he legal elements and facts necessary to support a claim for relief under Title VII are identical to the facts which support a claim under § 1981.”); *Village of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016) (“[W]e analyze claims of racial discrimination identically under Title VII and § 1981 in other respects, and we see no reason why we should not do the same with respect to how we define race for purposes of those statutes.”).

303. *Barrella*, 814 F.3d 594

304. The case may be particularly instructive given the Court’s characterization of the correct definition of “Hispanic” as a “vexed question.” *Id.* at 602. This may provide a helpful parallel to the difficulty in characterizing “caste” within anti-discrimination laws.

305. *Id.*

306. *Id.* See also *supra* note 297 and accompanying text.

307. *Barrella*, 814 F.3d at 606.

308. *Id.* at 607. See also *Albert v. Carovano*, 851 F.2d 561, 572 (2d Cir. 1988) (en banc); *Rivera v. United States*, 928 F.2d 592, 607 (2d Cir. 1991) (noting that § 1981 “protect[s] against discrimination on the basis not only of race, but also of ‘ancestry or ethnic characteristics’” (quoting *Memphis v. Greene*, 451 U.S. 100, 128 (1981))); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) (“There can be no question that [§ 1981’s ban on racial discrimination] includes persons . . . who are of Puerto Rican descent.”).

protected class under Title VII without clarifying whether it was race or national origin, while others have found the underlying intent to be irrelevant.<sup>309</sup> Repeatedly, though, courts have “assumed that claims of ethnicity-based discrimination, including discrimination based on Hispanicity, are cognizable as claims of racial discrimination under Title VII, albeit without holding so explicitly.”<sup>310</sup>

Before the *Village of Freeport* case, the Second Circuit had determined that Hispanic or Latino status was a national origin group under Title VII.<sup>311</sup> In *Freeport*, though, the Second Circuit considered that if it excluded Hispanic status from Title VII’s definition of race, plaintiffs pursuing both Section 1981 and Title VII claims might in some circumstances need to present two different factual arguments in order to invoke the distinct remedies of these two statutes that apply to employment discrimination.<sup>312</sup> The Second Circuit concluded “race” in Title VII claims encompassed ethnicity to avoid this result.<sup>313</sup>

Courts’ pattern of equating the definitions of race under Section 1981 and Title VII suggests that the discussion earlier in the Article of Section 1981’s applicability to caste discrimination based on untouchability as race discrimination will also apply to the application of Title VII.<sup>314</sup> However, the Supreme Court has concluded that the definition of “race” for purposes of Section 1981 is to be drawn from its understanding in the 19th century. One could argue that this definition is not appropriate for Title VII, which was enacted almost 100 years later. But the Second Circuit’s decision points to how a considered decision to do so would create a huge legal problem.

### 3. Congressional Debates During Passage of the Civil Rights Act of 1964

During deliberations that led to the passage of the Civil Rights Act of 1964, several members of Congress discussed their desire not to recognize a caste system

---

309. *Barrella*, 814 F.3d at 606.

310. *Id.* at 607 (“In *Malave v. Potter*, for instance, we implicitly acknowledged the viability of a Title VII race-discrimination claim based on Hispanic ethnicity.”) (citing 320 F.3d 321, 324 (2d Cir. 2003)).

311. *See Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 19 (2d Cir.1995) (describing requirements for showing “an inference of ethnic discrimination” under Title VII).

312. 814 F.3d at 606.

313. *Id.*

314. *See supra* note 301 and accompanying text.

in the U.S.<sup>315</sup> The most significant discussion of the South Asian caste system during the debates of the Act came from Paul Douglas, a Democratic senator from Illinois, when he addressed the issue of school segregation. He argued that

[t]he caste system still endures in India and is a great disgrace upon India; but at least the Government of India has had the courage and the foresight to make it illegal; at least it is not sanctified by law; and, at least in theory and law, the temples are open to members of all castes-both the high castes and the low castes.<sup>316</sup>

The references to caste were not as numerous during the Congressional debates that led to the passage of Civil Rights Act of 1964 as they were during the passage of the Civil Rights Act of 1866. Nevertheless, these Congressional references to caste suggest that Congress continued with the view that caste differences were equivalent to race differences into the 1960s.

#### 4. *Contemporary Sources Defining Race*

Looking to contemporary sources of encyclopedias and dictionary definitions of race may not, alone, be helpful in determining whether caste discrimination fits within these definitions. The edition of Black's Law Dictionary published in 1951 did not include a definition of race.<sup>317</sup> The 1964 Concise Oxford Dictionary defined race as the following:

Group of Persons . . . connected by common descent posterity of (person); house, family, tribe or nation regarded as of common stock; distinct ethnical stock (the Caucasian, Mongolian, etc.) . . . ;  
Descent, kindred, (of noble, oriental, etc.)

Class of persons with some common feature . . . .<sup>318</sup>

The 1964 Webster's New World Dictionary defined race as follows:

---

315. During the House debates, a Republican Representative from Minnesota argued that "this country did not develop a caste system whereby we would have first- and second-class citizens." 110 CONG. REC. 1582, 1646 (1964). On February 10, 1964, Representative William St. Onge (D-Connecticut) noted, "We must not recognize any caste system in the United States, or the supremacy of one race over another. Such practices can never be justified in the light of our moral and democratic principles, because there is no moral justification for racial or religious discrimination." 110 CONG. REC. 2705, 2783 (1964). In discussing Title VI during the Senate debate on April 7, 1964, Senator John Pastore of Rhode Island acknowledged that segregation was "a caste system that imposed an inferior status on the Negro citizen from cradle to grave." 110 CONG. REC. 7051, 7055 (1964).

316. 110 CONG. REC. 6812, 6823 (1964). There were a few other mentions of caste during the debates of the Civil Rights Act of 1964. For example, Representative Abernathy, who opposed the Act because, in his words, the bill ignored the discrimination by African Americans against each other, referred to caste. See 110 CONG. REC. 2548, 2555 (1964).

317. BLACK'S LAW DICTIONARY (4th ed. 1951).

318. *Race*, THE CONCISE OXFORD DICTIONARY (5th ed. 1964).

Any of the major biological divisions of mankind, distinguished by color and texture of hair, color of skin and eyes, stature, bodily proportions, etc.: many ethnologists now consider that there are only three primary divisions, the Caucasian (loosely, *white race*), Negroid (loosely, *black race*), and Mongoloid (loosely, *yellow race*), each with various subdivisions: the term has acquired so many unscientific connotations that in this sense it is often replaced in scientific usage by *ethnic stock* or *group*. . .

A population that differs from others in the relative frequency of some gene or genes: a modern scientific usage

Any geographical, national, or tribal ethnic grouping

a) the state of belonging to a certain ethnic stock, group, etc. b) the qualities, traits, etc. belonging, or supposedly belonging, to such a division

Any group of people having the same ancestry; family; clan; lineage

Any group of people having the same activities, habits, ideas, etc.: as, the *race* of dramatists.<sup>319</sup>

These definitions may not lead to conclusive results. Arguably, some of the above definitions would include Dalits as a race. For example, the definition of “any group of people having the same ancestry; family; clan; lineage.” Others would not include Dalits as a race.<sup>320</sup>

### *C. Is Caste Discrimination Based on Untouchability Covered Under the Protected Trait of National Origin Discrimination?*

Title VII<sup>321</sup> does not define national origin. In *Espinoza v. Farah Manufacturing Company*,<sup>322</sup> the Supreme Court discussed whether failing to hire a permanent resident because they were not a U.S. citizen constituted national origin discrimination. The Court understood the term “national origin” to “refer[] to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”<sup>323</sup> The Court went on to note that, while “an earlier version of § 703 had referred to discrimination because of ‘race, color, religion, national origin, or *ancestry*,’” the removal of the word *ancestry* was not supposed to be a material change, but was rather considered to be synonymous with

---

319. *Race*, WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE: COLLEGE EDITION (1964).

320. See, e.g., *supra* note 319, noting that many ethnologists now consider that there are only three primary divisions.

321. 42 U.S.C. § 2000e. *et seq.*

322. *Espinoza v. Farah Mfg. Co. Inc.*, 414 U.S. 86 (1973).

323. *Id.* at 88.

“national origin.”<sup>324</sup> Further, in considering a situation in which an employer required prospective employees to have an Anglo-Saxon background, the Court affirmed that such a condition would be clearly illegal.<sup>325</sup>

Following the same reasoning, the Ninth Circuit has held that a Serbian complainant could bring a national origin employment discrimination claim even though, at the time, Serbia no longer existed as a nation.<sup>326</sup> The EEOC’s guidance on discrimination based on national origin also defines it as the “denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, *place of origin*; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”<sup>327</sup>

While physical and linguistic characteristics may not differentiate Dalits from other South Asians, the membership of a group presumed by discriminators to be religiously polluted could constitute a cultural group.<sup>328</sup> One Third Circuit opinion addressing a national origin claim provides language that may be particularly applicable to the type of caste discrimination that Dalits encounter:

Discrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits. It results in a stubborn refusal to judge a person on his merits as a human being. Our various statutes against discrimination express the policy that this refusal to judge people who belong to various, particularly disadvantaged, groups is too costly to be tolerated in a society committed to equal individual liberty and opportunity.<sup>329</sup>

Given the above discussions about the definition of national origin, the Dalits could assert at least four different legal theories that they constitute a national origin group.

---

324. *Id.* at 89.

325. *Id.* at 95. *See also* Kanaji v. Children’s Hosp. of Phila., 276 F. Supp. 2d 399, 401–02 (E.D. Pa. 2003) (finding it “clear that the Supreme Court would not require that one’s national origin be linked directly to a specific country or nation” but rather embraces “a broader class of people” and refers to “certain traits or characteristics that can be linked to one’s place of origin”).

326. Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 673 (9th Cir. 1988). *See also* Roach v. Dressler Industrial Valve & Instrument Division, 494 F. Supp. 215, 218 (W.D. La. 1980) (recognizing discrimination against Cajun employees as national origin discrimination under Title VII even though the colony of Acadia no longer existed). National origin also encompasses discrimination based on foreign accents. *See* Fragante v. City & Cnty. of Honolulu, 888 F.2d 591, 595 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) (addressing appellant’s argument that “national origin” under Title VII also encompasses discrimination based on foreign accents).

327. 29 C.F.R. § 1606.1 (emphasis added).

328. *See supra* notes 108–15 and accompanying text.

329. Bennun v. Rutgers State Univ., 941 F.2d 154, 173 (3d Cir. 1991).

*1. Dalits as a National Origin Group Due to Stigmatization by Caste Members*

The cultural experience of Dalits that is the basis of a caste discrimination claim based on untouchability is the idea that Dalits possess some sort of religious pollution.<sup>330</sup> Like the Third Circuit acknowledged, this prevents Dalits from being judged based on their individual merit; they are instead stereotyped with imagined undesirable characteristics. Their history in South Asia was one of being set apart from Caste Hindus and non-Dalit members of other religions and compelled to practice endogamy. Remedying this historical injustice is consistent with Title VII's stated purpose of removing "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."<sup>331</sup>

*2. Dalits as a National Origin Group Based on Ancestry Analogy to U.K. Treatment of Caste Discrimination*

The Supreme Court has noted that the deletion of the term "ancestry" from an earlier list of protected traits by Congress was not a material change because "national origin" was considered synonymous.<sup>332</sup> A Dalit complainant could argue that discrimination against them is the product of common descent as a form of ancestry, an argument that has had success in the United Kingdom.

The Equality Act, passed in the U.K. in 2010, prohibits discrimination on nine grounds, including race, defined by statute as including color, nationality, and ethnic or national origins.<sup>333</sup> "Ethnic origins" has been interpreted as a "wide and flexible"<sup>334</sup> phrase which also includes questions of birth, lineage, descent, and ancestry.<sup>335</sup> In *Tirkey v. Chandhok*, the U.K.'s first and to date only successful caste discrimination case, the claimant was a domestic servant trafficked from India to work in a private home in the U.K.<sup>336</sup> She alleged egregious violations of employment rights and unlawful discrimination contrary to the Equality Act.<sup>337</sup> Since she had no access to an explicit statutory prohibition of caste discrimination, she alleged her discrimination had occurred for reasons related to her ethnic origins including her status in the caste system as perceived by the respondents.<sup>338</sup> The Employment Tribunal found that she was mistreated by the respondents

---

330. See *supra* notes 122–30 and accompanying text.

331. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–01 (1973) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971)).

332. See *supra* note 324 and accompanying text.

333. See Nat'l Archives, *Equality Act 2010, Part II, Chapter I*, LEGISLATION.GOV.UK, <https://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/1> [<https://perma.cc/4JTV-ZJ83>].

334. *Chandhok & Anor v. Tirkey*, Appeal No. UKEAT/0190/14/KN, ¶ 44 (Emp. Appeal Trib. Dec. 19, 2014).

335. *R (E) v Governing Body of JFS* [2009] UKSC 15, [28].

336. *Tirkey v. Chandhok* [2015] EAT 3400174/2015, [205]–[210].

337. *Id.* at ¶ 1.

338. *Id.* at ¶ 205–10.

because of race, specifically because of her ethnic origins—defined as her birth, her *descent*, her inherited position in society or caste, and her background and upbringing.<sup>339</sup> The concept of descent or ancestry in the U.K. is thus far broader than the concept of the land of one's ancestors. Descent was relied on by the tribunals in the *Tirkey* litigation as the legal source of a prohibition of caste discrimination, albeit with the proviso that this finding was case-specific and not intended to establish a general proposition.<sup>340</sup>

Dalit complainants in the U.S., too, could make the argument that discrimination based on untouchability is derived from their ancestry in the sense that it is derived from the descent or inherited position due to their caste. Given a broad definition of national origin, it is possible that this form of discrimination would fit within that category.

### 3. Aryan Origin Theory and National Origin Discrimination

A third argument derives from the Aryan Origin Theory discussed earlier.<sup>341</sup> As protests increased for Indian independence from Great Britain, many South Asian scholars increasingly criticized the Aryan Origin Theory, noting that it was the product of a biased view of Western thinkers.<sup>342</sup> A new explanation asserted that the Aryans were actually the initial inhabitants of India. According to this theory, original Hindus were the Aryans, a distinctive people indigenous to India. Caste Hindus or Hindu Aryans are their descendants. Thus, there was no Aryan invasion, since the Aryans were indigenous to India, and, therefore, no confrontation between them and the original people of India occurred.<sup>343</sup>

Despite the criticisms of the Aryan Origin Theory, however, recent research may be bringing it back into societal good graces. A 2018 DNA study provides

---

339. *Id.* The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines racial discrimination as discrimination on grounds of race, color, descent, or national or ethnic origin. The Committee on the Elimination of Racial Discrimination (CERD)—ICERD's monitoring body—has affirmed that the term descent in ICERD includes the concept of caste; see Annapurna Waughray and David Keane, *CERD and caste-based discrimination, in FIFTY YEARS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A LIVING INSTRUMENT* (Waughray & Keane eds., 2017).

340. *Chandhok & Anor v. Tirkey*, Appeal No. UKEAT/0190/14/KN, ¶ 55 (Emp. Appeal Trib. Dec. 19, 2014).

341. See *supra* notes 195–218 and accompanying text.

342. For a more recent criticism by a professor at the Indian Institute of Technology Bombay, see Prasanna, *supra* note 196 (discussing the evidence that scientists must consider in order to form an opinion on the Aryan Invasion Theory).

343. *Id.*

genetic evidence for the Aryan Origin Theory.<sup>344</sup> The study documents “a southward spread of genetic ancestry from the Eurasian Steppe, correlating with the archaeologically known expansion of pastoralist sites from the Steppe to Turan in the Middle Bronze Age (2300–1500 BCE).”<sup>345</sup> It genetically links ancestry from the Steppe to Europe and South Asia in the Bronze Age and identifies the populations that almost certainly were responsible for spreading Indo-European languages across much of Eurasia.<sup>346</sup> Another genetic study concluded that:

[T]he upper castes have a higher affinity to Europeans than to Asians, and the upper castes are significantly more similar to Europeans than are the lower castes. Collectively, all five datasets show a trend toward upper castes being more similar to Europeans, whereas lower castes are more similar to Asians.<sup>347</sup>

If the Aryan Origin Theory continues to regain widespread acceptance, discrimination based on untouchability could be recognized as a form of national origin discrimination under Title VII. If Dalits are descendants of the indigenous people, and the high-caste Hindus are descendants of the Aryans, then they have different national origins.

---

344. VAGHEESH M. NARASIMHAN, NICK PATTERSON, PRIYA MOORJANI, IOSIF LAZARIDIS, MARK LIPSON, SWAPAN MALLICK, NADIN ROHLAND, REBECCA BERNARDOS, ALEXANDER M. KIM, NATHAN NAKATSUKA, IÑIGO OLALDE, ALFREDO COPPA, JAMES MALLORY, VYACHESLAV MOISEYEV, JANET MONGE, LUCA M. OLIVIERI, NICOLE ADAMSKI, NASREEN BROOMANDKHOSHBAHT, FRANCESCA CANDILIO, OLIVIA CHERONET, BRENDAN J. CULLETON, MATTHEW FERRY, DANIEL FERNANDES, BEATRIZ GAMARRA, DANIEL GAUDIO, MATEJA HAJDINJAK, ÉADAÖIN HARNEY, THOMAS K. HARPER, DENISE KEATING, ANN MARIE LAWSON, MEGAN MICHEL, MARIO NOVAK, JONAS OPPENHEIMER, NIRAJ RAI, KENDRA SIRAK, VIVIANE SLON, KRISTIN STEWARDSON, ZHAO ZHANG, GAZIZ AKHATOV, ANATOLY N. BAGASHEV, BAURYZHAN BAITANAYEV, GIAN LUCA BONORA, TATIANA CHIKISHEVA, ANATOLY DEREVIANKO, ENSHIN DMITRY, KATERINA DOUKA, NADEZHDA DUBOVA, ANDREY EPIMAKHOV, SUZANNE FREILICH, DORIAN FULLER, ALEXANDER GORYACHEV, ANDREY GROMOV, BRYAN HANKS, MARGARET JUDD, ERLAN KAZIZOV, ALEKSANDER KHOKHLOV, EGOR KITOV, ELENA KUPRIANOVA, PAVEL KUZNETSOV, DONATA LUISELLI, FARHOD MAKSUDOV, CHRISTOPHER MEIKLEJOHN, DEBORAH MERRETT, ROBERTO MICHELI, OLEG MOCHALOV, ZAHIR MUHAMMED, SAMARIDDIN MUSTAFOKULOV, AYUSHI NAYAK, RYKUN M. PETROVNA, DAVIDE PETTENER, RICHARD POTTS, DMITRY RAZHEV, STEFANIA SARNO, KULYAN SIKHYMBAEVA, SERGEY M. SLEPCHENKO, NADEZHDA STEPANOVA, SVETLANA SVYATKO, SERGEY VASILYEV, MASSIMO VIDALE, DMITRIY VOYAKIN, ANTONINA YERMOLAYEVA, ALISA ZUBOVA, VASANT S. SHINDE, CARLES LALUEZA-FOX, MATTHIAS MEYER, DAVID ANTHONY, NICOLE BOIVIN, KUMARASAMY THANGARAJ, DOUGLAS J. KENNETT, MICHAEL FRACHETTI, RON PINHASI, & DAVID REICH, *THE GENOMIC FORMATION OF SOUTH AND CENTRAL ASIA*, *Biorxiv* (2018), <https://www.biorxiv.org/content/10.1101/292581v1> [<https://perma.cc/BV4H-WAZ6>].

345. *Id.* at 4.

346. *Id.* According to the authors, “this work sheds new light on the spread of Indo-European languages and parallels between the genetic history of two sub-continent, Europe and South Asia.” *Id.*

347. Michael Bamshad, Toomas Kivisild, W. Scott Watkins, Mary E. Dixon, Chris E. Ricker, Baskara B. Rao, J. Mastan Naidu, B.V. Ravi Prasad, P. Govinda Reddy, Arani Rasanayagam, Surinder S. Papiha, Richard Villems, Alan J. Redd, Michael F. Hammer, Son V. Nguyen, Marion L. Carroll, Mark A. Batzer, & Lynn B. Jorde, *Genetic Evidence on the Origins of Indian Caste Populations*, 11 *GENOME RES.* 994, 994 (2001).

Whether this would be a strong argument for Dalits, however, can be doubted. In *Roach v. Dressler Industrial Valve & Instrument Division*, a Louisiana District Court addressed a Title VII national origin discrimination claim brought by a Cajun plaintiff, who was a native-born American of Acadian descent.<sup>348</sup> Although Acadia was never a country but instead a French colony founded in the early 1600s that the British conquered in 1713, the Court recognized that a national origin claim was available to the plaintiff.<sup>349</sup> Following the rationale of the *Roach* court, it would be irrelevant that the Indus Valley Civilization was not a country. What matters is that Dalits comprised a group of people sharing a common culture, ancestry, land, and other social characteristics. However, this argument is fraught with more difficulty and less certainty than the recognition of a national origin claim for an Acadian. A court would have to accept a theory of the origin of the caste system that has been contested for decades.<sup>350</sup> In order to find that the plaintiff had stated a claim, a court would need to define national origin based on events that occurred thousands of years ago as opposed to hundreds of years ago. Courts may simply find this ancestry too remote to support the claim that Dalits' ancestors and their descendants constitute a separate national origin group.

#### 4. Dalits as a National Origin Group Based on Applying Section 1981's Definition

As noted in the discussion of courts using the definition of Section 1981 to apply to race discrimination under Title VII, the same argument can be made about national origin discrimination. The definition of race discrimination in Section 1981 has also been interpreted by courts to be broad enough to also cover national origin discrimination. Thus, the recognition of caste discrimination as a form of race discrimination under Section 1981 could also lead to a conclusion that it is national origin discrimination under Title VII.

### V.

#### CHANGE THE PROTECTED TRAIT APPROACH ARTICULATED IN *BOSTOCK*

There are evidently several strong arguments that caste discrimination based on untouchability is included in race discrimination under Section 1981 and within a number of protected traits under Title VII. The arguments about whether caste discrimination is a form of race or national origin discrimination depend upon how those terms are interpreted. However, if the arguments already discussed above do not succeed, then the legal analysis adopted by the Supreme Court in its opinion in *Bostock v. Clayton County* may be of assistance.<sup>351</sup> The approach the Court

---

348. *Roach v. Dressler Indus. Valve & Instrument Div.*, 494 F. Supp. 215, 218 (W.D. La. 1980).

349. *Id.* at 217.

350. Prasanna, *supra* note 196, at 216 (noting that the Aryan Invasion Theory “has always been controversial”).

351. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

takes in *Bostock* would avoid the question of whether caste fits in a race or national origin category. Instead, it would recognize that caste is intertwined with being a member of the Asian race and, as such, caste discrimination involves the protected category of race. This part will discuss the application of the *Bostock* approach to the issue of whether caste discrimination is recognized under Title VII or Section 1981. The first section will discuss the Court's decision in *Bostock v. Clayton County*. The second section will apply the *Bostock* approach to caste discrimination based on untouchability under Title VII. The third section will apply it to Section 1981.

#### A. *Bostock v. Clayton County*

In June 2020, the Supreme Court delivered its 6 to 3 opinion in *Bostock v. Clayton County*.<sup>352</sup> Justice Gorsuch, writing for the Court, answered the question of whether termination of an employee for the sole reason of their homosexuality or transgender status violates Title VII's prohibition against sex discrimination.<sup>353</sup> The Court noted that the test to determine whether such discrimination involves sex discrimination is to change the person's sex and see if it would yield a different choice by the employer.<sup>354</sup> If so, then the discrimination is also sex discrimination.<sup>355</sup>

*Bostock* involved three different employment discrimination claims brought by long-time employees.<sup>356</sup> Two of the plaintiffs, Gerald Bostock and Donald Zarda, were terminated by their employers soon after they revealed they were homosexuals. The third, Aimee Stephens, who had lived as a man for the first six years of employment, was fired when she revealed that she would start to live as a woman.<sup>357</sup> These three individuals brought employment discrimination claims against their former employers contending that they were victims of sex discrimination under Title VII.<sup>358</sup>

The Court noted that, over the years, Title VII has been applied to aspects of discrimination that may not have been in the Congressional drafters' imaginations when they enacted the Civil Rights Act of 1964.<sup>359</sup> Justice Samuel Alito's dissent, joined by Justice Clarence Thomas, goes to great lengths to point this out.<sup>360</sup> Not only does Alito point out that Congress did not intend to provide such protection,

---

352. *Id.* Justices Roberts, Ginsburg, Breyer, Sotomayor and Kagan joined the opinion written by Justice Gorsuch. Justice Alito filed a dissenting opinion, joined by Thomas and Kavanaugh. *Id.*

353. *Id.* at 1737.

354. *Id.* at 1741.

355. *Id.*

356. *Id.* at 1737–38.

357. *Id.*

358. *Id.*

359. *Id.* For example, Title VII now bans discrimination based on motherhood and sexual harassment of male employees regardless of the lack of Congressional intent behind the application of the law. *Id.*

360. *Bostock*, 140 S. Ct. at 1754 (Alito, J., dissenting).

but also that “ordinary Americans reading the text of Title VII in 1964 would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.”<sup>361</sup> Alito goes on to note that “[w]hile Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of ‘transgender status’ or ‘gender identity.’”<sup>362</sup> He points out that the term “gender identity” did not appear in academic circles until 1964, doctors in the U.S. did not perform the first sex change operations until 1966, and the term “transgender” was not coined until the early 1970s.<sup>363</sup>

Justice Gorsuch, in the majority opinion, notes that Congress enacted other statutes since the 1964 Civil Rights Act that did address sexual orientation.<sup>364</sup> Over the years, it also considered amending Title VII to include protection for sexual orientation, but never did.<sup>365</sup> Gorsuch does not find the failure of Congress to include explicit sanctions for discrimination on the basis of sexual orientation or gender identity relevant:

[A]pplying protective laws to groups that were politically unpopular at the time of the law’s passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law’s passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law’s terms.<sup>366</sup>

Gorsuch also makes the relevant point that, in a disparate treatment case, the employer’s discriminatory actions are determined by focusing on their negative impact on the individual victim and not the group of which the victim is a member.<sup>367</sup> In other words, in a disparate treatment case, the issue is not whether the employer treats women differently than men, but whether the employer discriminates against any individual because of that individual’s sex.<sup>368</sup> Thus, if the employer would fire a gay man the same as a lesbian woman, it might be said

---

361. *Id.* at 1767 (Alito, J., dissenting).

362. *Id.* at 1772. (Alito, J., dissenting).

363. *Id.* at 1772–73. (Alito, J., dissenting).

364. *Id.* at 1747.

365. H.R. 5, 116th Cong., 1st Sess. (2019). Some attempts have failed. As recently as 2019, for example, the House of Representatives passed a bill which would have defined sex discrimination to include both sexual orientation and gender identity; however, the measure stalled in the Senate. *Bostock*, 140 S. Ct. at 1750.

366. *Bostock*, 140 S. Ct. at 1751.

367. *Id.* at 1740.

368. *Id.* at 1740–41.

that the employer is treating men and women alike. However, the relevant question relates to the employer discriminating against the individual employee based on sex, not on whether the employer discriminates against men or women.<sup>369</sup>

Much of Gorsuch's opinion for the Court addresses the issue of what it means for an employer to discriminate against a person "because of" a person's sex.<sup>370</sup> In answering the question of the meaning of "because of," the Court applies the "simple and traditional" standard of but-for causation typically used in tort cases and set forth in *University of Texas Southwestern Medical Center v. Nassar*, a Title VII retaliation case.<sup>371</sup> But-for causation exists whenever a particular outcome would not have happened without the purported cause.<sup>372</sup>

The ordinary meaning of the language of Title VII leads to the following conclusion: "If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."<sup>373</sup> Even if an employer's goal is only to discriminate against a person because they are gay, lesbian, or transgender, that is not possible without also discriminating against the person because of their sex.<sup>374</sup> While being gay or lesbian is distinct from a person's sex, an individual's homosexuality or transgender status is tied inextricably to their sex.<sup>375</sup> Thus, when an employer fires a gay, lesbian, or transgender person, there are two causal factors involved: both the person's sex and something else (attraction to others of the same sex or identifying with a different gender than the one received at birth).<sup>376</sup>

To illustrate what he means, Gorsuch works through a couple of examples. First, he discusses an employer who has two employees that are attracted to men, but one is a woman and the other is a man.<sup>377</sup> If the employer would fire the man because he is attracted to another man, but not the woman attracted to a man, then the employer's decision to fire the male employee reveals that the employer is firing the male employee for actions that the employer tolerates in a female

---

369. *Id.* at 1740–41, 1748.

370. *Id.* at 1740. Gorsuch notes that Congress could have used other causation tests such as "solely" or "primarily because of," which would have indicated the prohibited factor was the main cause of the defendant's employment decision. *Id.* at 1739. He also noted that Congress amended Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait was a "motivating factor" in an adverse employment action. *Id.* Thus, "under this more forgiving standard, liability can sometimes follow even if sex wasn't a but-for cause of the employer's challenged decision." *Id.* However, the motivating factor test is not the issue in *Bostock*.

371. *Univ. of Tex. SW Med. Ctr. v. Nassar*, 570 U.S. 338, 339 (2013).

372. *Bostock*, 140 S. Ct. at 1739. Gorsuch notes that "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.* The Court also notes that multiple but-for causes can exist.

373. *Id.*

374. *Id.* at 1745–46.

375. *Id.*

376. *Id.* at 1741–42.

377. *Id.* at 1741.

employee.<sup>378</sup> The same logic applies to transgender individuals. Take an employer who would fire a person that was assigned male at birth because the person decides now to identify as a female. If that employer would retain an otherwise identical employee who was assigned female at birth, then the employer is penalizing the person who was assigned male at birth for actions that he tolerates with regard to an employee who was assigned female at birth.<sup>379</sup>

The Court addresses the counterargument that, if you change the sex of a homosexual or a transgender individual, but not their sexual orientation or gender identification, then you eliminate the characteristic of the individual—being gay, lesbian or transgender—that motivated the employer to take the discriminatory action.<sup>380</sup> Gorsuch notes that this argument might work if Title VII only ensured equal treatment of men and women or if the statute applied only when sex was the sole or primary reason for the employer’s actions, but it goes beyond that—even if sex was not the main factor, it was a but-for factor.<sup>381</sup>

#### *B. Application of the Bostock Approach to Caste Discrimination Under Title VII*

While Gorsuch applied the change the protected trait approach in *Bostock* to sex discrimination,<sup>382</sup> there is no reason to think that such a test would not also apply to the other protected traits mentioned in Title VII where the discrimination victim’s protected trait is inextricably linked to another immutable characteristic from birth they possess. Like sexual orientation and gender identity, a person’s caste is also an immutable characteristic originating with birth that others may use to identify a person.<sup>383</sup> Thus, in discussing whether Title VII applies to caste discrimination based on untouchability, Justice Gorsuch’s opening salvo in *Bostock* appears an appropriate introduction:

Those who adopted the Civil Rights Act [of 1964] might not have anticipated their work would lead to this particular result. Likely, they weren’t thinking about many of the Act’s consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.<sup>384</sup>

---

378. *Id.*

379. *Id.*

380. *Id.* at 1747–48.

381. *Id.* at 1748.

382. See *supra* notes 373–79 and accompanying text.

383. See *supra* notes 117–19 and accompanying text.

384. *Bostock*, 140 S. Ct. at 1737.

Applying the *Bostock* approach to discrimination against Dalits, the motivation for the adverse employment decision will not be eliminated by changing the sex or color of the employee. Whether a Dalit is male or female, dark complexion or light complexion, they are still a Dalit.

*1. Does the Bostock Approach Using Religion Work for Dalits?*

With respect to religion, as discussed in the third part,<sup>385</sup> there is the possibility that a victim of intentional caste discrimination based on untouchability who suffered an adverse employment action could succeed on a reverse religious discrimination claim. However, under the *Bostock* approach, a Dalit is not likely to succeed by asserting discrimination based on religion because changing the religion of a Dalit is unlikely to change the discrimination. As noted earlier, caste is a product of Hinduism; however, it has permeated the other religions in South Asia, including Buddhism, Christianity, Islam, and Sikhism.<sup>386</sup> Thus, while the Hindu religion may be the original source of caste oppression, conversion to other religions is not a solution.<sup>387</sup> Given that South Asians bring their religious beliefs with them when they immigrate to the U.S., it is unlikely that changing the religion of a Dalit would lead the employer to a different choice regarding the adverse employment action.

*2. Does the Bostock Approach Using National Origin Work for Dalits?*

Earlier, this article discussed a number of different arguments that a Dalit victim of caste discrimination could assert for the conclusion that caste based on untouchability could be considered national origin under Title VII.<sup>388</sup> If Dalits are considered a national origin group using any of these approaches, however, then the *Bostock* approach is unnecessary. If Dalits are not a national origin group, then there is no national origin to change. Thus, the *Bostock* approach would not be applicable to national origin.

*3. Does the Bostock Approach Using Race Work for Dalits?*

The *Bostock* approach may be most effective for a claim within the protected trait of race. Using the federal definitions of race, which were first adopted in 1977, then, as already noted, all of those who have a caste would fit under the definition of who is Asian.<sup>389</sup> As with plaintiffs who have been discriminated against on the basis of their gender identity or sexual orientation, which are inextricably entwined with their sex, Dalits' status is inextricably entwined with their race. Applying the *Bostock* approach means that if we change the race of a

---

385. See *supra* notes 259–81 and accompanying text.

386. See *supra* note 129 and accompanying text.

387. Babu & Prasad, *supra* note 130.

388. See *supra* notes 322–50 and accompanying text.

389. See *supra* notes 287–350 and accompanying text.

particular Dalit victimized by caste discrimination based on untouchability from Asian to, say, Black or white, then the person would no longer be a Dalit. For employers whose adverse employment actions are motivated by a desire to engage in caste discrimination based on untouchability, changing individuals' race would lead to different decisions because such individuals would no longer be Dalits.

*B. Application of the Bostock Approach to Caste Discrimination Under Section 1981*

If a court rejects the argument that caste discrimination is a form of race discrimination under Section 1981,<sup>390</sup> Dalits can also assert the *Bostock* approach in a Section 1981 claim. Even though Section 1981 does not contain the “because of” language found in Title VII,<sup>391</sup> in order to establish causation, the Supreme Court recently reiterated that a successful Section 1981 plaintiff must demonstrate that “but for race,” the defendant would not have taken the discriminatory action the defendant took.<sup>392</sup>

Because we are dealing with the same “but for” test for race discrimination under Section 1981 as discussed in *Bostock* for Title VII,<sup>393</sup> it would follow that the change in the protected trait approach that Gorsuch specifically mentions would also apply for Section 1981 claims. As a result, for a disparate treatment claim under Section 1981, like Title VII, the question to ask, once again, would be, if we changed the race of an aggrieved Dalit who is a victim of caste discrimination from Asian to white, would the employer have made a different choice? Like when we discussed the application of the *Bostock* approach to Title VII,<sup>394</sup> the answer is yes, because there are no white Dalits. Thus, caste

---

390. See *supra* notes 144–253 and accompanying text.

391. See *supra* note 31 and accompanying text.

392. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020). Justice Gorsuch delivered the opinion of the Court in this case as well. The Court restated its embrace of the “but-for” test for the application of § 1981 to race discrimination, holding that

[t]he guarantee that each person is entitled to the “same right . . . as is enjoyed by white citizens” directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of English would say that the plaintiff received the ‘same’ legally protected right as a white person. Conversely, if the defendant would have responded differently but for the plaintiff’s race, it follows that the plaintiff has not received the same right as a white person.

*Id.* at 1015. See also *The Supreme Court 2019 Term*, 134 HARV. L.R. 580, 588 (2020) (arguing that the “but-for” test applied to § 1981 in *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media* adopted a narrow causation standard in contravention of the purpose of § 1981, while going on to note in footnote 78 that “one might argue that in light of *Bostock v. Clayton County*, in which the Court recognized the possibility of multiple but-for causes, it is not precisely true that the Court is requiring something meaningfully more difficult to satisfy in requiring that a plaintiff show a but-for cause”).

393. See *supra* notes 389–392 and accompanying text.

394. See *supra* notes 389–90 and accompanying text.

discrimination based on untouchability would also be actionable as race discrimination under Section 1981.

## VI.

### CONCLUSION

In this Article, we have discussed the question of whether a victim of caste discrimination based on untouchability can argue that it is a form of employment discrimination under the federal employment discrimination law under Title VII or Section 1981. This Article contends that there are legitimate arguments that caste discrimination based on untouchability is a form of religious discrimination under Title VII. The question of whether caste discrimination is a form of race or national origin discrimination under Title VII or Section 1981 is complex. The argument comes down to whether this form of discrimination fits within the definitions of those protected traits under the respective statutory frameworks. There are legitimate arguments that caste discrimination based on untouchability is a form of national origin or race discrimination recognized by federal employment discrimination law. However, if courts reject the notion that caste discrimination based on untouchability is a form of national origin and/or racial discrimination, the *Bostock* approach would provide another potent legal argument for recognizing such discrimination. The *Bostock* approach avoids the question of whether caste discrimination based on untouchability is a form of national origin or racial discrimination and instead recognizes that the “but-for” causation standard applies under both Section 1981 and Title VII. But-for causation exists whenever a particular outcome would not have happened without the purported cause. Thus, the but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause; further, multiple but-for causes can exist. Under this approach, because all of those who are victims of caste discrimination based on untouchability are from Asia, their caste is inextricably intertwined with their race. Thus, when Dalits are victims of intentional discrimination based on untouchability, the discriminator is motivated to discriminate against them because of their caste, which is not a protected trait, and their race, which is. Thus, caste discrimination inevitably also involves race discrimination.

AMENDED IN ASSEMBLY JULY 10, 2023

AMENDED IN ASSEMBLY JUNE 15, 2023

AMENDED IN SENATE APRIL 17, 2023

AMENDED IN SENATE MARCH 22, 2023

## SENATE BILL

**No. 403**

**Introduced by Senator Wahab**  
(Coauthor: Assembly Member Bains)

February 9, 2023

---

An act to amend Section 51 of the Civil Code, to amend Sections 200 and 210.2 of, and to add Section 210.4 to, the Education Code, and to amend Sections 11135, 12920, 12921, 12926, 12930, 12931, 12940, 12944, 12955, 12955.8, 12956.1, 12956.2, and 12993 *Section 12926* of the Government Code, relating to discrimination.

### LEGISLATIVE COUNSEL'S DIGEST

SB 403, as amended, Wahab. Discrimination on the basis of ~~caste~~  
*ancestry*.

Existing law, the Unruh Civil Rights Act, provides that all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This bill would ~~additionally provide that all persons within the jurisdiction of the state are so entitled regardless of their~~ *define “ancestry” for purposes of the act to include, among other things, caste, as defined.*

Existing law states the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or specified other characteristics, equal rights and opportunities in the educational institutions of the state, and states that the purpose of related existing law is to prohibit acts that are contrary to that policy and to provide remedies therefor.

This bill would additionally include ~~caste, as defined,~~ *ancestry* as a protected characteristic in that policy ~~statement.~~ *statement and would define "ancestry" and "caste" for purposes of those provisions.*

Existing law prohibits discrimination in any program or activity that is conducted, operated, or administered by the state, or by any state agency, that is funded directly by the state, or that receives any financial assistance from the state, based upon specified personal characteristics.

~~This bill would also prohibit discrimination based upon caste, as defined.~~

Existing law, the California Fair Employment and Housing Act (FEHA), establishes the Civil Rights Department to enforce civil rights laws with respect to housing and employment, as prescribed. The FEHA declares the public policy of the state that it is necessary to protect and safeguard the right of all persons to seek, obtain, and hold employment without discrimination on account of race, religious creed, color, national origin, ~~ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or military and veteran status.~~ *The FEHA discrimination, and recognizes and declares to be a civil right the opportunity to seek, obtain, and hold employment without discrimination because of a specified characteristic: discrimination, based on specified characteristics, including ancestry.* The FEHA makes certain discriminatory employment practices based on those characteristics unlawful.

~~This bill would revise FEHA to prohibit prescribed discriminatory employment practices on account of caste.~~ *define "ancestry" for purposes of the FEHA to include, among other things, caste, and would also define "caste" for purposes of those provisions.*

~~The FEHA further declares the practice of discrimination because of race, caste, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information in housing accommodations to be against public~~

policy. The FEHA recognizes and declares to be a civil right the opportunity to seek, obtain, and hold housing without discrimination because of a specified characteristic. The FEHA makes certain discriminatory housing practices based on those characteristics unlawful, including to discriminate through public or private land use practices, decisions, and authorizations because of a specified characteristic, including the existence of a restrictive covenant, regardless of whether accompanied by a statement that the restrictive covenant is repealed or void. The FEHA authorizes a person who holds an ownership interest of record in property that they believe is the subject of an unlawfully restrictive covenant, as specified, to record a Restrictive Covenant Modification, which is required to include a copy of the original document with the illegal language stricken.

This bill would revise these FEHA housing provisions to include protection for discrimination because of caste.

This bill would make additional similar changes relating to the duties and powers of the department and the construction of the FEHA and would define “caste” for purposes of the FEHA.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. The Legislature finds and declares the following:
- 2 The amendments in this act are declarative of and clarify existing
- 3 law. This act shall not be construed to mean that caste
- 4 discrimination is not already prohibited under existing law,
- 5 including by protections for religion, ancestry, national origin,
- 6 ethnicity, race, color, or any other protected characteristic under
- 7 existing law. *discrimination on the basis of ancestry does not*
- 8 *already include discrimination on the basis of lineal descent,*
- 9 *heritage, parentage, caste, or any other inherited social status.*
- 10 SEC. 2. Section 51 of the Civil Code is amended to read:
- 11 51. (a) This section shall be known, and may be cited, as the
- 12 Unruh Civil Rights Act.
- 13 (b) All persons within the jurisdiction of this state are free and
- 14 equal, and no matter what their sex, race, caste, color, religion,
- 15 ancestry, national origin, disability, medical condition, genetic
- 16 information, marital status, sexual orientation, citizenship, primary
- 17 language, or immigration status are entitled to the full and equal

1 accommodations, advantages, facilities, privileges, or services in  
2 all business establishments of every kind whatsoever.

3 (c) This section shall not be construed to confer any right or  
4 privilege on a person that is conditioned or limited by law or that  
5 is applicable alike to persons of every sex, color, race, ~~caste~~,  
6 religion, ancestry, national origin, disability, medical condition,  
7 marital status, sexual orientation, citizenship, primary language,  
8 or immigration status, or to persons regardless of their genetic  
9 information.

10 (d) Nothing in this section shall be construed to require any  
11 construction, alteration, repair, structural or otherwise, or  
12 modification of any sort whatsoever, beyond that construction,  
13 alteration, repair, or modification that is otherwise required by  
14 other provisions of law, to any new or existing establishment,  
15 facility, building, improvement, or any other structure, nor shall  
16 anything in this section be construed to augment, restrict, or alter  
17 in any way the authority of the State Architect to require  
18 construction, alteration, repair, or modifications that the State  
19 Architect otherwise possesses pursuant to other laws.

20 (e) For purposes of this section:

21 (1) “Disability” means any mental or physical disability as  
22 defined in Sections 12926 and 12926.1 of the Government Code.

23 (2) (A) “Genetic information” means, with respect to any  
24 individual, information about any of the following:

25 (i) The individual’s genetic tests.

26 (ii) The genetic tests of family members of the individual.

27 (iii) The manifestation of a disease or disorder in family  
28 members of the individual.

29 (B) “Genetic information” includes any request for, or receipt  
30 of, genetic services, or participation in clinical research that  
31 includes genetic services, by an individual or any family member  
32 of the individual.

33 (C) “Genetic information” does not include information about  
34 the sex or age of any individual.

35 (3) “Medical condition” has the same meaning as defined in  
36 subdivision (i) of Section 12926 of the Government Code.

37 (4) “Religion” includes all aspects of religious belief,  
38 observance, and practice.

39 (5) “Sex” includes, but is not limited to, pregnancy, childbirth,  
40 or medical conditions related to pregnancy or childbirth. “Sex”

1 also includes, but is not limited to, a person's gender. "Gender"  
2 means sex, and includes a person's gender identity and gender  
3 expression. "Gender expression" means a person's gender-related  
4 appearance and behavior whether or not stereotypically associated  
5 with the person's assigned sex at birth.

6 (6) "Sex, race, ~~caste~~, color, religion, ancestry, national origin,  
7 disability, medical condition, genetic information, marital status,  
8 sexual orientation, citizenship, primary language, or immigration  
9 status" includes a perception that the person has any particular  
10 characteristic or characteristics within the listed categories or that  
11 the person is associated with a person who has, or is perceived to  
12 have, any particular characteristic or characteristics within the  
13 listed categories.

14 (7) "Sexual orientation" has the same meaning as defined in  
15 subdivision (s) of Section 12926 of the Government Code.

16 (8) "*Ancestry includes, but is not limited to, lineal descent,  
17 heritage, parentage, caste, or any inherited social status. Nothing  
18 precludes a person from alleging discrimination on the basis of  
19 ancestry in combination with discrimination based upon other  
20 protected characteristics.*

21 ~~(8)~~

22 (9) "Caste" means an individual's perceived position in a system  
23 of social stratification on the basis of inherited status. "A system  
24 of social stratification on the basis of inherited status" may be  
25 characterized by factors that may include, but are not limited to,  
26 inability or restricted ability to alter inherited status; socially  
27 enforced restrictions on marriage, private and public segregation,  
28 and discrimination; and social exclusion on the basis of perceived  
29 status.

30 (f) A violation of the right of any individual under the federal  
31 Americans with Disabilities Act of 1990 (Public Law 101-336)  
32 shall also constitute a violation of this section.

33 (g) Verification of immigration status and any discrimination  
34 based upon verified immigration status, where required by federal  
35 law, shall not constitute a violation of this section.

36 (h) Nothing in this section shall be construed to require the  
37 provision of services or documents in a language other than  
38 English, beyond that which is otherwise required by other  
39 provisions of federal, state, or local law, including Section 1632.

40 SEC. 3. Section 200 of the Education Code is amended to read:

200. It is the policy of the State of California to afford all persons in public schools, regardless of their disability, ~~caste~~, ancestry, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, equal rights, and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor.

SEC. 4. Section 210.2 of the Education Code is amended to read:

210.2. “Disability, ~~caste~~, ancestry, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code” includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

SEC. 5. Section 210.4 is added to the Education Code, to read:

210.4. (a) “Ancestry” includes, but is not limited to, lineal descent, heritage, parentage, caste, or any inherited social status. Nothing precludes a person from alleging discrimination on the basis of ancestry in combination with discrimination based upon other protected characteristics.

“Caste”

(b) “Caste” means an individual’s perceived position in a system of social stratification on the basis of inherited status. “A system of social stratification on the basis of inherited status” may be characterized by factors that may include, but are not limited to, inability or restricted ability to alter inherited status; socially enforced restrictions on marriage, private and public segregation, and discrimination; and social exclusion on the basis of perceived status.

~~SEC. 6. Section 11135 of the Government Code is amended to read:~~

~~11135. (a) No person in the State of California shall, on the basis of sex, race, caste, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access~~

1 to the benefits of, or be unlawfully subjected to discrimination  
2 under, any program or activity that is conducted, operated, or  
3 administered by the state or by any state agency, is funded directly  
4 by the state, or receives any financial assistance from the state.  
5 Notwithstanding Section 11000, this section applies to the  
6 California State University.

7 (b) ~~With respect to discrimination on the basis of disability,~~  
8 ~~programs and activities subject to subdivision (a) shall meet the~~  
9 ~~protections and prohibitions contained in Section 202 of the federal~~  
10 ~~Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132),~~  
11 ~~and the federal rules and regulations adopted in implementation~~  
12 ~~thereof, except that if the laws of this state prescribe stronger~~  
13 ~~protections and prohibitions, the programs and activities subject~~  
14 ~~to subdivision (a) shall be subject to the stronger protections and~~  
15 ~~prohibitions.~~

16 (c) ~~The protected bases referenced in this section have the same~~  
17 ~~meanings as those terms are defined in Section 12926.~~

18 (d) ~~The protected bases used in this section include a perception~~  
19 ~~that a person has any of those characteristics or that the person is~~  
20 ~~associated with a person who has, or is perceived to have, any of~~  
21 ~~those characteristics.~~

22 SEC. 7. ~~Section 12920 of the Government Code is amended~~  
23 ~~to read:~~

24 12920. ~~It is hereby declared as the public policy of this state~~  
25 ~~that it is necessary to protect and safeguard the right and~~  
26 ~~opportunity of all persons to seek, obtain, and hold employment~~  
27 ~~without discrimination or abridgment on account of race, caste,~~  
28 ~~religious creed, color, national origin, ancestry, physical disability,~~  
29 ~~mental disability, medical condition, genetic information, marital~~  
30 ~~status, sex, gender, gender identity, gender expression, age, sexual~~  
31 ~~orientation, reproductive health decisionmaking, or military and~~  
32 ~~veteran status.~~

33 ~~It is recognized that the practice of denying employment~~  
34 ~~opportunity and discriminating in the terms of employment for~~  
35 ~~these reasons foments domestic strife and unrest, deprives the state~~  
36 ~~of the fullest utilization of its capacities for development and~~  
37 ~~advancement, and substantially and adversely affects the interests~~  
38 ~~of employees, employers, and the public in general.~~

39 ~~Further, the practice of discrimination because of race, caste,~~  
40 ~~color, religion, sex, gender, gender identity, gender expression,~~

1 sexual orientation, marital status, national origin, ancestry, familial  
2 status, source of income, disability, veteran or military status, or  
3 genetic information in housing accommodations is declared to be  
4 against public policy.

5 It is the purpose of this part to provide effective remedies that  
6 will eliminate these discriminatory practices.

7 This part shall be deemed an exercise of the police power of the  
8 state for the protection of the welfare, health, and peace of the  
9 people of this state.

10 SEC. 8. Section 12921 of the Government Code is amended  
11 to read:

12 12921. (a) The opportunity to seek, obtain, and hold  
13 employment without discrimination because of race, caste, religious  
14 creed, color, national origin, ancestry, physical disability, mental  
15 disability, medical condition, genetic information, marital status,  
16 sex, gender, gender identity, gender expression, age, sexual  
17 orientation, reproductive health decisionmaking, or veteran or  
18 military status is hereby recognized as and declared to be a civil  
19 right.

20 (b) The opportunity to seek, obtain, and hold housing without  
21 discrimination because of race, caste, color, religion, sex, gender,  
22 gender identity, gender expression, sexual orientation, marital  
23 status, national origin, ancestry, familial status, source of income,  
24 disability, veteran or military status, genetic information, or any  
25 other basis prohibited by Section 51 of the Civil Code is hereby  
26 recognized as and declared to be a civil right.

27 SEC. 9.

28 SEC. 6. Section 12926 of the Government Code is amended  
29 to read:

30 12926. As used in this part in connection with unlawful  
31 practices, unless a different meaning clearly appears from the  
32 context:

33 (a) “Affirmative relief” or “prospective relief” includes the  
34 authority to order reinstatement of an employee, awards of backpay,  
35 reimbursement of out-of-pocket expenses, hiring, transfers,  
36 reassignments, grants of tenure, promotions, cease and desist  
37 orders, posting of notices, training of personnel, testing, expunging  
38 of records, reporting of records, and any other similar relief that  
39 is intended to correct unlawful practices under this part.

1 (b) “Age” refers to the chronological age of any individual who  
2 has reached a 40th birthday.

3 (c) Except as provided by Section 12926.05, “employee” does  
4 not include any individual employed by that person’s parent,  
5 spouse, or child or any individual employed under a special license  
6 in a nonprofit sheltered workshop or rehabilitation facility.

7 (d) “Employer” includes any person regularly employing five  
8 or more persons, or any person acting as an agent of an employer,  
9 directly or indirectly, the state or any political or civil subdivision  
10 of the state, and cities, except as follows:

11 “Employer” does not include a religious association or  
12 corporation not organized for private profit.

13 (e) “Employment agency” includes any person undertaking for  
14 compensation to procure employees or opportunities to work.

15 (f) “Essential functions” means the fundamental job duties of  
16 the employment position the individual with a disability holds or  
17 desires. “Essential functions” does not include the marginal  
18 functions of the position.

19 (1) A job function may be considered essential for any of several  
20 reasons, including, but not limited to, any one or more of the  
21 following:

22 (A) The function may be essential because the reason the  
23 position exists is to perform that function.

24 (B) The function may be essential because of the limited number  
25 of employees available among whom the performance of that job  
26 function can be distributed.

27 (C) The function may be highly specialized, so that the  
28 incumbent in the position is hired based on expertise or the ability  
29 to perform a particular function.

30 (2) Evidence of whether a particular function is essential  
31 includes, but is not limited to, the following:

32 (A) The employer’s judgment as to which functions are essential.

33 (B) Written job descriptions prepared before advertising or  
34 interviewing applicants for the job.

35 (C) The amount of time spent on the job performing the function.

36 (D) The consequences of not requiring the incumbent to perform  
37 the function.

38 (E) The terms of a collective bargaining agreement.

39 (F) The work experiences of past incumbents in the job.

40 (G) The current work experience of incumbents in similar jobs.

1 (g) (1) “Genetic information” means, with respect to any  
2 individual, information about any of the following:

3 (A) The individual’s genetic tests.

4 (B) The genetic tests of family members of the individual.

5 (C) The manifestation of a disease or disorder in family members  
6 of the individual.

7 (2) “Genetic information” includes any request for, or receipt  
8 of, genetic services, or participation in clinical research that  
9 includes genetic services, by an individual or any family member  
10 of the individual.

11 (3) “Genetic information” does not include information about  
12 the sex or age of any individual.

13 (h) “Labor organization” includes any organization that exists  
14 and is constituted for the purpose, in whole or in part, of collective  
15 bargaining or of dealing with employers concerning grievances,  
16 terms or conditions of employment, or of other mutual aid or  
17 protection.

18 (i) “Medical condition” means either of the following:

19 (1) Any health impairment related to or associated with a  
20 diagnosis of cancer or a record or history of cancer.

21 (2) Genetic characteristics. For purposes of this section, “genetic  
22 characteristics” means either of the following:

23 (A) Any scientifically or medically identifiable gene or  
24 chromosome, or combination or alteration thereof, that is known  
25 to be a cause of a disease or disorder in a person or that person’s  
26 offspring, or that is determined to be associated with a statistically  
27 increased risk of development of a disease or disorder, and that is  
28 presently not associated with any symptoms of any disease or  
29 disorder.

30 (B) Inherited characteristics that may derive from the individual  
31 or family member, that are known to be a cause of a disease or  
32 disorder in a person or that person’s offspring, or that are  
33 determined to be associated with a statistically increased risk of  
34 development of a disease or disorder, and that are presently not  
35 associated with any symptoms of any disease or disorder.

36 (j) “Mental disability” includes, but is not limited to, all of the  
37 following:

38 (1) Having any mental or psychological disorder or condition,  
39 such as intellectual disability, organic brain syndrome, emotional

1 or mental illness, or specific learning disabilities, that limits a  
2 major life activity. For purposes of this section:

3 (A) “Limits” shall be determined without regard to mitigating  
4 measures, such as medications, assistive devices, or reasonable  
5 accommodations, unless the mitigating measure itself limits a  
6 major life activity.

7 (B) A mental or psychological disorder or condition limits a  
8 major life activity if it makes the achievement of the major life  
9 activity difficult.

10 (C) “Major life activities” shall be broadly construed and shall  
11 include physical, mental, and social activities and working.

12 (2) Any other mental or psychological disorder or condition not  
13 described in paragraph (1) that requires special education or related  
14 services.

15 (3) Having a record or history of a mental or psychological  
16 disorder or condition described in paragraph (1) or (2), which is  
17 known to the employer or other entity covered by this part.

18 (4) Being regarded or treated by the employer or other entity  
19 covered by this part as having, or having had, any mental condition  
20 that makes achievement of a major life activity difficult.

21 (5) Being regarded or treated by the employer or other entity  
22 covered by this part as having, or having had, a mental or  
23 psychological disorder or condition that has no present disabling  
24 effect, but that may become a mental disability as described in  
25 paragraph (1) or (2).

26 “Mental disability” does not include sexual behavior disorders,  
27 compulsive gambling, kleptomania, pyromania, or psychoactive  
28 substance use disorders resulting from the current unlawful use of  
29 controlled substances or other drugs.

30 (k) “Veteran or military status” means a member or veteran of  
31 the United States Armed Forces, United States Armed Forces  
32 Reserve, the United States National Guard, and the California  
33 National Guard.

34 (l) “On the bases enumerated in this part” means or refers to  
35 discrimination on the basis of one or more of the following: race,  
36 ~~east~~, religious creed, color, national origin, ancestry, physical  
37 disability, mental disability, medical condition, genetic information,  
38 marital status, sex, age, sexual orientation, reproductive health  
39 decisionmaking, or veteran or military status.

(m) “Physical disability” includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) “Limits” shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) “Major life activities” shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) “Physical disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(n) Notwithstanding subdivisions (j) and (m), if the definition of “disability” used in the federal Americans with Disabilities Act

1 of 1990 (Public Law 101-336) would result in broader protection  
2 of the civil rights of individuals with a mental disability or physical  
3 disability, as defined in subdivision (j) or (m), or would include  
4 any medical condition not included within those definitions, then  
5 that broader protection or coverage shall be deemed incorporated  
6 by reference into, and shall prevail over conflicting provisions of,  
7 the definitions in subdivisions (j) and (m).

8 (o) “Race, ~~caste~~, religious creed, color, national origin, ancestry,  
9 physical disability, mental disability, medical condition, genetic  
10 information, marital status, sex, age, sexual orientation,  
11 reproductive health decisionmaking, or veteran or military status”  
12 includes a perception that the person has any of those  
13 characteristics or that the person is associated with a person who  
14 has, or is perceived to have, any of those characteristics.

15 (p) “Reasonable accommodation” may include either of the  
16 following:

17 (1) Making existing facilities used by employees readily  
18 accessible to, and usable by, individuals with disabilities.

19 (2) Job restructuring, part-time or modified work schedules,  
20 reassignment to a vacant position, acquisition or modification of  
21 equipment or devices, adjustment or modifications of examinations,  
22 training materials or policies, the provision of qualified readers or  
23 interpreters, and other similar accommodations for individuals  
24 with disabilities.

25 (q) “Religious creed,” “religion,” “religious observance,”  
26 “religious belief,” and “creed” include all aspects of religious  
27 belief, observance, and practice, including religious dress and  
28 grooming practices. “Religious dress practice” shall be construed  
29 broadly to include the wearing or carrying of religious clothing,  
30 head or face coverings, jewelry, artifacts, and any other item that  
31 is part of an individual observing a religious creed. “Religious  
32 grooming practice” shall be construed broadly to include all forms  
33 of head, facial, and body hair that are part of an individual  
34 observing a religious creed.

35 (r) (1) “Sex” includes, but is not limited to, the following:

36 (A) Pregnancy or medical conditions related to pregnancy.

37 (B) Childbirth or medical conditions related to childbirth.

38 (C) Breastfeeding or medical conditions related to breastfeeding.

39 (2) “Sex” also includes, but is not limited to, a person’s gender.

40 “Gender” means sex, and includes a person’s gender identity and

1 gender expression. “Gender expression” means a person’s  
2 gender-related appearance and behavior whether or not  
3 stereotypically associated with the person’s assigned sex at birth.

4 (s) “Sexual orientation” means heterosexuality, homosexuality,  
5 and bisexuality.

6 (t) “Supervisor” means any individual having the authority, in  
7 the interest of the employer, to hire, transfer, suspend, lay off,  
8 recall, promote, discharge, assign, reward, or discipline other  
9 employees, or the responsibility to direct them, or to adjust their  
10 grievances, or effectively to recommend that action, if, in  
11 connection with the foregoing, the exercise of that authority is not  
12 of a merely routine or clerical nature, but requires the use of  
13 independent judgment.

14 (u) “Undue hardship” means an action requiring significant  
15 difficulty or expense, when considered in light of the following  
16 factors:

17 (1) The nature and cost of the accommodation needed.

18 (2) The overall financial resources of the facilities involved in  
19 the provision of the reasonable accommodations, the number of  
20 persons employed at the facility, and the effect on expenses and  
21 resources or the impact otherwise of these accommodations upon  
22 the operation of the facility.

23 (3) The overall financial resources of the covered entity, the  
24 overall size of the business of a covered entity with respect to the  
25 number of employees, and the number, type, and location of its  
26 facilities.

27 (4) The type of operations, including the composition, structure,  
28 and functions of the workforce of the entity.

29 (5) The geographic separateness or administrative or fiscal  
30 relationship of the facility or facilities.

31 (v) “National origin” discrimination includes, but is not limited  
32 to, discrimination on the basis of possessing a driver’s license or  
33 identification card granted under Section 12801.9 of the Vehicle  
34 Code.

35 (w) “Race” is inclusive of traits historically associated with  
36 race, including, but not limited to, hair texture and protective  
37 hairstyles.

38 (x) “Protective hairstyles” includes, but is not limited to, such  
39 hairstyles as braids, locks, and twists.

(y) “Reproductive health decisionmaking” includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health. This subdivision and other provisions in this part relating to “reproductive health decisionmaking” shall not be construed to mean that subdivision (r) of this section and other provisions in this part related to “sex” do not include reproductive health decisionmaking.

(z) “Ancestry” includes, but is not limited to, lineal descent, heritage, parentage, caste, or any inherited social status. Nothing precludes a person from alleging discrimination on the basis of ancestry in combination with discrimination based upon other protected characteristics.

(z)

(aa) “Caste” means an individual’s perceived position in a system of social stratification on the basis of inherited status. “A system of social stratification on the basis of inherited status” may be characterized by factors that may include, but are not limited to, inability or restricted ability to alter inherited status; socially enforced restrictions on marriage, private and public segregation, and discrimination; and social exclusion on the basis of perceived status.

~~SEC. 10. Section 12930 of the Government Code is amended to read:~~

~~12930. The department shall have the following functions, duties, and powers:~~

~~(a) To establish and maintain a principal office and any other offices within the state as are necessary to carry out the purposes of this part.~~

~~(b) To meet and function at any place within the state.~~

~~(c) To appoint attorneys, investigators, conciliators, mediators, and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.~~

~~(d) To obtain upon request and utilize the services of all governmental departments and agencies and, in addition, with respect to housing discrimination, of conciliation councils.~~

~~(e) To adopt, promulgate, amend, and rescind suitable procedural rules and regulations to carry out the investigation, prosecution,~~

1 and dispute resolution functions and duties of the department  
2 pursuant to this part.

3 (f) (1) To receive, investigate, conciliate, mediate, and prosecute  
4 complaints alleging practices made unlawful pursuant to Chapter  
5 6 (commencing with Section 12940).

6 (2) To receive, investigate, conciliate, mediate, and prosecute  
7 complaints alleging a violation of Section 51, 51.5, 51.7, 51.9, 54,  
8 54.1, or 54.2 of the Civil Code. The remedies and procedures of  
9 this part shall be independent of any other remedy or procedure  
10 that might apply.

11 (3) To receive, investigate, conciliate, mediate, and prosecute  
12 complaints alleging, and to bring civil actions pursuant to Section  
13 52.5 of the Civil Code for, a violation of Section 236.1 of the Penal  
14 Code. Damages awarded in any action brought by the department  
15 pursuant to Section 52.5 of the Civil Code shall be awarded to the  
16 person harmed by the violation of Section 236.1 of the Penal Code.  
17 Costs and attorney's fees awarded in any action brought by the  
18 department pursuant to Section 52.5 of the Civil Code shall be  
19 awarded to the department. The remedies and procedures of this  
20 part shall be independent of any other remedy or procedure that  
21 might apply.

22 (4) To receive, investigate, conciliate, mediate, and prosecute  
23 complaints alleging practices made unlawful pursuant to Article  
24 9.5 (commencing with Section 11135) of Chapter 1 of Part 1,  
25 except for complaints relating to educational equity brought under  
26 Chapter 2 (commencing with Section 200) of Part 1 of Division 1  
27 of Title 1 of the Education Code and investigated pursuant to the  
28 procedures set forth in Subchapter 5.1 of Title 5 of the California  
29 Code of Regulations, and not otherwise within the jurisdiction of  
30 the department.

31 (5) To receive, investigate, conciliate, mediate, and prosecute  
32 complaints alleging practices made unlawful pursuant to Section  
33 1197.5 of the Labor Code. The department shall, in coordination  
34 with the Division of Labor Standards Enforcement within the  
35 Department of Industrial Relations, adopt procedures to ensure  
36 that the departments coordinate activities to enforce Section 1197.5  
37 of the Labor Code.

38 (A) Nothing in this part prevents the director or the director's  
39 authorized representative, in that person's discretion, from making,

1 signing, and filing a complaint pursuant to Section 12960 or 12961  
2 alleging practices made unlawful under Section 11135.

3 ~~(B) Remedies available to the department in conciliating,~~  
4 ~~mediating, and prosecuting complaints alleging these practices are~~  
5 ~~the same as those available to the department in conciliating,~~  
6 ~~mediating, and prosecuting complaints alleging violations of Article~~  
7 ~~1 (commencing with Section 12940) of Chapter 6.~~

8 ~~(g) In connection with any matter under investigation or in~~  
9 ~~question before the department pursuant to a complaint filed under~~  
10 ~~Section 12960, 12961, or 12980:~~

11 ~~(1) To issue subpoenas to require the attendance and testimony~~  
12 ~~of witnesses and the production of books, records, documents, and~~  
13 ~~physical materials.~~

14 ~~(2) To administer oaths, examine witnesses under oath and take~~  
15 ~~evidence, and take depositions and affidavits.~~

16 ~~(3) To issue written interrogatories.~~

17 ~~(4) To request the production for inspection and copying of~~  
18 ~~books, records, documents, and physical materials.~~

19 ~~(5) To petition the superior courts to compel the appearance~~  
20 ~~and testimony of witnesses, the production of books, records,~~  
21 ~~documents, and physical materials, and the answering of~~  
22 ~~interrogatories.~~

23 ~~(h) To bring civil actions pursuant to Section 12965 or 12981~~  
24 ~~of this code, or Title VII of the Civil Rights Act of 1964 (Public~~  
25 ~~Law 88-352; 42 U.S.C. Sec. 2000 et seq.), as amended, the federal~~  
26 ~~Americans with Disabilities Act of 1990 (Public Law 101-336; 42~~  
27 ~~U.S.C. 12101, et seq.), as amended, or the federal Fair Housing~~  
28 ~~Act (42 U.S.C. Sec. 3601 et seq.), and to prosecute those civil~~  
29 ~~actions before state and federal trial courts.~~

30 ~~(i) To issue those publications and those results of investigations~~  
31 ~~and research as in its judgment will tend to promote goodwill and~~  
32 ~~minimize or eliminate discrimination in employment on the bases~~  
33 ~~enumerated in this part and discrimination in housing because of~~  
34 ~~race, caste, religious creed, color, sex, gender, gender identity,~~  
35 ~~gender expression, marital status, national origin, ancestry, familial~~  
36 ~~status, disability, veteran or military status, genetic information,~~  
37 ~~or sexual orientation.~~

38 ~~(j) To investigate, approve, certify, decertify, monitor, and~~  
39 ~~enforce nondiscrimination programs proposed by a contractor to~~  
40 ~~be engaged in pursuant to Section 12990.~~

1     ~~(k) To render annually to the Governor and to the Legislature~~  
2     ~~a written report of its activities and of its recommendations.~~

3     ~~(l) To conduct mediations at any time after a complaint is filed~~  
4     ~~pursuant to Section 12960, 12961, or 12980. The department may~~  
5     ~~end mediation at any time.~~

6     ~~(m) The following shall apply with respect to any accusation~~  
7     ~~pending before the former Fair Employment and Housing~~  
8     ~~Commission on or after January 1, 2013:~~

9     ~~(1) If an accusation issued under former Section 12965 includes~~  
10    ~~a prayer either for damages for emotional injuries as a component~~  
11    ~~of actual damages, or for administrative fines, or both, or if an~~  
12    ~~accusation is amended for the purpose of adding a prayer either~~  
13    ~~for damages for emotional injuries as a component of actual~~  
14    ~~damages, or for administrative fines, or both, with the consent of~~  
15    ~~the party accused of engaging in unlawful practices, the department~~  
16    ~~may withdraw an accusation and bring a civil action in superior~~  
17    ~~court.~~

18    ~~(2) If an accusation was issued under former Section 12981,~~  
19    ~~with the consent of the aggrieved party filing the complaint, an~~  
20    ~~aggrieved person on whose behalf a complaint is filed, or the party~~  
21    ~~accused of engaging in unlawful practices, the department may~~  
22    ~~withdraw the accusation and bring a civil action in superior court.~~

23    ~~(3) Where removal to court is not feasible, the department shall~~  
24    ~~retain the services of the Office of Administrative Hearings to~~  
25    ~~adjudicate the administrative action pursuant to Sections 11370.3~~  
26    ~~and 11502.~~

27    ~~(n) On a challenge, pursuant to Section 1094.5 of the Code of~~  
28    ~~Civil Procedure, to a decision of the former Fair Employment and~~  
29    ~~Housing Commission pending on or after January 1, 2013, the~~  
30    ~~director or the director's designee shall consult with the Attorney~~  
31    ~~General regarding the defense of that writ petition.~~

32    ~~(o) By performing the functions and duties and exercising the~~  
33    ~~powers set forth in this part, the department represents the interests~~  
34    ~~of the state and effectuates the declared public policy of the state~~  
35    ~~to protect and safeguard the rights and opportunities of all persons~~  
36    ~~from unlawful discrimination and other violations of this part. This~~  
37    ~~subdivision is declarative of existing law as stated in Department~~  
38    ~~of Fair Employment and Housing v. Cathy's Creations, Inc. (2020)~~  
39    ~~54 Cal.App.5th 404, 410.~~

1     ~~SEC. 11. Section 12931 of the Government Code is amended~~  
2     ~~to read:~~

3     ~~12931. The department may also provide assistance to~~  
4     ~~communities and persons therein in resolving disputes,~~  
5     ~~disagreements, or difficulties relating to discriminatory practices~~  
6     ~~based on race, caste, religious creed, color, national origin,~~  
7     ~~ancestry, physical disability, mental disability, veteran or military~~  
8     ~~status, medical condition, genetic information, marital status, sex,~~  
9     ~~gender, gender identity, gender expression, familial status, age,~~  
10    ~~reproductive health decisionmaking, or sexual orientation that~~  
11   ~~impair the rights of persons in those communities under the~~  
12   ~~Constitution or laws of the United States or of this state. The~~  
13   ~~services of the department may be made available in cases of these~~  
14   ~~disputes, disagreements, or difficulties only when, in its judgment,~~  
15   ~~peaceful relations among the persons of the community involved~~  
16   ~~are threatened thereby. The department's services are to be made~~  
17   ~~available only upon the request of an appropriate state or local~~  
18   ~~public body, or upon the request of any person directly affected~~  
19   ~~by the dispute, disagreement, or difficulty.~~

20    ~~The assistance of the department pursuant to this section shall~~  
21   ~~be limited to endeavors at investigation, conference, conciliation,~~  
22   ~~and persuasion.~~

23    ~~SEC. 12. Section 12940 of the Government Code is amended~~  
24    ~~to read:~~

25    ~~12940. It is an unlawful employment practice, unless based~~  
26    ~~upon a bona fide occupational qualification, or, except where based~~  
27    ~~upon applicable security regulations established by the United~~  
28    ~~States or the State of California:~~

29    ~~(a) For an employer, because of the race, caste, religious creed,~~  
30    ~~color, national origin, ancestry, physical disability, mental~~  
31    ~~disability, reproductive health decisionmaking, medical condition,~~  
32    ~~genetic information, marital status, sex, gender, gender identity,~~  
33    ~~gender expression, age, sexual orientation, or veteran or military~~  
34    ~~status of any person, to refuse to hire or employ the person or to~~  
35    ~~refuse to select the person for a training program leading to~~  
36    ~~employment, or to bar or to discharge the person from employment~~  
37    ~~or from a training program leading to employment, or to~~  
38    ~~discriminate against the person in compensation or in terms,~~  
39    ~~conditions, or privileges of employment.~~

~~(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.~~

~~(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.~~

~~(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:~~

~~(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the council.~~

~~(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.~~

~~(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.~~

~~(5) (A) This part does not prohibit an employer from refusing to employ an individual because of the individual's age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training,~~

1 rehiring on the basis of seniority and prior service with the  
2 employer, or hiring under an established recruiting program from  
3 high schools, colleges, universities, or trade schools do not, in and  
4 of themselves, constitute unlawful employment practices.

5 (B) The provisions of this part relating to discrimination on the  
6 basis of age do not prohibit an employer from providing health  
7 benefits or health care reimbursement plans to retired persons that  
8 are altered, reduced, or eliminated when the person becomes  
9 eligible for Medicare health benefits. This subparagraph applies  
10 to all retiree health benefit plans and contractual provisions or  
11 practices concerning retiree health benefits and health care  
12 reimbursement plans in effect on or after January 1, 2011.

13 (b) For a labor organization, because of the race, caste, religious  
14 creed, color, national origin, ancestry, physical disability, mental  
15 disability, medical condition, genetic information, marital status,  
16 sex, gender, gender identity, gender expression, age, sexual  
17 orientation, reproductive health decisionmaking, or veteran or  
18 military status of any person, to exclude, expel, or restrict from its  
19 membership the person, or to provide only second-class or  
20 segregated membership or to discriminate against any person  
21 because of the race, caste, religious creed, color, national origin,  
22 ancestry, physical disability, mental disability, medical condition,  
23 genetic information, marital status, sex, gender, gender identity,  
24 gender expression, age, sexual orientation, reproductive health  
25 decisionmaking, or veteran or military status of the person in the  
26 election of officers of the labor organization or in the selection of  
27 the labor organization's staff or to discriminate in any way against  
28 any of its members or against any employer or against any person  
29 employed by an employer.

30 (c) For any person to discriminate against any person in the  
31 selection, termination, training, or other terms or treatment of that  
32 person in any apprenticeship training program, any other training  
33 program leading to employment, an unpaid internship, or another  
34 limited duration program to provide unpaid work experience for  
35 that person because of the race, caste, religious creed, color,  
36 national origin, ancestry, physical disability, mental disability,  
37 medical condition, genetic information, marital status, sex, gender,  
38 gender identity, gender expression, age, sexual orientation,  
39 reproductive health decisionmaking, or veteran or military status  
40 of the person discriminated against.

~~(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, caste, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or veteran or military status, or any intent to make any such limitation, specification, or discrimination. This part does not prohibit an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action.~~

~~(e) (1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.~~

~~(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.~~

~~(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.~~

~~(f) (1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition,~~

1 or to make any inquiry regarding the nature or severity of a physical  
2 disability, mental disability, or medical condition.

3 ~~(2) Notwithstanding paragraph (1), an employer or employment~~  
4 ~~agency may require any examinations or inquiries that it can show~~  
5 ~~to be job related and consistent with business necessity. An~~  
6 ~~employer or employment agency may conduct voluntary medical~~  
7 ~~examinations, including voluntary medical histories, which are~~  
8 ~~part of an employee health program available to employees at that~~  
9 ~~worksite.~~

10 ~~(g) For any employer, labor organization, or employment agency~~  
11 ~~to harass, discharge, expel, or otherwise discriminate against any~~  
12 ~~person because the person has made a report pursuant to Section~~  
13 ~~11161.8 of the Penal Code that prohibits retaliation against hospital~~  
14 ~~employees who report suspected patient abuse by health facilities~~  
15 ~~or community care facilities.~~

16 ~~(h) For any employer, labor organization, employment agency,~~  
17 ~~or person to discharge, expel, or otherwise discriminate against~~  
18 ~~any person because the person has opposed any practices forbidden~~  
19 ~~under this part or because the person has filed a complaint, testified,~~  
20 ~~or assisted in any proceeding under this part.~~

21 ~~(i) For any person to aid, abet, incite, compel, or coerce the~~  
22 ~~doing of any of the acts forbidden under this part, or to attempt to~~  
23 ~~do so.~~

24 ~~(j) (1) For an employer, labor organization, employment agency,~~  
25 ~~apprenticeship training program or any training program leading~~  
26 ~~to employment, or any other person, because of race, caste,~~  
27 ~~religious creed, color, national origin, ancestry, physical disability,~~  
28 ~~mental disability, medical condition, genetic information, marital~~  
29 ~~status, sex, gender, gender identity, gender expression, age, sexual~~  
30 ~~orientation, reproductive health decisionmaking, or veteran or~~  
31 ~~military status, to harass an employee, an applicant, an unpaid~~  
32 ~~intern or volunteer, or a person providing services pursuant to a~~  
33 ~~contract. Harassment of an employee, an applicant, an unpaid~~  
34 ~~intern or volunteer, or a person providing services pursuant to a~~  
35 ~~contract by an employee, other than an agent or supervisor, shall~~  
36 ~~be unlawful if the entity, or its agents or supervisors, knows or~~  
37 ~~should have known of this conduct and fails to take immediate~~  
38 ~~and appropriate corrective action. An employer may also be~~  
39 ~~responsible for the acts of nonemployees, with respect to~~  
40 ~~harassment of employees, applicants, unpaid interns or volunteers,~~

1 or persons providing services pursuant to a contract in the  
2 workplace, if the employer, or its agents or supervisors, knows or  
3 should have known of the conduct and fails to take immediate and  
4 appropriate corrective action. In reviewing cases involving the  
5 acts of nonemployees, the extent of the employer's control and  
6 any other legal responsibility that the employer may have with  
7 respect to the conduct of those nonemployees shall be considered.  
8 An entity shall take all reasonable steps to prevent harassment  
9 from occurring. Loss of tangible job benefits shall not be necessary  
10 in order to establish harassment.

11 (2) The provisions of this subdivision are declaratory of existing  
12 law, except for the new duties imposed on employers with regard  
13 to harassment.

14 (3) An employee of an entity subject to this subdivision is  
15 personally liable for any harassment prohibited by this section that  
16 is perpetrated by the employee, regardless of whether the employer  
17 or covered entity knows or should have known of the conduct and  
18 fails to take immediate and appropriate corrective action.

19 (4) (A) For purposes of this subdivision only, "employer" means  
20 any person regularly employing one or more persons or regularly  
21 receiving the services of one or more persons providing services  
22 pursuant to a contract, or any person acting as an agent of an  
23 employer, directly or indirectly, the state, or any political or civil  
24 subdivision of the state, and cities. The definition of "employer"  
25 in subdivision (d) of Section 12926 applies to all provisions of this  
26 section other than this subdivision.

27 (B) Notwithstanding subparagraph (A), for purposes of this  
28 subdivision, "employer" does not include a religious association  
29 or corporation not organized for private profit, except as provided  
30 in Section 12926.2.

31 (C) For purposes of this subdivision, "harassment" because of  
32 sex includes sexual harassment, gender harassment, and harassment  
33 based on pregnancy, childbirth, or related medical conditions.  
34 Sexually harassing conduct need not be motivated by sexual desire.

35 (5) For purposes of this subdivision, "a person providing services  
36 pursuant to a contract" means a person who meets all of the  
37 following criteria:

38 (A) The person has the right to control the performance of the  
39 contract for services and discretion as to the manner of  
40 performance.

1     ~~(B) The person is customarily engaged in an independently~~  
2     ~~established business.~~

3     ~~(C) The person has control over the time and place the work is~~  
4     ~~performed, supplies the tools and instruments used in the work,~~  
5     ~~and performs work that requires a particular skill not ordinarily~~  
6     ~~used in the course of the employer's work.~~

7     ~~(k) For an employer, labor organization, employment agency,~~  
8     ~~apprenticeship training program, or any training program leading~~  
9     ~~to employment, to fail to take all reasonable steps necessary to~~  
10    ~~prevent discrimination and harassment from occurring.~~

11    ~~(l) (1) For an employer or other entity covered by this part to~~  
12    ~~refuse to hire or employ a person or to refuse to select a person~~  
13    ~~for a training program leading to employment or to bar or to~~  
14    ~~discharge a person from employment or from a training program~~  
15    ~~leading to employment, or to discriminate against a person in~~  
16    ~~compensation or in terms, conditions, or privileges of employment~~  
17    ~~because of a conflict between the person's religious belief or~~  
18    ~~observance and any employment requirement, unless the employer~~  
19    ~~or other entity covered by this part demonstrates that it has explored~~  
20    ~~any available reasonable alternative means of accommodating the~~  
21    ~~religious belief or observance, including the possibilities of~~  
22    ~~excusing the person from those duties that conflict with the~~  
23    ~~person's religious belief or observance or permitting those duties~~  
24    ~~to be performed at another time or by another person, but is unable~~  
25    ~~to reasonably accommodate the religious belief or observance~~  
26    ~~without undue hardship, as defined in subdivision (u) of Section~~  
27    ~~12926, on the conduct of the business of the employer or other~~  
28    ~~entity covered by this part. Religious belief or observance, as used~~  
29    ~~in this section, includes, but is not limited to, observance of a~~  
30    ~~Sabbath or other religious holy day or days, reasonable time~~  
31    ~~necessary for travel prior and subsequent to a religious observance,~~  
32    ~~and religious dress practice and religious grooming practice as~~  
33    ~~described in subdivision (q) of Section 12926. This subdivision~~  
34    ~~shall also apply to an apprenticeship training program, an unpaid~~  
35    ~~internship, and any other program to provide unpaid experience~~  
36    ~~for a person in the workplace or industry.~~

37    ~~(2) An accommodation of an individual's religious dress practice~~  
38    ~~or religious grooming practice is not reasonable if the~~  
39    ~~accommodation requires segregation of the individual from other~~  
40    ~~employees or the public.~~

~~(3) An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.~~

~~(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.~~

~~(m) (1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.~~

~~(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.~~

~~(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.~~

~~(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.~~

~~(p) For an employer to require, as a condition of employment, continued employment, or a benefit of employment, the disclosure of information relating to an applicant's or employee's reproductive health decisionmaking.~~

~~(q) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.~~

1     ~~SEC. 13. Section 12944 of the Government Code is amended~~  
2     ~~to read:~~

3     ~~12944. (a) It shall be unlawful for a licensing board to require~~  
4     ~~any examination or establish any other qualification for licensing~~  
5     ~~that has an adverse impact on any class by virtue of its race, caste,~~  
6     ~~religious creed, color, national origin or ancestry, sex, gender,~~  
7     ~~gender identity, gender expression, age, medical condition, genetic~~  
8     ~~information, physical disability, mental disability, reproductive~~  
9     ~~health decisionmaking, or sexual orientation, unless the practice~~  
10    ~~can be demonstrated to be job related.~~

11    ~~Where the council, after hearing, determines that an examination~~  
12    ~~is unlawful under this subdivision, the licensing board may~~  
13    ~~continue to use and rely on the examination until such time as~~  
14    ~~judicial review by the superior court of the determination is~~  
15    ~~exhausted.~~

16    ~~If an examination or other qualification for licensing is~~  
17    ~~determined to be unlawful under this section, that determination~~  
18    ~~shall not void, limit, repeal, or otherwise affect any right, privilege,~~  
19    ~~status, or responsibility previously conferred upon any person by~~  
20    ~~the examination or by a license issued in reliance on the~~  
21    ~~examination or qualification.~~

22    ~~(b) It shall be unlawful for a licensing board to fail or refuse to~~  
23    ~~make reasonable accommodation to an individual's mental or~~  
24    ~~physical disability or medical condition.~~

25    ~~(c) It shall be unlawful for any licensing board, unless~~  
26    ~~specifically acting in accordance with federal equal employment~~  
27    ~~opportunity guidelines or regulations approved by the council, to~~  
28    ~~print or circulate or cause to be printed or circulated any~~  
29    ~~publication, or to make any non-job-related inquiry, either verbal~~  
30    ~~or through use of an application form, which expresses, directly~~  
31    ~~or indirectly, any limitation, specification, or discrimination as to~~  
32    ~~race, caste, religious creed, color, national origin, ancestry, physical~~  
33    ~~disability, mental disability, medical condition, genetic information,~~  
34    ~~sex, gender, gender identity, gender expression, age, reproductive~~  
35    ~~health decisionmaking, or sexual orientation or any intent to make~~  
36    ~~any such limitation, specification, or discrimination. Nothing in~~  
37    ~~this subdivision shall prohibit any licensing board from making,~~  
38    ~~in connection with prospective licensure or certification, an inquiry~~  
39    ~~as to, or a request for information regarding, the physical fitness~~  
40    ~~of applicants if that inquiry or request for information is directly~~

1 related and pertinent to the license or the licensed position the  
2 applicant is applying for. Nothing in this subdivision shall prohibit  
3 any licensing board, in connection with prospective examinations,  
4 licensure, or certification, from inviting individuals with physical  
5 or mental disabilities to request reasonable accommodations or  
6 from making inquiries related to reasonable accommodations.

7 (d) It is unlawful for a licensing board to discriminate against  
8 any person because the person has filed a complaint, testified, or  
9 assisted in any proceeding under this part.

10 (e) It is unlawful for any licensing board to fail to keep records  
11 of applications for licensing or certification for a period of two  
12 years following the date of receipt of the applications.

13 (f) As used in this section, “licensing board” means any state  
14 board, agency, or authority in the Business, Consumer Services,  
15 and Housing Agency that has the authority to grant licenses or  
16 certificates which are prerequisites to employment eligibility or  
17 professional status.

18 SEC. 14. Section 12955 of the Government Code is amended  
19 to read:

20 12955. It shall be unlawful:

21 (a) For the owner of any housing accommodation to discriminate  
22 against or harass any person because of the race, caste, color,  
23 religion, sex, gender, gender identity, gender expression, sexual  
24 orientation, marital status, national origin, ancestry, familial status,  
25 source of income, disability, veteran or military status, or genetic  
26 information of that person.

27 (b) For the owner of any housing accommodation to make or  
28 to cause to be made any written or oral inquiry concerning the  
29 race, caste, color, religion, sex, gender, gender identity, gender  
30 expression, sexual orientation, marital status, national origin,  
31 ancestry, familial status, disability, veteran or military status, or  
32 genetic information of any person seeking to purchase, rent, or  
33 lease any housing accommodation.

34 (c) For any person to make, print, or publish, or cause to be  
35 made, printed, or published any notice, statement, or advertisement,  
36 with respect to the sale or rental of a housing accommodation that  
37 indicates any preference, limitation, or discrimination based on  
38 race, caste, color, religion, sex, gender, gender identity, gender  
39 expression, sexual orientation, marital status, national origin,  
40 ancestry, familial status, source of income, disability, veteran or

1 military status, or genetic information or an intention to make that  
2 preference, limitation, or discrimination:

3 ~~(d) For any person subject to the provisions of Section 51 of~~  
4 ~~the Civil Code, as that section applies to housing accommodations,~~  
5 ~~to discriminate against any person on the basis of sex, gender,~~  
6 ~~gender identity, gender expression, sexual orientation, color, race,~~  
7 ~~caste, religion, ancestry, national origin, familial status, marital~~  
8 ~~status, disability, genetic information, source of income, veteran~~  
9 ~~or military status, or on any other basis prohibited by that section.~~  
10 ~~Selection preferences based on age, imposed in connection with~~  
11 ~~a federally approved housing program, do not constitute age~~  
12 ~~discrimination in housing.~~

13 ~~(e) For any person, bank, mortgage company, or other financial~~  
14 ~~institution that provides financial assistance for the purchase,~~  
15 ~~refinance, organization, or construction of any housing~~  
16 ~~accommodation to discriminate against any person or group of~~  
17 ~~persons because of the race, caste, color, religion, sex, gender,~~  
18 ~~gender identity, gender expression, sexual orientation, marital~~  
19 ~~status, national origin, ancestry, familial status, source of income,~~  
20 ~~disability, veteran or military status, or genetic information in the~~  
21 ~~terms, conditions, or privileges relating to the obtaining or use of~~  
22 ~~that financial assistance.~~

23 ~~(f) For any owner of housing accommodations to harass, evict,~~  
24 ~~or otherwise discriminate against any person in the sale or rental~~  
25 ~~of housing accommodations when the owner's dominant purpose~~  
26 ~~is retaliation against a person who has opposed practices unlawful~~  
27 ~~under this section, informed law enforcement agencies of practices~~  
28 ~~believed unlawful under this section, has testified or assisted in~~  
29 ~~any proceeding under this part, or has aided or encouraged a person~~  
30 ~~to exercise or enjoy the rights secured by this part. Nothing herein~~  
31 ~~is intended to cause or permit the delay of an unlawful detainer~~  
32 ~~action.~~

33 ~~(g) For any person to aid, abet, incite, compel, or coerce the~~  
34 ~~doing of any of the acts or practices declared unlawful in this~~  
35 ~~section, or to attempt to do so.~~

36 ~~(h) For any person, for profit, to induce any person to sell or~~  
37 ~~rent any dwelling by representations regarding the entry or~~  
38 ~~prospective entry into the neighborhood of a person or persons of~~  
39 ~~a particular race, caste, color, religion, sex, gender, gender identity,~~  
40 ~~gender expression, sexual orientation, marital status, ancestry,~~

1 disability, genetic information, source of income, familial status,  
2 veteran or military status, or national origin.

3 (i) (1) For any person or other organization or entity whose  
4 business involves real estate-related transactions to discriminate  
5 against any person in making available a transaction, or in the  
6 terms and conditions of a transaction, because of race, caste, color,  
7 religion, sex, gender, gender identity, gender expression, sexual  
8 orientation, marital status, national origin, ancestry, source of  
9 income, familial status, disability, veteran or military status, or  
10 genetic information.

11 (2) For any person or other entity whose business includes  
12 performing appraisals, as defined in subdivision (b) of Section  
13 11302 of the Business and Professions Code, of residential real  
14 property to discriminate against any person in making available  
15 those services, or in the performance of those services, because of  
16 race, caste, color, religion, sex, gender, gender identity, gender  
17 expression, sexual orientation, familial status, source of income,  
18 disability, genetic information, veteran or military status, or  
19 national origin.

20 (j) To deny a person access to, or membership or participation  
21 in, a multiple listing service, real estate brokerage organization,  
22 or other service because of race, caste, color, religion, sex, gender,  
23 gender identity, gender expression, sexual orientation, marital  
24 status, ancestry, disability, genetic information, familial status,  
25 source of income, veteran or military status, or national origin.

26 (k) To otherwise make unavailable or deny a dwelling based  
27 on discrimination because of race, caste, color, religion, sex,  
28 gender, gender identity, gender expression, sexual orientation,  
29 familial status, source of income, disability, genetic information,  
30 veteran or military status, or national origin.

31 (l) To discriminate through public or private land use practices,  
32 decisions, and authorizations because of race, caste, color, religion,  
33 sex, gender, gender identity, gender expression, sexual orientation,  
34 familial status, marital status, disability, genetic information,  
35 national origin, source of income, veteran or military status, or  
36 ancestry. Discrimination includes, but is not limited to, restrictive  
37 covenants, zoning laws, denials of use permits, and other actions  
38 authorized under the Planning and Zoning Law (Title 7  
39 (commencing with Section 65000)), that make housing  
40 opportunities unavailable.

1 Discrimination under this subdivision also includes the existence  
2 of a restrictive covenant, regardless of whether accompanied by a  
3 statement that the restrictive covenant is repealed or void.

4 (m) ~~As used in this section, “race, caste, color, religion, sex,~~  
5 ~~gender, gender identity, gender expression, sexual orientation,~~  
6 ~~marital status, national origin, ancestry, familial status, source of~~  
7 ~~income, disability, veteran or military status, or genetic~~  
8 ~~information,” includes a perception that the person has any of those~~  
9 ~~characteristics or that the person is associated with a person who~~  
10 ~~has, or is perceived to have, any of those characteristics.~~

11 (n) ~~To use a financial or income standard in the rental of housing~~  
12 ~~that fails to account for the aggregate income of persons residing~~  
13 ~~together or proposing to reside together on the same basis as the~~  
14 ~~aggregate income of married persons residing together or proposing~~  
15 ~~to reside together.~~

16 (o) ~~In instances where there is a government rent subsidy, to~~  
17 ~~use a financial or income standard in assessing eligibility for the~~  
18 ~~rental of housing that is not based on the portion of the rent to be~~  
19 ~~paid by the tenant.~~

20 (p) (1) ~~For the purposes of this section, “source of income”~~  
21 ~~means lawful, verifiable income paid directly to a tenant, or to a~~  
22 ~~representative of a tenant, or paid to a housing owner or landlord~~  
23 ~~on behalf of a tenant, including federal, state, or local public~~  
24 ~~assistance, and federal, state, or local housing subsidies, including,~~  
25 ~~but not limited to, federal housing assistance vouchers issued under~~  
26 ~~Section 8 of the United States Housing Act of 1937 (42 U.S.C.~~  
27 ~~Sec. 1437f). “Source of income” includes a federal Department of~~  
28 ~~Housing and Urban Development Veterans Affairs Supportive~~  
29 ~~Housing voucher. For the purposes of this section, a housing owner~~  
30 ~~or landlord is not considered a representative of a tenant unless~~  
31 ~~the source of income is a federal Department of Housing and Urban~~  
32 ~~Development Veterans Affairs Supportive Housing voucher.~~

33 (2) ~~For the purposes of this section, it shall not constitute~~  
34 ~~discrimination based on source of income to make a written or~~  
35 ~~oral inquiry concerning the level or source of income.~~

36 SEC. 15. ~~Section 12955.8 of the Government Code is amended~~  
37 ~~to read:~~

38 12955.8. ~~For purposes of this article, in connection with~~  
39 ~~unlawful practices:~~

~~(a) Proof of an intentional violation of this article includes, but is not limited to, an act or failure to act that is otherwise covered by this part, that demonstrates an intent to discriminate in any manner in violation of this part. A person intends to discriminate if race, caste, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice. An intent to discriminate may be established by direct or circumstantial evidence.~~

~~(b) Proof of a violation causing a discriminatory effect is shown if an act or failure to act that is otherwise covered by this part, and that has the effect, regardless of intent, of unlawfully discriminating on the basis of race, caste, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information. A business establishment whose action or inaction has an unintended discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of this part if the business establishment can establish that the action or inaction is necessary to the operation of the business and effectively carries out the significant business need it is alleged to serve. In cases that do not involve a business establishment, the person whose action or inaction has an unintended discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of this part if the person can establish that the action or inaction is necessary to achieve an important purpose sufficiently compelling to override the discriminatory effect and effectively carries out the purpose it is alleged to serve.~~

~~(1) Any determination of a violation pursuant to this subdivision shall consider whether or not there are feasible alternatives that would equally well or better accomplish the purpose advanced with a less discriminatory effect.~~

~~(2) For purposes of this subdivision, the term “business establishment” shall have the same meaning as in Section 51 of the Civil Code.~~

1 SEC. 16. ~~Section 12956.1 of the Government Code is amended~~  
2 ~~to read:~~

3 12956.1. (a) As used in this section:

4 (1) ~~“Association,” “governing documents,” and “declaration”~~  
5 ~~have the same meanings as set forth in Sections 4080, 4135, and~~  
6 ~~4150 or Sections 6528, 6546, and 6552 of the Civil Code.~~

7 (2) ~~“Redaction” means the process of rerecording of a document~~  
8 ~~that originally contained unlawful restrictive language, and when~~  
9 ~~presented to the county recorder for rerecording, no longer contains~~  
10 ~~the unlawful language or the unlawful language is masked so that~~  
11 ~~it is not readable or visible.~~

12 (3) ~~“Redacted” means the result of the rerecording of a document~~  
13 ~~that originally contained unlawful restrictive language, and when~~  
14 ~~presented to the county recorder for rerecording, no longer contains~~  
15 ~~the unlawful language or the unlawful language is masked so that~~  
16 ~~it is not readable or visible.~~

17 (b) (1) ~~A county recorder, title company, escrow company, real~~  
18 ~~estate broker, real estate agent, or association that provides a copy~~  
19 ~~of a declaration, governing document, or deed to any person shall~~  
20 ~~place a cover page or stamp on the first page of the previously~~  
21 ~~recorded document or documents stating, in at least 14-point~~  
22 ~~boldface type, the following:~~

23  
24 ~~“If this document contains any restriction based on age, race,~~  
25 ~~caste, color, religion, sex, gender, gender identity, gender~~  
26 ~~expression, sexual orientation, familial status, marital status,~~  
27 ~~disability, veteran or military status, genetic information, national~~  
28 ~~origin, source of income as defined in subdivision (p) of Section~~  
29 ~~12955, or ancestry, that restriction violates state and federal fair~~  
30 ~~housing laws and is void, and may be removed pursuant to Section~~  
31 ~~12956.2 of the Government Code by submitting a “Restrictive~~  
32 ~~Covenant Modification” form, together with a copy of the attached~~  
33 ~~document with the unlawful provision redacted to the county~~  
34 ~~recorder’s office. The “Restrictive Covenant Modification” form~~  
35 ~~can be obtained from the county recorder’s office and may be~~  
36 ~~available on its internet website. The form may also be available~~  
37 ~~from the party that provided you with this document. Lawful~~  
38 ~~restrictions under state and federal law on the age of occupants in~~  
39 ~~senior housing or housing for older persons shall not be construed~~  
40 ~~as restrictions based on familial status.”~~

~~(2) The requirements of paragraph (1) shall not apply to documents being submitted for recordation to a county recorder.~~

~~(3) A title company, escrow company, or association that delivers a copy of a declaration, governing document, or deed directly to a person who holds an ownership interest of record in property shall also provide a Restrictive Covenant Modification form with procedural information for appropriate processing along with the document.~~

~~(c) Any person who records a document for the express purpose of adding a racially restrictive covenant is guilty of a misdemeanor. The county recorder shall not incur any liability for recording the document. Notwithstanding any other provision of law, a prosecution for a violation of this subdivision shall commence within three years after the discovery of the recording of the document.~~

~~SEC. 17. Section 12956.2 of the Government Code is amended to read:~~

~~12956.2. (a) (1) A person who holds or is acquiring an ownership interest of record in property that the person believes is the subject of an unlawfully restrictive covenant in violation of subdivision (f) of Section 12955 may record a document titled Restrictive Covenant Modification. A title company, escrow company, county recorder, real estate broker, real estate agent, or other person also may record the modification document provided for in this section. The county recorder may waive the fee prescribed for recording and indexing instruments pursuant to Section 27361 in the case of a Restrictive Covenant Modification document. The modification document shall include a complete copy of the original document containing the unlawfully restrictive language with the unlawfully restrictive covenant language redacted.~~

~~(2) Beginning July 1, 2022, if a title company, escrow company, real estate broker, or real estate agent has actual knowledge that a declaration, governing document, or deed that is being directly delivered to a person who holds or is acquiring an ownership interest in property includes a possible unlawfully restrictive covenant, they shall notify the person who holds or is acquiring the ownership interest in the property of the existence of that covenant and their ability to have it removed through the restrictive~~

1 covenant modification process. There shall be no presumption that  
2 a party providing a document has read the document or has actual  
3 knowledge of its content.

4 (3) ~~Beginning July 1, 2022, if requested before the close of~~  
5 ~~escrow, the title company or escrow company directly involved~~  
6 ~~in the pending transaction shall assist in the preparation of a~~  
7 ~~Restrictive Covenant Modification pursuant to this section, but~~  
8 ~~the title company or escrow company shall have no liability~~  
9 ~~associated with the recordation of a Restrictive Covenant~~  
10 ~~Modification that contains modifications not authorized by this~~  
11 ~~section on behalf of the requester.~~

12 (b) ~~(1) Before recording the Restrictive Covenant Modification~~  
13 ~~document, the county recorder shall submit the modification~~  
14 ~~document and the original document to the county counsel who~~  
15 ~~shall determine whether the language in the original document~~  
16 ~~contains an unlawful restriction based on age, race, caste, color,~~  
17 ~~religion, sex, gender, gender identity, gender expression, sexual~~  
18 ~~orientation, familial status, marital status, disability, genetic~~  
19 ~~information, veteran or military status, national origin, source of~~  
20 ~~income as defined in subdivision (p) of Section 12955, or ancestry.~~  
21 ~~The county counsel shall return the documents and inform the~~  
22 ~~county recorder of its determination within a period of time~~  
23 ~~specified in paragraph (2). The county recorder shall refuse to~~  
24 ~~record the modification document if the county counsel or their~~  
25 ~~designee finds that the original document does not contain an~~  
26 ~~unlawful restriction as specified in this subdivision or the~~  
27 ~~modification document contains modifications not authorized by~~  
28 ~~this section.~~

29 (2) ~~For documents recorded pursuant to subdivision (a), the~~  
30 ~~period of time shall be a reasonable period of time, not to exceed~~  
31 ~~three months, from the date the request for recordation is made,~~  
32 ~~unless extraordinary circumstances apply.~~

33 (c) ~~If a person requests to record a modification document, that~~  
34 ~~person shall provide a return address in order for the county~~  
35 ~~recorder to notify this person of the action taken by the county~~  
36 ~~counsel on the respective property. The notice required pursuant~~  
37 ~~to this subdivision may be made on a postcard mailed by first-class~~  
38 ~~mail.~~

39 (d) ~~The modification document shall be indexed in the same~~  
40 ~~manner as the original document being modified. It shall contain~~

1 a recording reference to the original document in the form of a  
2 book and page or instrument number, and date of the recording.

3 (e) ~~Subject to covenants, conditions, and restrictions that were~~  
4 ~~recorded after the recording of the original document that contains~~  
5 ~~the unlawfully restrictive language and subject to covenants,~~  
6 ~~conditions, and restrictions that will be recorded after the~~  
7 ~~Restrictive Covenant Modification, the restrictions in the~~  
8 ~~Restrictive Covenant Modification, once recorded, are the only~~  
9 ~~restrictions having effect on the property. The effective date of the~~  
10 ~~terms and conditions of the modification document shall be the~~  
11 ~~same as the effective date of the original document.~~

12 (f) ~~A Restrictive Covenant Modification form shall be prepared~~  
13 ~~and accepted for submission and recordation in all counties in~~  
14 ~~substantially the following form:~~

15  
16 **RESTRICTIVE COVENANT MODIFICATION:**

17 The following referenced document contains a restriction based  
18 on age, race, caste, color, religion, sex, gender, gender identity,  
19 gender expression, sexual orientation, familial status, marital status,  
20 disability, veteran or military status, genetic information, national  
21 origin, source of income as defined in subdivision (p) of Section  
22 12955 of the Government Code, or ancestry, that violates state and  
23 federal fair housing laws and is void. Pursuant to Section 12956.2  
24 of the Government Code, this document is being recorded solely  
25 for the purpose of redacting and eliminating that restrictive  
26 covenant as shown on page(s) \_\_\_\_ of the document recorded on  
27 \_\_\_\_\_ (date) in book \_\_\_\_\_ and page \_\_\_\_\_ or instrument  
28 number \_\_\_\_\_ of the official records of the County of  
29 \_\_\_\_\_, State of California.

30 Attached hereto is a true, correct and complete copy of the  
31 document referenced above, with the unlawful restrictive covenant  
32 redacted.

33 This modification document shall be indexed in the same manner  
34 as the original document being modified, pursuant to subdivision  
35 (d) of Section 12956.2 of the Government Code.

36 The effective date of the terms and conditions of the modification  
37 document shall be the same as the effective date of the original  
38 document.

39 (Signature of submitting party)

1 ~~\_\_\_\_\_ County Counsel, or their designee, pursuant to~~  
2 ~~paragraph (1) of subdivision (b) of Section 12956.2 of the~~  
3 ~~Government Code, hereby states that it has determined that the~~  
4 ~~original document referenced above contains an unlawful restriction~~  
5 ~~and this modification may be recorded.~~

6 Or

7 ~~\_\_\_\_\_ County Counsel, or their designee, pursuant to~~  
8 ~~paragraph (1) of subdivision (b) of Section 12956.2 of the~~  
9 ~~Government Code, finds that the original document does not~~  
10 ~~contain an unlawful restriction, or the modification document~~  
11 ~~contains modifications not authorized, and this modification may~~  
12 ~~not be recorded.~~

13 County Counsel

14 By:

15 Date:

16  
17 (g) ~~The county recorder shall make available to the public~~  
18 ~~Restrictive Covenant Modification forms onsite in an appropriately~~  
19 ~~designated area, or online on the county recorder's internet website,~~  
20 ~~either of which shall be deemed to satisfy the requirement of~~  
21 ~~paragraphs (1) and (2) of subdivision (b) of Section 12956.1 to~~  
22 ~~provide a Restrictive Covenant Modification form if the procedural~~  
23 ~~information for appropriate processing is attached to the form.~~  
24 ~~Those forms shall permit multiple submissions on behalf of~~  
25 ~~different homes and for processing homes in batches with respect~~  
26 ~~to a modification document that affects multiple homes or lots.~~  
27 ~~The forms shall also permit the submission of a Restrictive~~  
28 ~~Covenant Modification form for a homeowners' association or a~~  
29 ~~common interest development to modify covenants, conditions,~~  
30 ~~and restrictions that will correct unlawfully restrictive covenants~~  
31 ~~for multiple dwellings within a subdivision.~~

32 (h) ~~If a person causes to be recorded a modified document~~  
33 ~~pursuant to this section that contains modifications not authorized~~  
34 ~~by this section, the county recorder shall not incur liability for~~  
35 ~~recording the document. The liability that may result from the~~  
36 ~~unauthorized recordation is the sole responsibility of the person~~  
37 ~~who caused the modified recordation as provided in subdivision~~  
38 ~~(a).~~

39 (i) ~~(1) A Restrictive Covenant Modification that is approved~~  
40 ~~by county counsel or their designee and recorded pursuant to this~~

1 section removes the illegal covenant from all property affected by  
2 the original covenant regardless of who submits the modification.

3 (2) This section does not affect the obligations of the governing  
4 board of a common interest development as defined in Section  
5 4100 or 6534 of the Civil Code if the board of directors of that  
6 common interest development is subject to the requirements of  
7 subdivision (b) of Section 4225 or of subdivision (b) of Section  
8 6606 of the Civil Code.

9 (j) For purposes of this section, “redaction” and “redacted” mean  
10 the same as defined in Section 12956.1.

11 SEC. 18. Section 12993 of the Government Code is amended  
12 to read:

13 12993. (a) The provisions of this part shall be construed  
14 liberally for the accomplishment of the purposes of this part. This  
15 part does not repeal any of the provisions of civil rights law or of  
16 any other law of this state relating to discrimination because of  
17 race, caste, religious creed, color, national origin, ancestry, physical  
18 disability, mental disability, medical condition, genetic information,  
19 marital status, sex, age, reproductive health decisionmaking, or  
20 sexual orientation, unless those provisions provide less protection  
21 to the enumerated classes of persons covered under this part.

22 (b) The provisions in this part relating to discrimination in  
23 employment on account of sex or medical condition do not affect  
24 the operation of the terms or conditions of any bona fide retirement,  
25 pension, employee benefit, or insurance plan, provided the terms  
26 or conditions are in accordance with customary and reasonable or  
27 actuarially sound underwriting practices.

28 (c) While it is the intention of the Legislature to occupy the field  
29 of regulation of discrimination in employment and housing  
30 encompassed by the provisions of this part, exclusive of all other  
31 laws banning discrimination in employment and housing by any  
32 city, city and county, county, or other political subdivision of the  
33 state, this part does not limit or restrict the application of Section  
34 51 of the Civil Code.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**FILED**  
NOV 06 2023

Clerk of the Court  
Superior Court of CA County of Santa Clara  
BY Felicia Samoy DEPUTY

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA**

DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING,

Plaintiff,

vs.

CISCO SYSTEMS, INC., ET AL.  
Defendants,

Case No. 20CV372366

ORDER RE: DEFENDANT CISCO  
SYSTEMS, INC.'S DEMURRER AND  
MOTION TO STRIKE PLAINTIFF'S  
COMPLAINT

The demurrer and motion to strike portions of Department of Fair Employment and Housing's Complaint by defendant Cisco Systems, Inc. came on for hearing before the Honorable Eric S. Geffon on November 2, 2023 at 9:00 a.m. in Department 16. The matter having been submitted, after full consideration of the authorities submitted by each party, and arguments made by the parties in their papers and at the hearing, the Court makes the following ruling:

1           **I. Factual Background**

2           On October 16, 2020, the California Department of Fair Employment and Housing  
3 (“DFEH”)<sup>1</sup> brought this action against Cisco Systems, Inc. (“Cisco”), Sundar Iyer (“Iyer”), and  
4 Ramana Kompella (“Kompella”) (collectively, “Defendants”) to remedy workplace  
5 discrimination, harassment, and retaliation violations under the California Fair Employment and  
6 Housing Act (Cal. Govt. Code, § 12900, et seq.) (“FEHA”) against employee John Doe (“Doe”).

7           Doe is a Dalit Indian, a caste at the bottom of the Indian hierarchy into which he was  
8 born. (Compl., ¶ 1.) Doe was recruited and hired at Cisco by Iyer in or around September 2015.  
9 (30.) At Cisco, Doe worked with a team of entirely Indian employees who all grew up in India  
10 and immigrated to the United States as adults. (Compl., ¶ 3.) Except for Doe, his entire team was  
11 from the high castes in India. (*Ibid.*) Specifically, Doe’s supervisors and co-workers, defendants  
12 Iyer and Kompella, are from India’s highest castes and both were aware that Doe is Dalit.  
13 (Compl., ¶ 4.)

14           In or around October 2016, two of Doe’s colleagues informed him that Iyer was  
15 informing others that he was Dalit. (Compl., ¶ 31.) In or around November 2016, Doe confronted  
16 Iyer about disclosing his caste to Cisco employees and Iyer denied making the comment.  
17 (Compl., ¶ 32.) That month, Doe filed a discrimination complaint against Iyer with Cisco’s HR  
18 and Employee Relations department (“HR”). (Compl., ¶ 33.)

19           On or around December 8, 2016, Doe submitted a written complaint about Iyer’s  
20 disclosure of Doe’s caste, Doe’s complaint to Iyer, and Iyer’s subsequent retaliatory employment  
21 actions, including a sudden change in his job duties. (Compl., ¶ 37.) An internal investigation  
22 was conducted revealing Iyer admitted he told Doe’s colleagues Doe was not on the main list,  
23 effectively revealing his caste. (Compl., ¶ 38.) No further action was taken after the  
24 investigation, indicating caste discrimination was not unlawful. (Compl., ¶¶ 38-39.) On or  
25 around February 2, 2017, Cisco’s employee relations manager closed the investigation finding all  
26 of Doe’s complaints were unsubstantiated. (Compl., ¶ 39.) When Doe opposed these unlawful

27  
28 <sup>1</sup> The Court acknowledges that the DFEH is now referred to as the California Civil Rights  
Department (“CRD”). However, as the complaint and moving papers refer to “DFEH,” for  
clarity, the Court will refer to CRD as DFEH.

1 practices internally, Defendants retaliated against him. (Compl., ¶ 4.) As a result, Doe received  
2 less pay, fewer opportunities, endured a hostile work environment, and other inferior terms and  
3 conditions of employment because of his religion, ancestry, national origin/ethnicity, and  
4 race/color. (Compl., ¶¶ 4, 40.)

5 On or around February 26, 2018, Kompella was promoted and became responsible for  
6 directing Doe's day-to-day assignments and employment actions, Doe's role was reduced and he  
7 was isolated from his colleagues. (Compl., ¶¶ 35, 36, 45.) Doe was later denied a promotion.  
8 (Compl., ¶ 47.)

## 9 10 **II. Procedural Background**

11 Doe filed a pre-complaint inquiry with the DFEH on or around April 20, 2018. He filed a  
12 verified administrative complaint against Cisco on or around July 30, 2018 and an amended  
13 administrative complaint, adding Iyer and Kompella, on or around October 9, 2018. The DFEH  
14 and Defendants entered into consecutive tolling agreements to toll the statutory deadline for  
15 DFEH to file a civil action against Defendants to June 30, 2020.

16 On or about June 30, 2020, DFEH filed a complaint in the United States District Court  
17 for the Northern District of California. On or around October 16, 2020, DFEH voluntarily  
18 dismissed the federal action and thereafter filed the operative state court action asserting the  
19 following five causes of action:

- 20 1) FEHA violation: Discrimination on the basis of religion, ancestry, national  
21 origin/ethnicity, and race/color [against Cisco];
- 22 2) FEHA violation: Harassment on the basis of religion, ancestry, national  
23 origin/ethnicity, and race/color [against all Defendants];
- 24 3) FEHA violation: Retaliation [against Cisco];
- 25 4) FEHA violation: Failure to take all reasonable steps to prevent discrimination,  
26 harassment, and retaliation [against Cisco]; and
- 27 5) FEHA violation: Failure to take all reasonable steps to prevent discrimination,  
28 harassment, and retaliation [on behalf of DFEH against Cisco].

1 On November 3, 2020, Cisco filed a demurrer and motion to strike portions of the  
2 Complaint. However, on March 1, 2021 (several days before the hearing on the demurrer and  
3 motion to strike), Defendants filed a notice of appeal from this Court's (Hon. Takaichi) order  
4 denying a motion to compel arbitration and to stay proceedings. On October 25, 2022, the Sixth  
5 District Court of Appeal affirmed the order denying the motion to compel arbitration. The  
6 hearing on the demurrer and motion to strike was rescheduled to November 2, 2023. The DFEH  
7 opposes both motions.

### 8 9 **III. Demurrer**

#### 10 **A. Legal Standard**

11 "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all  
12 material factual allegations in the complaint; the question of plaintiff's ability to prove these  
13 allegations, or the possible difficulty in making such proof does not concern the reviewing  
14 court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197,  
15 213-214.) The only issue involved in a demurrer is whether the complaint, as it stands,  
16 unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public*  
17 *Works* (1956) 141 Cal.App.2d 376, 381.)

#### 18 19 **B. Meet and Confer Efforts**

20 Code Civ. Proc. section 430.41 requires a demurring party to meet and confer with the  
21 party who filed the challenged pleading to seek informal resolution of the demurring party's  
22 objections. (Code Civ. Proc., § 430.41(a).) "As part of the meet and confer process, the  
23 demurring party shall identify all of the specific causes of action that it believes are subject  
24 to demurrer and identify with legal support the basis of the deficiencies." (Code Civ. Proc., §  
25 430.41, subd. (a)(1).) "Any determination by the court that the meet and confer process was  
26 insufficient shall not be grounds to overrule or sustain a demurrer." (Code Civ. Proc., § 430.41,  
27 subd. (a)(4).)

1 The DFEH contends it made efforts to meet and confer and Cisco's counsel failed to do  
2 so and then subsequently filed a demurrer. In its declaration, Cisco asserts it attempted to meet  
3 and confer regarding the demurrer and motion to strike on several occasions and that counsel for  
4 DFEH requested to reschedule the meet and confer on several occasions. (See Liburt Decl., ¶¶ 5-  
5 7.) The emails attached in Exhibit E of the Liburt Declaration confirm that Cisco's counsel  
6 attempted to set up times to meet and confer and the parties were unable to find an agreed upon  
7 date and time, where DFEH continued to reschedule. While the parties failed to actually meet  
8 and confer regarding the motions, Cisco made multiple attempts to meet and confer.  
9 Accordingly, the Court does not find that Cisco's meet and confer process was deficient. The  
10 Court reminds counsel for DFEH that they should not treat Code of Civil Procedure section  
11 430.41 as a procedural hurdle and should, instead, undertake the obligations set forth therein  
12 with sincerity and good faith.

### 13 C. Cisco's Request for Judicial Notice

14 In support of its demurrer and motion to strike, Cisco requests the Court take judicial  
15 notice of the following documents:

- 16 1) John Doe's original administrative charges filed with the DFEH ("Ex. A");
- 17 2) John Doe's amended administrative charges filed with the DFEH ("Ex. B");
- 18 3) DFEH's federal complaint, proof of service, and voluntary dismissal ("Exs. C – E").

19 The DFEH opposes the request for judicial notice of Ex. A and Ex. B, arguing that an  
20 administrative charge is not an official act of the legislative, executive, and judicial departments  
21 of the United States and is therefore not covered by Evidence code section 452, subdivision (c).  
22 (See RJN Opp., p. 1:7-9.) In reply, Cisco does not address this argument but asserts that the  
23 administrative complaints are referenced in the Complaint, they are a prerequisite to filing the  
24 complaint, and are referenced in the demurrer and motion to strike. (RJN Reply, pp. 1-2.)

25 The request for judicial notice of Ex. A and Ex. B is GRANTED only as to the  
26 document's existence. (See *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing*  
27 *Com.* (2004) 121 Cal.App.4th 1578, 1591 [granting request for judicial notice of DFEH  
28 decision].) While the Court understands that Cisco would like judicial notice taken of the boxes

1 that were selected on the DFEH complaint, the Court declines to take judicial notice of the  
2 contents of the DFEH complaints, as they likely contain disputed facts, and on demurrer and  
3 motion to strike, a court's function is limited to testing the legal sufficiency of the complaint.  
4 (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 [stating also "hearing on  
5 demurrer may not be turned into a contested evidentiary hearing through the guise of having the  
6 court take judicial notice of documents whose truthfulness or proper interpretation are  
7 disputable"].)

8 The request for judicial notice of Ex. C, Ex. D, and Ex. E is GRANTED as to the  
9 documents' existence. (See *Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29  
10 Cal.App.5th 1, 14 [judicial notice may be taken of court records but the truth of matters asserted  
11 in such documents is not subject to judicial notice].)

#### 12 **D. Statute of Limitations**

13 A court may sustain a demurrer on the ground of failure to state sufficient facts if "the  
14 complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v.*  
15 *Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) A demurrer is not sustainable if  
16 there is only a possibility the cause of action is time-barred; the statute of limitations defense  
17 must be clearly and affirmatively apparent from the allegations in the pleading. (*Id.* at pp. 1315-  
18 16.) When evaluating whether a claim is time-barred, a court must determine (1)  
19 which statute of limitations applies and (2) when the claim accrued. (*Id.* at p. 1316.) "To  
20 determine the statute of limitations which applies to a cause of action it is necessary to identify  
21 the nature of the cause of action, i.e., the 'gravamen' of the cause of action." (*Hensler v. City of*  
22 *Glendale* (1994) 8 Cal.4th 1, 22.) "The nature of the cause of action and the primary right  
23 involved, not the form or label of the cause of action or the relief demanded, determine  
24 which statute of limitations applies." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011)  
25 198 Cal.App.4th 396, 412.)  
26  
27  
28

1 FEHA claims are governed by two statutory deadlines. (*Acuna v. San Diego Gas &*  
2 *Electric Co.* (2013) 217 Cal.App.4th 1402, 1411 (*Acuna*)). First, the employee must exhaust  
3 statutory administrative remedies by filing a complaint with the DFEH within one year of “the  
4 date upon which the alleged unlawful practice or refusal to cooperate occurred[.]” (Gov. Code §  
5 12960, subd. (d); *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492-  
6 493; *Acuna, supra*, 217 Cal.App.4th at p. 1412.) Second, the civil action based on the claims  
7 asserted in the DFEH complaint must be commenced within one year of the date of the DFEH’s  
8 notice of the right to sue. (Gov. Code, § 12965, subd. (d); *Acuna, supra*, 217 Cal.App.4th at p.  
9 1413.)

10 Cisco argues the entire Complaint is barred by the statute of limitations because it did not  
11 file a civil action in state court within one year after Doe filed his administrative complaint.  
12 (Demurrer, p. 5:15-16.) Specifically, Cisco asserts that “Doe filed an amended administrative  
13 complaint on October 9, 2018 . . . Thus, in the absence of a tolling agreement, DFEH’s deadline  
14 to file a civil action was October 9, 2019.” (Id. at p. 5:16-18.) In this case, it is undisputed that  
15 the parties entered into several tolling agreements<sup>2</sup> that extended the DFEH’s deadline to June  
16 30, 2020. (Id. at p. 5:19; Compl., ¶ 13.) On June 30, 2020, DFEH filed a federal action, and then  
17 on October 16, 2020, DFEH voluntarily dismissed the federal action and subsequently filed the  
18 current action in state court. (Id. at p. 5:20-23.)

19 Cisco argues it is “black-letter law” that when a plaintiff voluntarily dismisses a first  
20 lawsuit, the time during which the first lawsuit was pending does not toll the statute of  
21 limitations and if a plaintiff files a second action after the statute of limitations has run, the  
22 second action is time-barred. (Demurrer, p. 5:25-28, citing *Thomas v. Gilliland*, 95 Cal.App.4th  
23 427.) In opposition, DFEH argues the parties’ tolling agreement, California Emergency Rules of  
24 Court, Rule 9 (“Rule 9”), and federal law “more than ensure the timeliness of DFEH’s  
25 complaint. (Opposition, p. 4:10-12.)

26  
27 <sup>2</sup> While both parties agree that they entered into a tolling agreement extending the DFEH’s time  
28 to file a civil action to June 30, 2020, there are no tolling agreements attached to the Complaint  
and none are the subject of any request for judicial notice. Thus, with respect to any tolling  
agreements, the Court is confined to what is stated in the Complaint regarding them.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

The DFEH asserts that at the time Rule 9 took effect, DFEH had 91 days remaining before it was required to file a civil action on June 30, 2020 and therefore, the complaint was due to be filed 91 days after October 1, 2020, or on December 20, 2020. (Opposition, p. 4:17-20.)

## E. Discrimination

Cisco argues the discrimination claims fail because: 1) caste is not a protected class; 2) Doe did not exhaust his allegations of religion, national origin/ethnicity, and color and so there cannot be discrimination allegations on those bases; 3) DFEH does not state sufficient facts to assert discrimination based on ancestry or race.

### 1. Caste as a Protected Class

As to the first argument, Cisco directs the Court to arguments made in its motion to strike. (See Demurrer, p. 6:16-17.) As an initial point, the Court notes that directing the Court to a separate motion is insufficient to support arguments made in the current motion. Moreover, Cisco merely asserts that caste and ethnicity-based discrimination are not protected under FEHA. (See MTS, p. 4:4-5.) In opposition, DFEH argues that FEHA is to be liberally construed and that discrimination based on religion, ancestry, national origin/ethnicity, and race/color are “manifest in caste.” (Opposition, p. 7:13-14.)

As an initial matter, the Court notes there is no California case that is directly on point here. However, the Legislature has established that provisions of FEHA “shall be construed liberally for the accomplishment of the purposes of this part.” (Gov. Code, § 12993, subd. (a); see also *Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1114 [“Because the FEHA is remedial legislation, . . . the court must construe the FEHA broadly, not restrictively”]; *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157 [Legislature intended the FEHA “to expand” the rights of persons who are victims of employment discrimination”].) Moreover, although not controlling, the Legislature recently passed Senate Bill 403, which would have added “caste” into the definition of ancestry. While Governor Gavin Newsom vetoed S.B. 403, he stated in that veto that civil rights protections “shall be liberally construed. Because discrimination based on caste is already prohibited under these existing categories, this bill is unnecessary.” (See October 7, 2023, S.B. 403 Veto, Office of the

1 Governor.)<sup>3</sup> Taken together, and under the current state of the law, it is clear that it was the intent  
2 of the Legislature that “caste” be included under the already existing protected categories.

3 Based on the foregoing, the Court declines to sustain the demurrer on the ground that  
4 caste is not a protected class.

## 5 6 7 2. Exhaustion of Administrative Remedies

8 Cisco next asserts that Doe did not exhaust his administrative remedies by indicating he  
9 was discriminated against on the basis of religion, national origin/ethnicity, and color animus,  
10 and so the DFEH cannot allege discrimination on those bases. Again, Cisco directs the Court to  
11 its motion to strike. There, Cisco asserts that Doe’s initial and amended administrative complaint  
12 alleges only claims based on ancestry and/or race. However, while the Court has taken judicial  
13 notice of the amended administrative complaint, it was as to its existence only, and therefore, the  
14 Court will not rely on the contents of the document.

15 ““An employee who wishes to file suit under the FEHA must exhaust the administrative  
16 remedy provided by the statute by filing a complaint with the DFEH, and must obtain from the  
17 DFEH a notice of right to sue. The timely filing of an administrative complaint before the DFEH  
18 is a prerequisite to the bringing of a civil action for damages.”” (*Guzman v. NBA Automotive,*  
19 *Inc.* (2021) 68 Cal.App.5th 1109, 1117 (*Guzman*) [internal quotations omitted].)

20 As DFEH notes in opposition, “[t]he purpose of filing a charge with an administrative  
21 agency prior to filing a civil lawsuit is to enable that agency to investigate the charges and  
22 attempt to obtain voluntary compliance with the law. When submitting the charge, claimants are  
23 not held to specify the charges with literal exactitude.” (*Soldinger v. Northwest Airlines* (1996)  
24 51 Cal.App.4th 345, 381.) While “[s]ome authorities state the more specific the original charge  
25 filed with the administrative agency, the less likely a civil lawsuit may be expanded into other  
26 areas . . . all [authorities] recognize that a DFEH charge ‘is not intended as a limiting device.’”  
27

---

28 <sup>3</sup> Cisco is apparently aware of this fact, as it refers to it on p. 1 of its reply to DFEH’s opposition  
to the demurrer. (See Reply, p. 1, fn. 1.)

1 (*Ibid.*; see also *Stearns v. Fair Employment Practice Com* (1971) 6 Cal.3d 205, 213-214.)  
2 Further, “[i]ncidents not described in a DFEH charge can be included in the subsequently filed  
3 lawsuit if they would necessarily have been discovered by investigation of the charged  
4 incidents.” (*Ibid.*; see also *Guzman, supra*, 68 Cal.App.5th at p. 1117 [“The administrative  
5 exhaustion requirement is satisfied if FEHA claims in a judicial complaint are like and  
6 reasonably related to those in the DFEH complaint or likely to be uncovered in the course of a  
7 DFEH investigation”].)

8 In this case, Doe filed an administrative complaint with the DFEH indicating he was  
9 discriminated against, harassed, and retaliated against by his employer. (Compl., pp. 1:20-2:2.)  
10 The DFEH then brought a civil action against Cisco after completing an investigation of Doe’s  
11 charges alleging Doe was discriminated, retaliated, and harassed on the basis of religion,  
12 ancestry, national origin/ethnicity, and race/color. (Compl., ¶¶ 11-12.) Accordingly, Doe has  
13 sufficiently exhausted his administrative remedies and the Court declines to sustain the demurrer  
14 on this basis.

### 15 16 3. Discrimination Based on Ancestry or Race

17 The elements of a discrimination claim are: “(1) the employee’s membership in a  
18 classification protected by the statute; (2) discriminatory animus on the part of the employer  
19 toward members of that classification; (3) an action by the employer adverse to the employee’s  
20 interests; (4) a causal link between the discriminatory animus and the adverse action; (5) damage  
21 to the employee; and (6) a causal link between the adverse action and the damage.” (*McCaskey*  
22 *v. California State Automobile Assn.* (2010) 189 Cal.App.4th 947, 979.)

23 Cisco asserts there are no allegations: 1) Iyer or Kompella are of a different ancestry or  
24 race, 2) that they harbored animus on these bases; or 2) that Doe suffered an adverse  
25 employment action within the meaning of FEHA.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*i. Race/Ancestry*

Cisco contends that race and ancestry are the only exhausted and statutorily protected categories alleged by DFEH. It asserts there are no allegations that Iyer or Kompella or anyone else were of a different ancestry or race than Doe, but rather that they were of different castes than Doe. (Demurrer, p. 6:21-24.) Cisco cites no authority to support the contention that the person doing the discriminating must be of another ancestry or race than the person he is discriminating against. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [a point asserted without citation to authority will be disregarded].) DFEH argues that “it is of no consequence that Iyer and Kompella . . . are also from India or may share the same religion or race as Doe. Moreover, persons within the same protected category can still discriminate.” (Opposition, p. 10:19-22, citing *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 79 (*Oncale*).)

The Court is persuaded by DFEH’s argument, as several cases hold that discrimination by members of the same protected categories can be actionable.<sup>4</sup> (See e.g., *Oncale, supra*, 523 U.S. at p. 76 [“in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race ‘Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group’”]; *Castaneda v. Partida* (1977) 430 U.S. 482, 499 [stating same]; *St. Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 609-610 [rejecting argument that discrimination claims by one Caucasian against another are not cognizable]; *Bryant v. Begin Manage Program* (E.D.N.Y. 2003) 281 F.Supp.2d 561, 570 [“the fact that [plaintiff’s] supervisor was [also] black does not place [plaintiff’s] race discrimination claim outside the scope of Title VII”].) Furthermore, DFEH does allege Doe “has a darker complexion relative to other persons of non-Dalit Indian

---

<sup>4</sup> “We observe initially that while federal authority may be regarded as persuasive, California courts are not bound by decisions of federal . . . courts of appeals.” (*People v. Uribe* (2011) 199 Cal.App.4th 836, 875.) In this instance, the Court finds the cited cases to be persuasive and on-point.

1 descent” (Compl., ¶¶ 1, 29) and that Iyer and Kompella are of a higher caste than Dalit (Compl.,  
2 ¶ 4), creating an inference that there were differences between those within the same protected  
3 category. (See *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152  
4 Cal.App.4th 1106, 1111-1112 (*Poseidon*) [in reviewing sufficiency of complaint against general  
5 demurrer, court treats as true “not only the complaint’s material factual allegations, but also facts  
6 that may be implied or inferred from those expressly alleged”].)

7  
8 *ii. Animus*

9 Cisco argues that the Complaint’s allegations “do not allow the Court to reasonably infer  
10 that (to the extent any of these actually happened) they were caused by an intent to unlawfully  
11 discriminate against Doe. . . . This is especially true given that Iyer actively recruited and hired  
12 Doe to work with him in a highly coveted position at Cisco earning top compensation[.]”  
13 (Demurrer, p. 7:13-19; see also Reply, p. 6:9-12 [stating Cisco is entitled to an inference of  
14 nondiscrimination based on the same actor inference].)

15 In making this “same actor” argument, Cisco relies on *Nazir v. United Airlines, Inc.*  
16 (2009) 178 Cal.App.4th 243, 273 (*Nazir*), stating that when the same allegedly discriminatory  
17 actor previously selected plaintiff for favorable treatment it creates an inference of  
18 nondiscrimination. However, Cisco quotes *Nazir* only in part. The First District Court of Appeal  
19 explained that same-actor evidence “is a strong inference that a court must take into account on a  
20 summary judgment motion.” (*Id.* at p. 273 [internal quotations omitted]; see also *Cornell v.*  
21 *Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 937 [“while once commonly relied on by  
22 courts affirming summary judgment against a plaintiff alleging discriminatory action, the same-  
23 actor inference has lost some of its persuasive appeal in recent years”][internal quotations  
24 omitted].) Thus, the same actor inference is not properly considered on a demurrer, where a court  
25 is not concerned with a plaintiff’s ability to prove its allegations or the possible difficulty in  
26 making such proof. (*Alcorn v. Ambro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.) Furthermore,  
27 the Complaint alleges Defendants acted with the intent to discriminate against Doe, which is  
28 sufficient for pleading purposes. (See Compl., ¶¶ 49, 58.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

iii. *Adverse Employment Action*

Cisco additionally contends the allegations of isolating Doe from his colleagues, reassigning job duties, denying him a raise, and denying him a promotion are insufficient to state a discrimination claim. (Demurrer, p. 7:1-8, 20.) Specifically, Cisco asserts that there “is no reason to believe that other employees were unaffected by a reorganization, or that Doe was the only employee who did not receive a raise . . . there is no elaboration as to what alleged ‘work opportunities’ Doe was denied . . . [and] Doe does not allege he was equally qualified for the [promotions].” (Demurrer, p. 7:20-27.) Cisco further asserts there are no allegations that the person who did receive the promotion was outside of the protected classes that Doe pleads. (*Id.* at p. 8:2-3.)

“[A]n adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, [however], the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052.) “The court should consider ‘plaintiff’s allegations collectively under a totality-of-the-circumstances approach’ . . . ‘Minor or relatively trivial adverse actions’ do not suffice. . . . But an adverse action that ‘is reasonably likely to impair a reasonable employee’s job performance or prospects for advancement or promotion falls within the reach of’ FEHA.” (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423 (*Wysinger*).)

Here, DFEH alleges Doe was informed that Iyer was disclosing his Dalit caste to his coworkers (Compl., ¶ 31); Doe contacted HR to file a discrimination complaint against Iyer (Compl., ¶ 33); six days later, Iyer took away Doe’s role leading two technologies (Compl., ¶ 34); Iyer then promoted two of Doe’s colleagues, including Kompella who was a higher caste than Doe (Compl., ¶ 35); then Doe’s role was reduced and he was isolated from his colleagues (Compl., ¶ 36); Doe then submitted another written complaint to HR (Compl., ¶ 37); Doe was further isolated and Iyer disparaged Doe and misrepresented that he performed his job

1 inadequately (Compl., ¶ 40); Doe was later denied another promotion based on Iyer's retaliatory  
2 employment actions (Compl., ¶ 47.) Taken as a whole, the Court finds these allegations are  
3 sufficient to allege an adverse employment action for pleading purposes to overcome a demurrer.  
4 (See *Poseidon, supra*, 152 Cal.App.4th at p. 1111 [the complaint must be liberally construed and  
5 given a reasonable interpretation, with a view to substantial justice between the parties]; see also  
6 *Wysinger, supra*, 157 Cal.App.4th at p. 424 [refusal to promote plaintiff is an adverse  
7 employment action under FEHA, especially where there was "also a pattern of conduct, the  
8 totality of which constitutes an adverse employment action. This includes underserved negative  
9 job reviews [and] reductions in his staff".])

10  
11 Based on the foregoing, Cisco's demurrer to the first cause of action for discrimination<sup>5</sup>  
12 on the ground DFEH failed to state a claim is OVERRULED.

13  
14 **F. Harassment**

15 Cisco demurs to the second cause of action on grounds it fails to state a claim because: 1)  
16 Doe did not exhaust his administrative remedies; 2) DFEH fails to allege the first four elements  
17 of harassment; and 3) the harassment claims are time-barred.

18 **1. Exhaustion of Administrative Remedies**

19 Cisco asserts that Doe did not exhaust its administrative remedies on religion, national  
20 origin/ethnicity, and color claims and therefore cannot allege harassment on those bases. For the  
21 same reasons as stated above, the Court finds Doe sufficiently exhausted his administrative  
22 remedies and declines to sustain the demurrer to the second cause of action on this basis.

23  
24  
25  
26  
27 <sup>5</sup> Cisco requests that if the Court sustain its demurrer to the discrimination cause of action, the  
28 Court should also sustain the derivative failure to prevent discrimination claim. As the demurrer  
is overruled as to the discrimination cause of action, it is likewise overruled to the derivative  
fourth and fifth causes of action.

## 2. Elements of Harassment

To state a prima facie case of harassment, the plaintiff must allege: 1) plaintiff is a member of a protected group; 2) plaintiff was subjected to unwelcome harassment; 3) the harassment complained of was based on membership in the protected group; 4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and 5) respondeat superior. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.)

Cisco asserts that DFEH fails to plead facts establishing the first four elements of a harassment claim. (Demurrer, p. 8:22-24.)

### *i. Protected Category*

As to the first element, as explained above, caste is included within the already protected categories. Thus, the Court will not sustain the demurrer on this basis.

### *ii. Unwelcome Harassment*

Next, Cisco contends that allegations in the Complaint consist of personal management decisions that cannot be harassment under FEHA. (Demurrer, p. 9:2-3, relying on *Reno v. Baird* (1998) 18 Cal.4th 640 (*Reno*) [superseded by statute] and *Janken v. GM Hughes Elecs.* (1996) 46 Cal.App.4th 55 (*Janken*).)

In *Reno*, the Supreme Court, citing to *Janken*, explained that “harassment consists of a type of conduct outside the scope of necessary job performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer’s business or performance of the supervisory employee’s job.” (*Reno, supra*, 18 Cal.4th at pp. 645-646.)

Cisco argues the following harassment allegations are personnel management decisions that are not actionable under *Reno*: revealing Doe’s caste to his colleagues; disparaging him to the team; subjecting him to offensive comments; isolating him from the team; reducing his role;

1 giving him assignments that were impossible to complete; and requiring him to submit weekly  
2 status reports. (Demurrer, p. 9:17-22.) In opposition, DFEH argues courts have held that adverse  
3 personnel management decisions can be harassment and the Court should consider a totality of  
4 the circumstances. (Opposition, p. 13:14-15, 18-19.) DFEH cites to several cases to support its  
5 argument that management decisions may constitute an adverse employment action. However,  
6 all of the cases cited by DFEH address discrimination under FEHA and do not specifically state  
7 that management acts can be considered harassment.<sup>6</sup>

8 Cisco next asserts that four of the seven allegations it references “are plainly personnel  
9 management” and contends the remaining allegations are conclusory and insufficient. (Demurrer  
10 p. 9:23-26.) While DFEH’s harassment claims are based in part upon personnel management  
11 decisions, such as giving Doe difficult assignments and requiring him to complete status reports  
12 (Compl., ¶ 63), DFEH additionally alleges non-personnel management decisions, including  
13 revealing Doe’s caste to his colleagues (*ibid.*); disparaging him to the team, misrepresenting that  
14 he did not perform his job adequately and telling Doe’s team members to avoid working with  
15 him (Compl., ¶¶ 40, 63); isolating him from the team (Compl., ¶ 63); and criticizing his social  
16 skills (Compl., ¶ 47). These allegations fall within the established definition of harassment. (See  
17 e.g., *Janken, supra*, 46 Cal.App.4th at p. 63 [harassment includes verbal epithets or derogatory  
18  
19

---

20 <sup>6</sup> DFEH cites to: *Horsford v. Board of Trustees of California State Univ.* (2005) 132 Cal.App.4th  
21 359, 374 [concluding that, in a racial discrimination action, where management actions were  
22 permissible in other contexts, those decisions still resulted in adverse employment action. As  
23 such, if the transfer and suspension resulted from racial animus, they are actionable under  
24 FEHA”]; *Simers v. Los Angeles Times Communications LLC* (2018) 18 Cal.App.5th 1248, 1279  
25 [in an age and disability discrimination action, “a job reassignment may be an adverse  
26 employment action when it entails materially adverse consequences”]; *Wysinger, supra*, 157  
27 Cal.App.4th at p. 424 [in a retaliation action, court held that a refusal to promote plaintiff is an  
28 adverse employment action under FEHA given the totality of the circumstances]. However,  
while these cases provide examples of adverse employment actions, none of the cases  
specifically address managerial acts as harassment. The Court notes neither party addresses *Roby*  
*v. McKesson Corp.*, where the California Supreme Court determined that managerial acts can  
form the basis for a harassment claim where such acts have the “secondary effect of  
communicating a hostile message. This occurs when the actions establish a widespread pattern of  
bias.” (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 709.)

1 comments].) Accordingly, at the pleading stage, the Court finds these allegations to be sufficient  
2 to allege harassment.

3  
4 *iii. Causation*

5 Cisco next argues the allegations do not “sufficiently suggest that anything happened  
6 based on Doe’s caste.” (Demurrer, p. 10:10-12.) In opposition, DFEH contends that it alleges the  
7 harassment Doe faced was based on his caste. (Opposition, p. 11:16-17, citing Compl., ¶¶ 61-  
8 64.) The Complaint contains significant allegations that Doe was subjected to harassment based  
9 on his caste, including allegations that other employees had learned of Doe’s caste; that he was  
10 being treated unfairly, and that “Iyer was setting Doe up to push him out of the Company.”  
11 (Compl., ¶ 41); and that Defendants subjected Doe to offensive comments and other misconduct  
12 based on his caste (Compl., ¶ 63.) The Court finds these allegations are sufficient to survive a  
13 demurrer.

14 *iv. Sufficiently Pervasive Harassment*

15 Finally, Cisco contends the Complaint’s allegations are not actionable as harassment  
16 because they are not severe or pervasive because Iyer made a single comment over three years,  
17 and it was not made to Doe. (Demurrer, p. 10:21-27.)

18 “The law prohibiting harassment is violated when the workplace is permeated with  
19 discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the  
20 conditions of the victim’s employment and create an abusive working environment.” (*Caldera v.*  
21 *Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31, 38 (*Caldera*) [internal  
22 quotations omitted].)

23 In this case, the Complaint alleges significantly more than a single comment made by  
24 Iyer about Doe’s caste. However, even if the Complaint alleged only a single act, the Legislature  
25 has declared that a single incident of harassing conduct is sufficient if the harassing conduct has  
26 unreasonably interfered with the plaintiff’s work performance or created an intimidating, hostile,  
27 or offensive working environment. (Gov. Code, § 12923, subd. (b).) In any event, whether  
28 harassment is sufficiently severe or pervasive “‘is ordinarily one of fact’” and is therefore not

properly decided on demurrer. (See *Caldera, supra*, 25 Cal.App.5th at p. 38 [stating also “[a]s to whether the alleged conduct is sufficiently severe or pervasive, a jury is to consider the totality of circumstances”].) Accordingly, the Court declines to sustain the demurrer on this basis.

### 3. Time-Barred

Cisco additionally asserts the harassment claim must fail because there are no allegations of timely harassment occurring on or after August 1, 2017.<sup>7</sup> Cisco argues that the only events occurring after August 1, 2017 were Kompella’s promotion, Doe’s lack of promotion, Kompella assigning Doe impossible assignments and requiring him to submit weekly reports, which are all acts of personnel management. (Demurrer, p. 11:23-25.) In opposition, DFEH argues that the continuing violation doctrine applies to Doe’s harassment claims.

“A plaintiff suing for violations of FEHA ordinarily cannot recover for acts occurring more than one year before the filing of the DFEH complaint.” (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1400 (*Jumaane*).) However, “[t]his one-year period is subject to equitable tolling under various doctrines” including the continuing violation doctrine. (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412.) “[W]hen an employer engages in a continuing course of unlawful conduct under the FEHA . . . and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that [his] rights may have been violated, but rather, *either* when the course of conduct is brought to an end, . . . *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain.” (*Jumaane, supra*. [emphasis original].)

“Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period. A continuing violation exists if (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside

---

<sup>7</sup> Cisco asserts that Doe filed his DFEH charge on July 30, 2018 and so to be timely, the last instance of harassment must have occurred on or after August 1, 2017. (Demurrer, p. 11:20-22, citing Gov. Code, § 12960.)

1 the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of  
2 permanence.” (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714,  
3 721 [internal citations omitted].)

4 Whether the Complaint’s allegations, accepted as true on demurrer, describe acts outside  
5 the applicable limitations period that are “reasonably” frequent and similar to those within the  
6 limitations period such that the continuing violations doctrine will apply to the alleged events  
7 outside the limitations period presents a question of fact that cannot be resolved on demurrer as  
8 reasonable minds could certainly disagree on the issue. Moreover, Cisco refers to cases that deal  
9 with motions for summary judgment which are not persuasive on demurrer. Accordingly, the  
10 Court declines to sustain the demurrer to the second cause of action on this basis.

11  
12 Therefore, the demurrer to the second cause of action is OVERRULED.

### 13 14 **G. Retaliation**

15 “FEHA makes it unlawful for any employer . . . or person to discharge, expel, or  
16 otherwise discriminate against any person because the person has opposed any practices  
17 forbidden under FEHA or because the person has filed a complaint, testified, or assisted in any  
18 proceeding under FEHA. In order to establish a prima facie claim of retaliation under this  
19 section, a plaintiff must show (1) [he] engaged in a protected activity, (2) [he] was subjected to  
20 an adverse employment action, and (3) there is a causal link between the protected activity and  
21 the adverse employment action.” (*Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th  
22 1241, 1252 [internal citations and quotations omitted].)

23 Cisco argues the retaliation cause of action fails because DFEH does not allege: 1)  
24 protected activity; 2) an adverse action, or 3) a causal link between protected activity and the  
25 adverse action.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1. Protected Activity

Cisco first contends that Doe must complain of unlawful conduct and because caste is not protected under FEHA, the allegations do not state a retaliation claim. (Demurrer, p. 12:19-23.) Cisco additionally asserts that it thoroughly investigated Doe's claims and found nothing to substantiate his complaints. (*Id.* at p. 12:22-24.)

Engaging in protected activity includes "engaging in opposition to any practices forbidden under FEHA or the filing of a complaint, testifying, or assisting in any proceeding under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 247.)

Here, DFEH alleges Doe contacted Cisco's HR to file a discrimination complaint on two separate occasions, thereby engaging in protected activity. (Compl., ¶¶ 33, 37.) As explained in more detail above, caste is included in the already existing protected categories. Moreover, that Cisco investigated Doe's claims and could not substantiate them does not mean that Doe did not participate in protected activity. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 474 ["An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct"].) Therefore, the Court will not sustain the demurrer on this basis.

2. Adverse Action

Cisco contends there are no allegations of adverse action taken against Doe. However, as explained in detail above, DFEH has sufficiently alleged that adverse actions were taken against Doe.

3. Causal Link

Cisco argues the retaliation claim also fails because there is no causal link between the protected activity and the adverse actions. The Complaint contains allegations that as a result of Doe's HR complaints, he was retaliated against by Iyer and Kompella. (See Compl., ¶¶ 34, 74, 75.) These allegations are sufficient to survive a demurrer.

1 Based on the foregoing, the demurrer to the third cause of action is OVERRULED.

2  
3 **IV. Motion to Strike**

4 **A. Legal Standard**

5 A court may strike out any irrelevant, false, or improper matter asserted in a pleading or  
6 strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a  
7 court rule, or an order of the court. (Code Civ. Proc., § 436, subd. (a).) The grounds for a motion  
8 to strike must appear on the face of the challenged pleading or from any matter of which the  
9 court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion  
10 to strike, a court reads the complaint as a whole, all parts in their context, and assumes the truth  
11 of all well-pleaded allegations. (*Clauson v. Superior Ct.* (1998) 67 Cal.App.4th 1253, 1255.)  
12 While a motion to strike can be used to target only a portion of a cause of action or a portion of a  
13 pleading's general allegations the Court has "no intention of creating a procedural 'line item  
14 veto' for the civil defendant." (*PH II, Inc. v. Superior Ct.* (1995) 33 Cal.App.4th 1680, 1683.)  
15  
16

17 **B. General Allegations**

18 Cisco first moves to strike allegations in the Complaint regarding "caste" and "casteism"  
19 on the ground they are immaterial because "caste" is not a protected class listed in FEHA. As the  
20 Court explains in detail above, caste is included under the already existing protected categories.  
21 Accordingly, the Court will not strike the allegations in the Complaint regarding caste.

22 Cisco next moves to strike the allegations in the Complaint regarding "ethnicity" on the  
23 ground they are immaterial because "ethnicity" is not a protected class listed in the FEHA. While  
24 ethnicity is not explicitly stated in Government Code section 12940, subdivision (a), ethnicity is  
25 included in the code sections notes to decisions. (See also *Dee v. Vintage Petroleum, Inc.* (2003)  
26 106 Cal.App.4th 30, 35 [stating FEHA prohibits harassment based on ethnicity].) As such, the  
27 Court will not strike allegations in the complaint regarding ethnicity.  
28

1 Cisco moves to strike “religion,” “color,” and “national origin” from the Complaint on  
2 the ground they are immaterial to the claims because Doe failed to exhaust his administrative  
3 remedies with the DFEH. As explained above, the Court does not find that Doe failed to exhaust  
4 his administrative remedies. Moreover, “caste” is included within the already existing protected  
5 categories. The Court does not find these allegations to be immaterial and declines to strike  
6 religion, color, and national origin from the Complaint.

7 The motion to strike the above allegations is DENIED.

### 8 9 **C. Background Information Allegations**

10 Cisco moves to strike the following:

- 11 1) **Complaint, p. 2:14-17:** “Unlike Doe, most Indian immigrants in the United States are  
12 from upper castes. For example, in 2003, only 1.5 percent of Indian immigrants in the  
13 United States were Dalits or members of lower castes. More than 90 percent were from  
14 high or dominant castes. Similarly, upon information and belief, the same is true of the  
15 Indian employees in Cisco’s workforce in San Jose, California.”
- 16 2) **Complaint, pp. 3:16-4:6:** “For decades, similar to Doe’s team, Cisco’s technical  
17 workforce has been—and continues to be—predominantly South Asian Indian.  
18 According to the 2017 EEO-1 Establishment Report (EEO-1 Report), for example, Cisco  
19 has significant overrepresentation of Asian employees compared to other companies in  
20 the communications, equipment and manufacturing industry (NAICS 3342) in the same  
21 geographic area, which is statistically significant at nearly 30 standard deviations. Such  
22 overrepresentation is also present in management and professional job categories. In  
23 addition to Cisco’s direct workforce, Cisco also employs a significant number of South  
24 Asian Indian workers through Indian- owned consulting firms. When combining its direct  
25 employees and consultants together, Cisco is among the top five H-1B Visa users in the  
26 United States. Over 70 percent of these H-1B workers come from India. Outside of San  
27 Jose, Cisco’s second largest workforce is in India. Although Cisco has employed  
28 predominantly South Asian Indian workforce for decades”
- 3) **Complaint, p. 3, fn. 7:** “2017 EEO-1 Report for Cisco Systems, Inc. at 170 West Tasman  
Drive in San Jose, California. Because Cisco is federal contractor and employs 50 or  
more employees in California and the United States, Cisco is required to file an Employer  
Information Report EEO-1 also known as the EEO—1 Report. The EEO-1 Report requires  
employers to report employment data for all employees categorized by sex,  
race/ethnicity, and job category. EEOC, EEO-1 Instruction Booklet,  
<https://www.eeoc.gov/employers/eo-1-survey/eo-1-instruction-booklet> (last Visited  
June 23, 2020)”
- 4) **Complaint, p. 4, fn. 8:** citation to Joshua Brustein, Cisco, Google benefit from Indian  
firms’ use of H—1B program, The Economic Times (June 6, 2017, 8:31 PM),

1 [https://economictimes.indiatimes.com/tech/ites/cisco-google-benefit-from-indian-firms-](https://economictimes.indiatimes.com/tech/ites/cisco-google-benefit-from-indian-firms-use-of-h-1b-program/articleshow/S9020625.cms)  
2 [use-of-h-1b-program/articleshow/S9020625.cms.](https://economictimes.indiatimes.com/tech/ites/cisco-google-benefit-from-indian-firms-use-of-h-1b-program/articleshow/S9020625.cms)

3 5) **Complaint, p. 4, fn. 9:** “Laura D. Francis & Jasmine Ye Han, Deloitte Top Participant in  
4 H-1B Foreign Worker Program—By Far, Bloomberg Law (Feb. 4, 2020, 2:30 AM),  
5 [https://news.bloomberglaw.com/daily-labor-report/ deloitte—topparticipant-in-h-1b-](https://news.bloomberglaw.com/daily-labor-report/deloitte-topparticipant-in-h-1b-foreign-worker-program-by-far)  
6 [foreign-worker—program-by-far.”](https://news.bloomberglaw.com/daily-labor-report/deloitte-topparticipant-in-h-1b-foreign-worker-program-by-far)

7 6) **Complaint, p. 4, fn. 10:** citation to U.S. Citizenship and Immigration Services,  
8 Characteristics of H—1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report  
9 to Congress October 1, 2018 September 30, 2019, at (Mar. 5, 2020),  
10 [https://www.uscis.gov/sites/default/files/reports-studies/](https://www.uscis.gov/sites/default/files/reports-studies/Characteristics_of_Specialty_Occupation_Workers_H—1B_Fiscal_Year_2019.pdf)  
11 [Characteristics\\_of\\_Specialty\\_Occupation\\_Workers\\_H—1B\\_Fiscal\\_Year\\_2019.pdf](https://www.uscis.gov/sites/default/files/reports-studies/Characteristics_of_Specialty_Occupation_Workers_H—1B_Fiscal_Year_2019.pdf)).

12 In support of its motion to strike the above allegations, Cisco asserts that allegations  
13 about non-parties have no rational nexus to plaintiff’s claims against it. (See MTS, p. 8:3-7.) In  
14 opposition, DFEH argues the information is relevant background information on the Indian Caste  
15 System and Dalits and helps link caste with characteristics of race, religion, ancestry, national  
16 origin, ethnicity, and color. (MTS Opposition, p. 12:3-6.)

17 The motion to strike Item Nos. 4 – 6 is GRANTED without leave to amend. The Court  
18 does not find these articles regarding tech companies’ involvement in H-1B programs to be  
19 relevant to DFEH’s claims against Cisco. While the Court understands that DFEH alleges that  
20 Cisco employs a high number of workers from India, it relies on other information to make the  
21 same point, including mandatory EEO-1 reports.

22 The motion to strike Item No. 2 is GRANTED, in part, without leave to amend, for the  
23 same reasons as stated above. The Court strikes the following allegations at p. 4:1-4: “When  
24 combining its direct employees and consultants together, Cisco is among the top five H-1B via  
25 users in the United States. Over 70 percent of these H1-B workers come from India.”

26 The motion to strike Item Nos. 1 and 3 is DENIED. The Court finds these allegations to  
27 be relevant to DFEH’s contention that the Indian caste system was prevalent at Cisco due to the  
28 number of employees from India.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**D. Allegations Regarding Cisco's Conduct**

Finally, Cisco moves to strike the following allegations as "class allegations" regarding Cisco's purported failure to "prevent, remedy, or deter" unlawful conduct against lower caste workers because they are immaterial and impertinent:

- 1) **Complaint, p. 4:6-7:** "Cisco was—and continues to be—wholly unprepared to prevent, remedy, or deter the unlawful conduct against Doe or similarly situated lower caste workers."
- 2) **Complaint, p. 17:17-20:** "As the agency of the State of California charged with the administration, interpretation, investigation, and enforcement of FEHA, the DFEH brings this claim in the name of the DFEH on behalf of all Indian persons who are or are perceived to be Dalit, of lower castes, or who fall outside the caste system, who are employed by or may seek employment with Cisco in the future."

In opposition, DFEH argues the above allegations are not "class allegations" and that it may independently seek non-monetary preventative remedies for violations of Government Code section 12940, subdivision (k), whether or not it prevails on its underlying claims. (MTS Opposition, p. 15:7-12.)

Pursuant to Cal. Code Regs., tit. 2, section 11023, subdivision (a)(3), "in an exercise of its police powers, the [DFEH] may independently seek non-monetary preventative remedies for a violation of Government Code section 12940(k) whether or not the Department prevails on an underlying claim of discrimination, harassment, or retaliation." As such, the motion to strike Item Nos. 1 – 2 is DENIED.

**V. Conclusion and Order**

The demurrer is OVERRULED in its entirety. The motion to strike is GRANTED, in part and DENIED, in part.

November 3, 2023

  
ERIC S. GEFFON  
JUDGE OF THE SUPERIOR COURT



**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA**  
DOWNTOWN COURTHOUSE  
191 NORTH FIRST STREET  
SAN JOSE, CALIFORNIA 95113  
CIVIL DIVISION

**FILED**  
NOV 06 2023

Clerk of the Court  
Superior Court of CA County of Santa Clara  
BY Felicia Samoy DEPUTY

RE: **California Department Of Fair Employment And Housing et al vs Cisco Systems, Inc. et al**  
Case Number: **20CV372366**

**PROOF OF SERVICE**

**ORDER RE: DEFENDANT CISCO SYSTEMS, INC.'S DEMURRER AND MOTION TO STRIKE PLAINTIFF'S COMPLAINT** was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

---

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

**DECLARATION OF SERVICE BY MAIL:** I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on November 06, 2023. CLERK OF THE COURT, by Felicia Samoy, Deputy.

cc: Lynne C. Hermle Orrick Herrington & Sutcliffe LLP 1000 Marsh Road Menlo Park, CA 94025-1015  
Alex Hernaez 345 California St. Suite 2200 San Francisco, CA 94104  
Janette L Wipper 2218 Kausen Drive #100 Elk Grove, CA 95758  
Timothy Carl Travelstead Narayan Travelstead P.C. 7901 Stoneridge Drive, Ste 230 PLEASANTON, CA 94588  
Ryan McCarl 2219 Main Street #144 San Monica, CA 90405

1 Timothy C. Travelstead, Esq. (SBN 215260)  
2 *t.travelstead@narayantravelstead.com*  
3 Scott C. Ku, Esq. (SBN 314970)  
4 *s.ku@narayantravelstead.com*  
5 NARAYAN TRAVELSTEAD P.C.  
6 7901 Stoneridge Drive, Suite 230  
7 Pleasanton, CA 94588  
8 Telephone: (650) 403-0150

9 Attorneys for Plaintiff  
10 HINDU AMERICAN FOUNDATION

11  
12 IN THE UNITED STATES DISTRICT COURT  
13  
14 FOR THE EASTERN DISTRICT OF CALIFORNIA  
15

16 HINDU AMERICAN FOUNDATION, INC., a  
17 Florida Not For Profit Corporation,

18 Plaintiff,

19 vs.

20 KEVIN KISH, an individual, in his official  
21 capacity as Director of the California Civil  
22 Rights Department; and DOES 1 - 50, inclusive,

23 Defendants.

Case No.

**HINDU AMERICAN FOUNDATION'S  
COMPLAINT FOR:**

1. **Civil Rights Violations – Free Exercise of Religion**
2. **Civil Rights Violations – Denial of Procedural Due Process**
3. **Civil Rights Violations – Denial of Equal Protection**

24 The Hindu American Foundation, Inc. (HAF) hereby brings this action for declaratory  
25 and injunctive relief against Kevin Kish, sued in his official capacity only, the Director of the  
26 California Civil Rights Department (CRD) (formerly known as the Department of Fair  
27 Employment and Housing) for violating the First Amendment and Due Process rights of Hindu  
28 Americans.

**INTRODUCTION**

The Hindu American Foundation (HAF), the largest and most respected Hindu educational and advocacy institution in North America, acts to protect the religious freedoms of Hindu Americans, and all Americans of faith, from the unconstitutional efforts of the State of California to decide the scope and nature of Hindu religious teachings and practices. The California Civil Rights Department (CRD) is pursuing enforcement actions under the California Fair Employment and Housing Act (FEHA) that wrongly asserts that a caste system and caste-based discrimination are integral parts of Hindu teachings and practices by declaring the caste system to be “a strict Hindu social and religious hierarchy,” which requires discrimination by “social custom and legal mandate.”

As HAF has consistently maintained throughout its history, a caste system or discrimination on its basis are in no way a legitimate part of Hindu beliefs, teachings, or practices.

HAF vehemently opposes all types of discrimination; and takes great exception to the State of California defaming and demeaning all of Hinduism by attempting to conflate a discriminatory caste system with the Hindu religion.

Worse, California defames Hinduism by doing what the U.S. Constitution says it cannot, assert a government right to resolve questions of religious doctrine. Preventing the government from establishing religious doctrines or interfering with religious practices is as old a principle as the Republic itself. As American courts have recognized since the earliest days of our Constitution, those principles require a clear and unambiguous prohibition on any “civil determination of religious doctrine.” *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09, 96 S. Ct. 2372, 2380 (1976).

The wisdom of that principle is reinforced by the complete lack of any objective evidence, law or context in the CRD’s assertion. Caste has no legal, social, or cultural definition in the United States, and is not an observable or objectively determinable trait or characteristic. California law and regulations provide no definition or workable method to determine anyone’s caste other than its assumption that Hindus of South Asian decent must all necessarily identify as

1 part of a specific caste and must engage in discrimination based on caste as an “inherent” part of  
2 their religious beliefs and practices.

3 As a result, the CRD’s violation of the First Amendment rights of all Hindu Americans  
4 also leads to a violation of their due process rights and would likely lead employers to actively  
5 discriminate against Hindu and South Asian Americans in order to avoid the undefined maze of  
6 legal uncertainty that would be California’s caste-discrimination bar. Hindus would effectively  
7 lose their due process rights by a state government wrongly labeling part of their religion and  
8 ethnic culture as inherently illegal and discriminatory, regardless of the actual tenets of Hinduism  
9 and regardless of the evidence or facts of a particular case.

10 Stopping caste-based discrimination is a worthy goal that directly furthers Hinduism’s  
11 belief in the equal and divine essence of all people. But wrongly tying Hindu beliefs and  
12 practices to the abhorrent practice of caste-discrimination undermines that goal, violates the First  
13 Amendment rights of all Hindu-Americans, and can only lead to a denial of due process and  
14 equal protection to Americans based on their religious affiliation and national origin.

### 15 **PARTIES**

16 1. Plaintiff Hindu American Foundation is the largest and most respected Hindu  
17 educational and advocacy institution in North America.

18 2. Defendant Kevin Kish, sued in his official capacity only, is the Director of the  
19 California Civil Rights Department.<sup>1</sup> In his official capacity, Mr. Kish is charged with enforcing  
20 California’s civil rights, employment and housing laws. The main office of the California Civil  
21 Rights Department is located in Elk Grove, California, within the Eastern District of California.

### 22 **JURISDICTION AND VENUE**

23 3. The Hindu American Foundation brings this action under 42 U.S.C. Section 1983,  
24 which provides that “[e]very person who, under color of any statute . . . of any State . . . ,  
25 subjects, or causes to be subjected, any citizen of the United States or other person within the  
26 jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the  
27 Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or  
28

---

<sup>1</sup> Formerly known as the California Department of Fair Employment and Housing (DFEH).

1 other proper proceeding for redress.” Therefore, this Court has jurisdiction over this matter under  
2 28 U.S.C. Section 1331.

3 4. Venue is proper in this judicial district under 28 U.S.C. Section 1391(b)(1), which  
4 provides that “[a] civil action may be brought in a judicial district in which any defendant  
5 resides, if all defendants are residents of the State in which the district is located.” Defendant  
6 Kevin Kish, sued in his official capacity as the Director of the California Civil Rights  
7 Department, resides in this district and is a resident of the State of California, specifically located  
8 in Elk Grove, California, Sacramento County.

9 **FACTUAL BACKGROUND**

10 5. Established in 2003, the Hindu American Foundation is the nation’s largest Hindu  
11 education and advocacy organization. As a non-partisan group that is not affiliated with any  
12 other religious or political organization, HAF works with a wide range of people and groups that  
13 are committed to promoting dignity, mutual respect, and pluralism, working across all  
14 sampradaya (Hindu religious traditions) regardless of race, color, national origin, citizenship,  
15 ancestry, gender, sexual orientation, age and/or disability.

16 **Hinduism Teaches the Inherent Equal Worth of All Persons**

17 6. As the world’s oldest religion with over 1.2 billion adherents, Hinduism  
18 represents a broad, pluralistic family of traditions. Its diversity is bound together by certain  
19 ancient, core teachings, not a single spiritual founder, authority or book.

20 7. The core of Hinduism lies in its assertion that the divine is equally present in all,  
21 and that this divinity is the ultimate, eternal, omnipresent reality and reflected through the  
22 immortal, individual Self or Pure Consciousness, which takes form through a cycle of birth and  
23 rebirth or reincarnation. This inherent divinity leads Hindus to understand the purpose of human  
24 life and means to flourishing as a quest for: (i) goodness or societal well-being (Dharma); (ii)  
25 material prosperity and security (Artha); (iii) mental and physical happiness (Kama); and (iv)  
26 wholeness or spiritual freedom (Moksha).

27 8. Moreover, as a result of this shared divinity, Hinduism asserts a moral obligation  
28 (Dharma) to ensure that one’s thoughts, words, and actions (Karma) uphold values like truth,

1 non-injury, compassion, equanimity, generosity, and equal regard in order to honor the divine in  
2 all. Developed over millennia through the meditations, experiences, and spiritual practices of its  
3 sages, teachers, lay leaders, and practitioners, Hinduism represents a broad and diverse faith,  
4 with each of the over 1.2 billion Hindus’ understanding its wisdom based on their own study,  
5 practice, and experience of its precepts.

6 **CRD Pursues Enforcement Actions Against Hindu Americans Based On**  
7 **Inaccurate and Racist Colonial Views of Hinduism**

8 9. The CRD is actively pursuing religious discrimination enforcement actions  
9 against Hindu Americans in California State Court based on the inaccurate, colonial assertion  
10 that Hindu beliefs and practices include a discriminatory caste system. In its enforcement action  
11 filed in California Superior Court for the County of Santa Clara, Case No. 20CV372366, the  
12 CRD alleges that a caste system is “a strict Hindu social and religious hierarchy,” which requires  
13 discrimination by “social custom and legal mandate” and that Hindu Americans, therefore,  
14 adhere to this strict and discriminatory religious hierarchy in violation of the California Fair  
15 Employment and Housing Act. **(Exhibit A – CRD/DFEH State Complaint, ¶¶ 1-4.)**

16 10. The CRD’s Complaint makes claims about Hinduism not from Hinduism’s deep  
17 and diverse history teaching the equal and divine value of all, but rather in the misinformed and  
18 misrepresentative assertions about Hinduism by Western European colonial occupation. Looking  
19 for tools to control the indigenous population that greatly outnumbered it, British colonial  
20 occupation defined Hinduism not based on the Hindu peoples’ own understandings of  
21 Hinduism’s precepts and practices, but rather on the British’s own 18th and 19th century belief  
22 in their superiority over non-white, non-Christian peoples outside of Europe.

23 11. The British colonial government latched onto existing, non-uniform, highly  
24 localized social and cultural divisions within Indian society and combined it with then-prevailing  
25 racist theories to devise a four-fold pan-Indian caste system to use to control the occupied. This  
26 British-created system reflected their own 19th century views on race, postulating that “upper  
27 castes” consisted of light-skinned, “more evolved” Caucasians or Indo-Europeans who, after  
28

1 invading the Indian subcontinent, relegated the indigenous, “inferior” and “less evolved” darker-  
2 skinned people to the “lower castes.”

3 12. The CRD’s depiction of the caste system is rooted in this British-created tool of  
4 colonial control, a tool arising out of 19th Century British racist imperialism. It is not based on  
5 any universal understanding among Hindus about their own beliefs and traditions, nor the actual  
6 ways in which Indian communities functioned.

7 **DFEH Has No Role in Defining Hinduism**

8 13. Regardless of the source of the CRD’s misunderstandings about Hindu beliefs and  
9 practices, the CRD and the State of California cannot define or act upon assertions of Hindu  
10 beliefs and practices that Hinduism itself disclaims. Just as Catholics are free to define  
11 Catholicism and Muslims are free to define Islam, it is for Hindus alone to define Hinduism, and  
12 the CRD and the State of California cannot, as it seeks to here, adopt a legal definition of  
13 Hinduism that incorrectly includes caste, a caste system and caste-based discrimination.

14 14. The CRD and the State of California are attempting to define Hinduism against  
15 the beliefs of an overwhelming number of its own adherents, in direct violation of the  
16 constitutional right to the free exercise of religion. It is attempting to chain Hinduism to  
17 discriminatory practices abhorred by and rejected by the vast majority of Hindu Americans.

18 15. And in doing so, the State of California is violating the First Amendment and due  
19 process rights of all Hindu Americans.

20 **The CRD’s Approach Undermines Efforts to End Caste-Based**  
21 **Discrimination**

22 16. By wrongly attempting to define Hinduism to include caste, the CRD would  
23 actually require the very discrimination that it seeks to ban.

24 17. The Religious Freedom Restoration Act prohibits the federal government from  
25 taking any action that would “substantially burden a person’s exercise of religion even if the  
26 burden results from a rule of general applicability” unless the government can show a compelling  
27 government interest in doing so. 42 U.S.C. § 2000bb-1. Title VII requires an employer to  
28 reasonably accommodate the religious beliefs of its employees unless the employer can

1 demonstrate that doing so would impose an undue hardship. 42 U.S.C. § 2000e(j). The California  
2 Fair Employment and Housing Act, likewise, requires employers to accommodate religious  
3 beliefs. Cal. Gov. Code § 12940(l)(1).

4 18. The CRD's enforcement actions assert, as a legally-binding principle of law  
5 necessary to their religious discrimination claim, that caste discrimination is a religious belief  
6 and practice under Hinduism. Must an employer then accommodate requests for caste  
7 discrimination from employees as a religious accommodation?

8 19. California would doubtless answer no, because FEHA states that employers are  
9 not required to accommodate religious beliefs "under this subdivision if it would result in a  
10 violation of this part or any other law prohibiting discrimination or protecting civil rights." Cal.  
11 Gov. Code § 12940 subd. (l)(3).

12 20. But caste discrimination is not barred by any part of any other California law or  
13 regulation. The Fair Employment and Housing Act prohibits discrimination based on: "race,  
14 religious creed, color, national origin, ancestry, physical disability, mental disability, medical  
15 condition, genetic information, marital status, sex, gender, gender identity, gender expression,  
16 age, sexual orientation, or military and veteran status." Cal. Gov. Code § 12940 subd. (a).  
17 Similar facially neutral and generally applicable categories are listed in California's other civil  
18 rights statutes. See Cal. Gov. Code §§ 11135, 12940; Civ. Code § 51. Nowhere does Title VII or  
19 FEHA, their regulations, or any other provision of federal or California law bar caste  
20 discrimination.

21 21. In seeking to declare caste an inherent part of Hindu religious beliefs, teachings,  
22 and practices, employers might arguably be required to accommodate an employee's request not  
23 to work with someone the employee believes to be of the "wrong" caste. An employer might also  
24 arguably have to accommodate an employee's request not to be supervised by, or to supervise,  
25 persons perceived to be of the "wrong" caste, even where no other employee identifies with that  
26 or any caste or has any personal belief in or understanding of a caste system or where other  
27 employees lack the ability to recognize or identify different castes.

22. By wrongly claiming that caste, a caste system and caste-based discrimination are an inherent part of Hindu religious belief and practice, the CRD would actually seem to encourage and possibly even require, employers to engage in the very discrimination that they purportedly seek to bar.

**FIRST CLAIM FOR RELIEF**

**Civil Rights Violations - Free Exercise of Religion**

42 U.S.C. § 1983

23. HAF incorporates the preceding paragraphs as if they were repeated in full herein.

24. HAF has associational standing to bring this claim on behalf of its Hindu American members.

25. HAF seeks relief under 42 U.S.C. § 1983, which prohibits any person, under color of law, from depriving others of their rights, privileges or immunities secured by the Constitution of the United States.

26. In filing enforcement actions based on the inaccurate assertion that caste, a caste system and caste-based discrimination are an inherent part of Hindu religious belief and practice, the California Civil Rights Department has acted under color of state law.

27. Under the First Amendment to the United States Constitution, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const., 1st Amend. “To be sure, the Free Exercise Clause bars ‘governmental regulation of religious beliefs.’” *Gillette v. United States*, 401 U.S. 437, 462, 91 S. Ct. 828, 842 (1971); *quoting Sherbert v. Verner*, 374 U.S. 398, 402 (1963). “If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.” *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (opinion of Warren, C. J.); *quoted in Sherbert, supra*, 374 U.S. at 402. Neither federal nor state governments can interfere with Americans’ free-exercise rights. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

28. Laws violate the Free-Exercise Clause of the First Amendment when they “impose special disabilities on the basis of religious status.” *Espinoza v. Mont. Dep’t of Revenue*,

1 \_\_\_\_U.S.\_\_\_\_ [140 S.Ct. 2246, 2254-2255, 207 L.Ed.2d 679, 689-690] (2020); *citing Trinity*  
2 *Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. \_\_\_\_ [137 S.Ct. 2012, 2016, 198 L.Ed.2d  
3 551, 555] (2017); *see also Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

4 29. By acting under color of state law to wrongly define Hindu beliefs, teachings and  
5 practices to include an abhorrent practice of discrimination, the California Civil Rights  
6 Department has violated the Free-Exercise rights of Hindu Americans by seeking to legally  
7 define their religious beliefs and by imposing special disabilities on the basis of religion by  
8 wrongly claiming that Hindus believe in and participate in a discriminatory caste system.

9 30. As a result, HAF prays for the judgment and relief set forth below.

## 10 **SECOND CLAIM FOR RELIEF**

### 11 **Civil Rights Violations - Denial of Procedural Due Process**

12 42 U.S.C. § 1983

13 31. HAF incorporates the preceding paragraphs as if they were repeated in full herein.

14 32. HAF has associational standing to bring this claim on behalf of its Hindu  
15 American members.

16 33. “A fundamental principle in our legal system is that laws which regulate persons  
17 or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox TV*  
18 *Stations, Inc.*, 567 U.S. 239, 253 (2012). A statute or regulation violates procedural due-process  
19 rights where it “is so standardless that it authorizes or encourages seriously discriminatory  
20 enforcement.” *United States v. Williams*, 553 U. S. 285, 304 (2008). A law qualifies as  
21 unconstitutionally vague not because it is difficult to prove, but where “it is unclear as to what  
22 fact must be proved.” *Id.*, at 306.

23 34. The CRD’s position in wrongly seeking to legally define Hinduism to include  
24 belief and practice in caste and a caste system is so standardless that it would actually require the  
25 very discrimination that it seeks to prevent.

26 35. FEHA requires employers to accommodate religious beliefs. Cal. Gov. Code §  
27 12940 subd. ( 1) (1). The CRD wants to establish, as a legally-binding principle of law, that caste  
28 discrimination is a religious belief and practice under Hinduism. The DFEH’s position would

1 both require and prohibit use of and consideration of caste beliefs in employment as a religious  
2 accommodation to Hindu employees.

3 36. This is true despite the language of FEHA that does not require religious  
4 accommodation “if it would result in a violation of this part or any other law prohibiting  
5 discrimination or protecting civil rights.” Cal. Gov. Code § 12940 subd. (l)(3).

6 37. But caste discrimination is not barred by any part of any other California law or  
7 regulation. The FEHA prohibits discrimination based on: “race, religious creed, color, national  
8 origin, ancestry, physical disability, mental disability, medical condition, genetic information,  
9 marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military  
10 and veteran status.” Cal. Gov. Code § 12940 subd. (a). Similar facially neutral and generally  
11 applicable categories are listed in California’s other civil rights statutes. See Gov. Code §§  
12 11135, 12940; Civ. Code § 51. Nowhere does FEHA, its regulations, or any other provision of  
13 California law bar caste discrimination.

14 38. In seeking to declare caste an inherent part of Hindu beliefs and practices,  
15 employers would be required to accommodate an employee’s request not to work with someone  
16 the employee believes to be of the “wrong” caste. An employer would have to accommodate an  
17 employee’s request not to be supervised by, or to supervise, persons perceived to be of the wrong  
18 caste, even where no other employee identifies with that or any caste or has any personal belief  
19 in a caste system or where other employees lack the ability to recognize or identify different  
20 castes. California would actually require employers to engage in the very discrimination that it  
21 seeks to prevent.

22 39. In fact, the only consistent factor the CRD seeks to identify with caste is that it is  
23 an inherent part of Hinduism. That this “authorizes or encourages seriously discriminatory  
24 enforcement” against Hindus and Americans of South Asian descent is self-evident. Without any  
25 context outside of its asserted connection to Hinduism, the CRD has provided no meaning or  
26 definition of caste and would set up a legal structure that actually requires the discrimination it  
27 seeks to prevent.

40. By acting under color of state law to enforce a state non-discrimination law in a way that both requires and prevents caste-based discrimination, all based on an inaccurate, colonial view that Hindu religious belief includes a caste system, the CRD has violated the procedural due-process rights of all Americans by adopting the interpretation and enforcement of the California Fair Employment and Housing Act that is so standardless that it would authorize or encourage seriously discriminatory enforcement.

41. As a result, HAF prays for the judgment and relief set forth below.

### **THIRD CLAIM FOR RELIEF**

## Civil Rights Violations – Denial of Equal Protection

42 U.S.C. § 1983

42. HAF incorporates the preceding paragraphs as if they were repeated in full herein.

43. HAF has associational standing to bring this claim on behalf of its Hindu American members.

44. Under the Fourteenth Amendment to the United States Constitution, no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

45. The “government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.” (*McDaniel v. Paty*, 435 U. S. 618, 639, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978) (J. Brennan, opinion concurring in judgment)).

46. Religion is a suspect class, as is national origin. *Saud v. Days*, 36 F.4th 949, 953 (9th Cir. 2022). Hindu Americans, the vast majority of whom are of Indian descent, are, therefore, members of a suspect class, and the CRD’s actions targeting Hindu Americans based on the CRD’s misrepresentation of Hindu beliefs are subject to strict scrutiny.

47. By wrongly claiming that Hinduism includes a belief in a caste system, by adopting an enforcement position that caste discrimination violates the California Fair Employment and Housing Act, and by filing enforcement actions that seek to enshrine its wrong and defamatory view of Hindu beliefs in state law, the CRD as acted under color of state law against Hindu Americans.

48. By falsely claiming that Hindu Americans inherently hold discriminatory beliefs in a caste system, and that such beliefs and practices are an “inherent” part of the Hindu religion, and by seeking to enforce the California Fair Employment and Housing Act against Hindu Americans based on these false claims, the CRD has applied the Fair Employment and Housing Act in a discriminatory manner against Hindu Americans and fundamentally interfered with Hindu American’s religious freedom.

49. As a result, HAF prays for the judgment and relief set forth below.

**PRAYER FOR RELIEF**

WHEREFORE, HAF respectfully requests that the Court enter judgment that:

1. Declares that the CRD, through the actions described above, has violated the First Amendment, Due Process, and Equal Protection rights of Hindu Americans.
2. Enjoins the CRD from engaging in any act or practice that seeks to define Hinduism as including a caste system or any other belief or practice.
3. Enjoins the CRD from bringing any religious discrimination action based on the premise that Hindu belief and practice includes a caste system.
4. Enjoins the CRD from ascribing religious or moral beliefs or practices to persons or groups who expressly disclaim any such beliefs or practices.
5. Awards attorneys’ fees and costs incurred for the prosecution of this matter as provided by law.
6. Grants such other additional relief as the Court deems just and proper.

Dated: September 20, 2022

NARAYAN TRAVELSTEAD P.C.



Timothy C. Travelstead, Esq.  
Scott C. Ku, Esq.  
Attorneys for Plaintiff  
HINDU AMERICAN FOUNDATION

# EXHIBIT A

JANETTE WIPPER (#275264)  
Chief Counsel  
Janette.Wipper@dfeh.ca.gov  
SIRITHON THANASOMBAT (#270201)  
Senior Staff Counsel  
Siri.Thanasombat@dfeh.ca.gov  
JEANETTE HAWN (#307235)  
Staff Counsel  
Jeanette.Hawn@dfeh.ca.gov  
CALIFORNIA DEPARTMENT OF FAIR  
EMPLOYMENT AND HOUSING  
2218 Kausen Drive, Suite 100  
Elk Grove, CA 95758  
Telephone: (916) 478-7251  
Facsimile: (888) 382-5293

Attorneys for Plaintiff,  
California Department of Fair Employment and Housing

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

CALIFORNIA DEPARTMENT OF FAIR  
EMPLOYMENT AND HOUSING, an agency of  
the State of California,

Plaintiff,

vs.

CISCO SYSTEMS, INC., a California  
Corporation; SUNDAR IYER, an individual;  
RAMANA KOMPELLA, an individual,

Defendants.

**Case No.**

**CIVIL RIGHTS - EMPLOYMENT  
DISCRIMINATION**

**DEMAND FOR JURY TRIAL**

The California Department of Fair Employment and Housing (DFEH) brings this action against Cisco Systems, Inc. (Cisco) to remedy workplace discrimination, harassment, and retaliation violations at its San Jose, California corporate headquarters under Title VII of the Civil Rights Act of 1964 § 701 *et seq.*, as amended, 42 U.S.C. § 2000e, *et seq.* (Title VII), and the California Fair Employment and Housing Act, Cal. Gov't Code § 12900, *et seq.* (FEHA). Specifically, Cisco engaged in unlawful employment practices on the bases of religion, ancestry, national origin/ethnicity, and race/color against

Complainant John Doe,<sup>1</sup> and after Doe opposed such unlawful practices, Cisco retaliated against him. Cisco also failed to take all reasonable steps to prevent such unlawful practices in its workplace, as required under FEHA.

## INTRODUCTION

1. John Doe is Dalit Indian, a population once known as the “Untouchables,” who are the most disadvantaged people under India’s centuries-old caste system.<sup>2</sup> As a strict Hindu social and religious hierarchy, India’s caste system defines a person’s status based on their religion, ancestry, national origin/ethnicity, and race/color—or the caste into which they are born—and will remain until death.<sup>3</sup> At the bottom of the Indian hierarchy is the Dalit, typically the darkest complexion caste, who were traditionally subject to “untouchability” practices which segregated them by social custom and legal mandate. Although *de jure* segregation ended in India, lower caste persons like Dalits continue to face *de facto* segregation and discrimination in all spheres.<sup>4</sup> Not only do Dalits endure the most severe inequality and unfair treatment in both the public and private sectors, they are often targets of hate violence and torture. Of India’s approximately 1.3 billion people, about 200 million are Dalits.<sup>5</sup>

2. Unlike Doe, most Indian immigrants in the United States are from upper castes. For example, in 2003, only 1.5 percent of Indian immigrants in the United States were Dalits or members of

---

<sup>1</sup> Because of the stigma and potential threats of violence associated with a person’s status as Dalit, DFEH uses a fictitious name for Complainant to protect his privacy and protect him from further discrimination, harassment, or retaliation based on his caste and related characteristics. Through the DFEH’s administrative process, Defendants have been made aware of Doe’s legal name.

<sup>2</sup> Complainant John Doe is Dalit because of his religion, ancestry, national origin/ethnicity, and race/color. The caste to which someone belongs is immutable and determines their social status in traditional Indian culture. Social stratification and discrimination based on caste persists in India and among those living outside India, including in America. Encyclopedia Britannica, *India: Caste* (June 24, 2020), <https://www.britannica.com/place/India/Caste> (last visited June 29, 2020).

<sup>3</sup> Smita Narula, Human Rights Watch, *Caste Discrimination: A Global Concern*, Background: “Untouchability” and Segregation (2001), [https://www.hrw.org/reports/2001/globalcaste/caste0801-03.htm#P133\\_16342](https://www.hrw.org/reports/2001/globalcaste/caste0801-03.htm#P133_16342) (last visited June 29, 2020).

<sup>4</sup> Human Rights Watch & Center for Human Rights and Global Justice at New York University School of Law, *Hidden Apartheid: Caste Discrimination against India’s “Untouchables,”* at 45 (2007), <https://www.hrw.org/reports/2007/india0207/india0207webwcover.pdf>.

<sup>5</sup> Office of the Registrar General & Census Commissioner, India, Ministry of Home Affairs, Government of India, *2011 Primary Census Abstract*, <https://censusindia.gov.in/pca/default.aspx>.

1 lower castes.<sup>6</sup> More than 90 percent were from high or dominant castes. Similarly, upon information  
 2 and belief, the same is true of the Indian employees in Cisco's workforce in San Jose, California.

3 3. As alleged below, at Cisco's San Jose headquarters, Doe worked with a team of entirely  
 4 Indian employees. The team members grew-up in India and immigrated as adults to the United States.  
 5 Except for Doe, the entire team are also from the high castes in India. As beneficiaries of the caste  
 6 system, Doe's higher caste supervisors and co-workers imported the discriminatory system's practices  
 7 into their team and Cisco's workplace.

8 4. Doe's supervisors and co-workers, Defendants Sundar Iyer and Ramana Kompella, are  
 9 from India's highest castes. Because both knew Doe is Dalit, they had certain expectations for him at  
 10 Cisco. Doe was expected to accept a caste hierarchy within the workplace where Doe held the lowest  
 11 status within the team and, as a result, received less pay, fewer opportunities, and other inferior terms  
 12 and conditions of employment because of his religion, ancestry, national origin/ethnicity, and race/color.  
 13 They also expected him to endure a hostile work environment. When Doe unexpectedly opposed the  
 14 unlawful practices, contrary to the traditional order between the Dalit and higher castes, Defendants  
 15 retaliated against him. Worse yet, Cisco failed to even acknowledge the unlawful nature of the conduct,  
 16 nor did it take any steps necessary to prevent such discrimination, harassment, and retaliation from  
 17 continuing in its workplace.

18 5. Not only did Cisco disregard Doe, but also its own workforce. For decades, similar to  
 19 Doe's team, Cisco's technical workforce has been—and continues to be—predominantly South Asian  
 20 Indian. According to the 2017 EEO-1 Establishment Report (EEO-1 Report), for example, Cisco has a  
 21 significant overrepresentation of Asian employees compared to other companies in the communications,  
 22 equipment and manufacturing industry (NAICS 3342) in the same geographic area, which is statistically  
 23 significant at nearly 30 standard deviations.<sup>7</sup> Such overrepresentation is also present in management and  
 24

25 <sup>6</sup> Tinku Ray, *The US isn't safe from the trauma of caste bias*, The World (Mar. 08, 2019, 9:00 AM),  
 26 <https://www.pri.org/stories/2019-03-08/us-isn-t-safe-trauma-caste-bias>.

27 <sup>7</sup> 2017 EEO-1 Report for Cisco Systems, Inc. at 170 West Tasman Drive in San Jose, California.  
 28 Because Cisco is a federal contractor and employs 50 or more employees in California and the United  
 States, Cisco is required to file an Employer Information Report EEO-1, also known as the EEO-1  
 Report. The EEO-1 Report requires employers to report employment data for all employees categorized

professional job categories. In addition to Cisco’s direct workforce, Cisco also employs a significant number of South Asian Indian workers through Indian-owned consulting firms.<sup>8</sup> When combining its direct employees and consultants together, Cisco is among the top five H-1B visa users in the United States.<sup>9</sup> Over 70 percent of these H1-B workers come from India.<sup>10</sup> Outside of San Jose, Cisco’s second largest workforce is in India.

6. Although Cisco has employed a predominantly South Asian Indian workforce for decades, Cisco was—and continues to be—wholly unprepared to prevent, remedy, or deter the unlawful conduct against Doe or similarly situated lower caste workers. Cisco failed to take any steps whatsoever to prevent “. . . inequalities associated with [c]aste status, ritual purity, and social exclusion [from] becom[ing] embedded . . .” into its workplace, which is a documented problem for “. . . American mainstream institutions that have significant South Asian immigrant populations.”<sup>11</sup> A 2018 survey of South Asians in the U.S. found that 67% of Dalits reported being treated unfairly at their American workplaces because of their caste and related characteristics.<sup>12</sup> However, few South Asian employees raised concerns to their American employers, because they believe “their concerns will not be given weight” or will lead to “negative consequences to their career.”<sup>13</sup> This is precisely what happened to Doe at Cisco.

by sex, race/ethnicity, and job category. EEOC, *EEO-1 Instruction Booklet*, <https://www.eeoc.gov/employers/eo-1-survey/eo-1-instruction-booklet> (last visited June 23, 2020).

<sup>8</sup> Joshua Brustein, *Cisco, Google benefit from Indian firms’ use of H-1B program*, The Economic Times (June 6, 2017, 8:31 PM), <https://economictimes.indiatimes.com/tech/ites/cisco-google-benefit-from-indian-firms-use-of-h-1b-program/articleshow/59020625.cms>.

<sup>9</sup> Laura D. Francis & Jasmine Ye Han, *Deloitte Top Participant in H-1B Foreign Worker Program—By Far*, Bloomberg Law (Feb. 4, 2020, 2:30 AM), <https://news.bloomberglaw.com/daily-labor-report/deloitte-top-participant-in-h-1b-foreign-worker-program-by-far>.

<sup>10</sup> U.S. Citizenship and Immigration Services, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018 – September 30, 2019*, at 7 (Mar. 5, 2020), [https://www.uscis.gov/sites/default/files/reports-studies/Characteristics\\_of\\_Specialty\\_Occupation\\_Workers\\_H-1B\\_Fiscal\\_Year\\_2019.pdf](https://www.uscis.gov/sites/default/files/reports-studies/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf)

<sup>11</sup> Maari Zwick-Maitreyi et al., Equality Labs, *Caste in the United States: A Survey of Caste Among South Asian Americans*, 16 (2018) [https://static1.squarespace.com/static/58347d04beba9bb1e66df84c/t/5d9b4f9afbaef569c0a5c132/1570459664518/Caste\\_report\\_2018.pdf](https://static1.squarespace.com/static/58347d04beba9bb1e66df84c/t/5d9b4f9afbaef569c0a5c132/1570459664518/Caste_report_2018.pdf).

<sup>12</sup> *Id.* at 20.

<sup>13</sup> *Ibid.*

**JURISDICTION AND VENUE**

7. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1367(a). This action is authorized and instituted pursuant to Title VII, 42 U.S.C. § 2000e-5(f)(3), and the Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a.

8. This Court has supplemental jurisdiction over Plaintiff's state law claims under the FEHA pursuant to 28 U.S.C. § 1367. These claims constitute the same case and controversy raised in the claims under federal law. This action is also authorized and instituted pursuant to Cal. Gov't Code §§ 12930 (f) and (h), 12965(a).

9. The employment practices alleged to be unlawful were and are now being committed within the County of Santa Clara in the State of California, which is within the jurisdiction of the United States District Court for the Northern District of California. Venue is therefore proper in the United States District Court for the Northern District of California. 28 U.S.C. § 1391(b)(1)-(2); 42 U.S.C. Section 2000e-5(f)(3); Cal. Gov't Code § 12965(a).

10. Plaintiff has standing to bring this suit and has complied with all statutory prerequisites to maintain Title VII and FEHA claims.

11. John Doe filed a pre-complaint inquiry with DFEH on or about April 20, 2018, and a verified administrative complaint against Defendant Cisco on or about July 30, 2018. The charge was dually filed with the Equal Employment Opportunity Commission (EEOC). DFEH properly served the administrative complaint on Defendant Cisco on or about August 7, 2018. On or around October 9, 2018, Doe filed an amended administrative complaint against Defendants Cisco, Iyer, and Kompella. The amended administrative complaint was properly served on all named responding parties on or about October 9, 2018.

12. DFEH investigated Doe's dually filed EEOC-DFEH charge and complaint pursuant to Cal. Gov't Code §§ 12930(f) and 12963; Title VII, 42 U.S.C. § 2000e-8(b); and the EEOC-DFEH Worksharing Agreement.

13. Pursuant to Cal. Gov't Code § 12965(a), the DFEH convened a mandatory dispute resolution session on or about February 11, 2020. Settlement discussions were unsuccessful. The DFEH and Defendants entered consecutive tolling agreements to toll the statutory deadline for DFEH to file a

1 civil action to June 30, 2020. The EEOC issued a right to sue letter regarding the Complainant's federal  
2 claims on June 29, 2020, and DFEH files this action pursuant to the FEHA, Cal. Gov't Code §§  
3 12930(f)(1), (h), 12965(a); Title VII, 42 U.S.C. § 2000e-8(b); and the EEOC-DFEH Worksharing  
4 Agreement. All conditions precedent to the institution of this lawsuit have been fulfilled. The amount of  
5 damages sought by this complaint exceeds the minimum jurisdictional limits of this Court.

6 **INTRADISTRICT ASSIGNMENT**

7 14. This action is appropriate for assignment to the San Jose Division of this Court as the  
8 alleged unlawful practices were and are now being committed in Santa Clara County, which is within  
9 the jurisdiction of the San Jose Division.

10 **PARTIES**

11 **Plaintiff California Department of Fair Employment and Housing**

12 15. Plaintiff DFEH is the agency of the State of California charged with the administration,  
13 interpretation, investigation, and enforcement of the FEHA and Title VII, and is expressly authorized to  
14 bring this action by Cal. Gov't Code §§ 12930(f), (h), and 12965(a); and 42 U.S.C. § 2000e-5(f)(3).

15 16. Complainant John Doe is the person claiming to be aggrieved on whose behalf the  
16 DFEH files this civil action. Cal. Gov't Code §§ 12965(a), 12930(f) & (h); 42 U.S.C. §2000e(l).

17 17. At all relevant times, Complainant Doe was, and remains, an "employee" of  
18 Defendant Cisco within the meaning of Title VII and FEHA. 42 U.S.C. §§ 2000e(f), 2000e-2(a), 2000e-  
19 3(a); Cal. Gov't Code §§ 12926(c)-(d); 12940(a), (j), (k). On or around October 2015 to November  
20 2018, Doe worked as a Principal Engineer with Cisco in Santa Clara County, California. Since on or  
21 about December 2018, Doe has worked as a Principal Engineer with Cisco in Santa Clara County,  
22 California.

23 18. At all relevant times, Complainant Doe was, and remains, a "person" within the meaning  
24 of the FEHA. Cal. Gov't Code §§ 12925(d), 12940(h).

25 **Defendant Cisco Systems, Inc.**

26 19. Defendant Cisco (EEO-1 reporting number N14137) is a leading global high-tech firm  
27 founded in 1984. The company designs, manufactures, sells, and supports equipment for internet-based  
28 networking. It has approximately 75,900 employees worldwide and is publicly traded on NASDAQ. The

1 firm's EEO-1 reports places it in the communications equipment manufacturing industry (NAICS 3342).  
2 Within California, Cisco employs at least 18,281 employees at 19 establishments in 6 different  
3 metropolitan areas, including the corporate headquarters in San Jose.

4 20. At all relevant times, Defendant Cisco has continuously been and is now a California  
5 Corporation doing business in the State of California and the Cities of San Jose and Milpitas in Santa  
6 Clara County and has continuously had at least fifteen employees.

7 21. At all relevant times, Defendant Cisco has continuously been an employer engaged in an  
8 industry affecting commerce within the meaning of Title VII, 42 U.S.C. § 2000e(b), (g), and (h), and  
9 Cal. Gov't Code § 12926(d).

10 22. At all relevant times, Cisco contracted with and received federal and state funds from the  
11 United States and California governments.

12 **Defendant Sundar Iyer**

13 23. At all relevant times, Defendant Sundar Iyer was employed by Cisco as a "supervisor"  
14 within the meaning of FEHA. Cal. Gov't Code § 12926(t). DFEH is informed and believes that Iyer was  
15 a Distinguished Engineer with Cisco. Public records indicate Iyer resided in Palo Alto, California at the  
16 time of the events alleged herein.

17 24. At all relevant times, Defendant Iyer was the agent of Defendant Cisco and was acting  
18 within the scope and authority of such agency, and Defendant Iyer is jointly and severally responsible  
19 and liable to Complainant Doe for the damages alleged.

20 **Defendant Ramana Kompella**

21 25. At all relevant times, Defendant Ramana Kompella was employed by Cisco as a  
22 "supervisor" within the meaning of the FEHA. Cal. Gov't Code § 12926(t). DFEH is informed and  
23 believes that Kompella was a Principal Engineer with Cisco. Public records indicate Kompella resided  
24 in Cupertino, California at the time of the events alleged herein.

25 26. At all relevant times, Defendant Kompella was the agent of Defendant Cisco and was  
26 acting within the scope and authority of such agency, and Defendant Kompella is jointly and severally  
27 responsible and liable to Complainant Doe for the damages alleged.  
28

**STATEMENT OF CLAIMS**

27. Beginning in the November 1, 2016, Defendants Cisco, Iyer, and Kompella engaged in unlawful employment practices, in violation of 42 U.S.C. §§ 2000e-2(a), 2000e-3(a), and Cal. Gov't Code § 12940(a), (j), (h), and (k). These practices include but are not limited to the practices described below.

28. Complainant Doe's ancestry, national origin/ethnicity, and race/color is Dalit Indian. Doe has a darker complexion relative to other persons of non-Dalit Indian descent. Doe's religion is Hindu. As a Dalit, he also is known as being from the Untouchable or Scheduled Caste.

29. Doe has over 20 years of experience in the software development lifecycle process at startups and established companies. In or around September 2015, Iyer recruited and hired Doe as a Principal Engineer for Cisco because of his expertise and experience. As the head of the Cisco team, Iyer hired and supervised Doe, having the authority to control his day-to-day assignments, discipline, discharge, direct, and transfer Doe. Upon information and belief, Iyer is Brahmin.

30. In or around October 2016, two of Doe's colleagues told Doe that Iyer informed them that Doe was from the "Scheduled Caste" (Dalit) and enrolled in the Indian Institute of Technology (IIT) through affirmative action. Iyer was aware of Doe's caste because they attended IIT at the same time.

31. In or around November 1, 2016, Doe confronted Iyer about disclosing Doe's caste to other Cisco employees. Iyer asked Doe who claimed he made such a comment. After Doe shared the names of his colleagues, Iyer denied the comment and stated Doe's colleagues were not telling the truth.

32. In or around November 21, 2016, Doe contacted Cisco's human resources (HR) and Employee Relations to file a discrimination complaint against Iyer.

33. Six days after Doe's first contact with Cisco's HR and employee relations, Iyer told Doe he was taking away Doe's role as lead on two technologies.

34. On or around November 28, 2016, Iyer promoted two of Doe's colleagues to head engineering roles, one of whom was Defendant Kompella. Kompella was made Head of Southbound Engineering. Upon information and belief, Kompella is Brahmin or at least of a higher caste than Dalit. With this new title, Defendant Kompella received a raise of approximately 15% or more. As the Head of

1 Southbound Engineering, Kompella had the ability to direct the day-to-day assignments and recommend  
2 employment actions for those on his team, including Doe.

3 35. On or around November 28, 2016, Iyer also removed team members from the third  
4 technology Doe was working on and did not formally integrate the third technology into either team  
5 headed by the two new Heads of Engineering. As a result of these changes, Doe's role was reduced to  
6 that of a system architect as an independent contributor, and he was isolated from all his colleagues.

7 36. On or around December 8, 2016, Doe submitted a written complaint about Iyer's  
8 disclosure of Doe's caste, Doe's complaint to Iyer, and Iyer's retaliatory employment actions, including  
9 the sudden changes to Doe's job duties. He also complained that Iyer made discriminatory comments to  
10 a colleague and about a job applicant because of the applicant's religion (Muslim).

11 37. Cisco's Employee Relations Manager, Brenda Davis, conducted the investigation into  
12 Doe's December 2016 complaint. Davis' internal investigation notes revealed that Iyer admitted that he  
13 told Doe's colleagues that Doe was not on the "main list." Among those from India, it is commonly  
14 known that students not on the main list are admitted to IIT through an affirmative action program  
15 designed for those from the "Scheduled Castes" or those outside the caste system. Therefore, stating that  
16 someone is not on the "main list" effectively reveals their caste. Despite this, Davis took no further  
17 action and failed to even contact relevant witnesses or Doe.

18 38. Cisco Employee Relations staff, including Davis, also indicated that caste discrimination  
19 was not unlawful. As a result, Davis did not recommend any corrective action against Iyer. Iyer also  
20 admitted that he made a joke about Doe's co-worker's religion and talked about an applicant's Muslim-  
21 related appearance. Still, Davis did not recommend any corrective action. On or around February 2,  
22 2017, Davis closed her investigation finding all of Doe's complaints were unsubstantiated.

23 39. Iyer's retaliatory efforts continued. He further isolated Doe from the team when he  
24 disparaged Doe to other employees, misrepresented that Doe did not perform his job adequately, and  
25 told Doe's team members that they should avoid working with him.

26 40. On or around March 2, 2017, Doe sought review of Davis' investigation findings. After  
27 repeated attempts to have Cisco review Davis' findings, HR official Tara Powell finally reopened the  
28 investigation on or around April 25, 2017. Powell re-interviewed one of the employees to whom Iyer

1 made the comment about Doe's caste in or around October 2015. The employee stated that he learned  
2 about Doe's caste but refused to tell Powell how he knew, noting that he did not want to say anything  
3 about Iyer because they had known each other for a long time. He also stated that he thought Doe was  
4 being treated unfairly and that he was very technically able but was being excluded at work. Powell did  
5 not attempt to contact for an interview the other employee who witnessed Iyer's disclosure of Doe's  
6 caste. Two additional witnesses told Powell that they feared losing their jobs or otherwise being  
7 retaliated against for speaking out against Iyer. One of those employees also told Powell that he thought  
8 Doe was very competent and asked appropriate questions, but that Iyer was setting Doe up to push him  
9 out of the company.

10 41. Powell's investigation also uncovered a spreadsheet that showed anticipated yearly  
11 raises, bonuses, and restricted stock unit awards that Iyer had promised Doe. These raises, bonuses, and  
12 awards never materialized when promised. But Powell also found that four out of the eight other team  
13 members received raises in or around October 2016.

14 42. In or around August 2017, Powell concluded she could not substantiate any caste-based  
15 or related discrimination or retaliation against Doe. Powell, however, determined that Iyer mocked  
16 another employee's religion, and thus violated Cisco's Code of Conduct. Still, no immediate corrective  
17 action was taken.

18 43. Despite Doe's repeated attempts to bring the caste-based and related discrimination,  
19 harassment, and retaliation to Defendant Cisco's attention in 2016 and 2017, Cisco failed to recognize  
20 casteism as a form of unlawful religion-, ancestry-, national origin/ethnicity-, and race/color-based  
21 discrimination or harassment under state or federal law and failed to conduct a thorough investigation.  
22 While the investigation confirmed Doe was increasingly isolated and treated unfairly by Iyer and  
23 Kompella, Cisco failed to take timely and appropriate corrective action. Moreover, Cisco's training was  
24 deficient in that it did not adequately train managerial employees on workplace discrimination,  
25 harassment, and retaliation, nor did the company prevent, deter, remedy, or monitor casteism in its  
26 workforce.

27 44. On or around February 26, 2018, Kompella became the Interim Head of Engineering for  
28 Cisco's team after Iyer stepped down. In his new role, Kompella supervised Doe and continued to

discriminate, harass, and retaliate against Doe by, for example, giving him assignments that were impossible to complete under the circumstances. Kompella also began requiring Doe to submit weekly status reports to him and Senior Vice President/General Manager Tom Edsall.

45. On or around May 21, 2018, Rajeev Gupta took over from Kompella and became the Director of Engineering. In that role, Gupta supervised Doe.

46. Two months later, in or around July 2018, Doe applied for the position of Director of Research and Development Operations with Gupta. According to Gupta's interview notes, he ranked Doe as "below average" in six out of eight categories and as "meeting requirements" in the remaining two categories. But Gupta's assessment of Doe was improperly influenced by Iyer's retaliatory employment actions. Gupta specifically cited Doe's lead role being taken away and his job reduced to that of an independent contributor in November 2016. Gupta's notes also reflected Iyer's retaliatory criticisms about Doe's work product, social skills, and insubordination. Doe did not get the position.

47. The effect of the unlawful employment practices complained of above was to deprive Doe of equal employment opportunities, and otherwise adversely affect his status as employees, because of religion, ancestry, national origin/ethnicity, and race/color.

48. The unlawful employment practices complained of above were intentional.

49. The unlawful employment practices complained of above were done with malice or with reckless indifference to Doe's federally and state-protected civil rights.

#### **FIRST CAUSE OF ACTION**

#### **Violation of Title VII: Discrimination on the Basis of Religion, Ancestry, National Origin/Ethnicity, and Race/Color (42 U.S.C. § 2000e-2(a)) Against Defendant Cisco**

50. The DFEH incorporates and realleges all previous allegations as if fully set forth herein.

51. Title VII provides it is an unlawful employment practice for an employer to discriminate against an employee with respect to his compensation, terms, conditions, or privileges of employment, or to limit, segregate or classify the employee in any way that would deprive or tend to deprive him of employment opportunities or otherwise adversely affect his employment status on the basis of his religion, ancestry, national origin/ethnicity, and race/color. 42 U.S.C. § 2000e-2(a).

52. As alleged above, Cisco discriminated against Doe by subjecting him to disparate terms and conditions of employment based on his religion, ancestry, national origin/ethnicity, and race/color. Among other actions, Cisco reassigned Doe's job duties and isolated him from his colleagues, denied him a raise, denied him work opportunities that would have led to a raise, denied him a promotion to the Head of Engineering, and denied him a promotion to the Director of Research and Development Operations.

53. The alleged discriminatory comments and conduct constitute unlawful discrimination for which Defendant Cisco is liable under 42 U.S.C. § 2000e-2(a).

54. As a direct result of these unlawful employment practices, Doe suffered economic injuries including, but not limited to, lost wages and other compensation, in an amount to be proven at trial.

55. As a direct result of these unlawful employment practices, Doe suffered emotional distress including, but not limited to, emotional pain, suffering, mental anguish, humiliation, and hopelessness, in an amount to be proven at trial.

56. Defendant Cisco's actions were willful, malicious, fraudulent, and oppressive, and were committed with the wrongful intent to injure Doe and in conscious disregard of his rights.

57. Defendant Cisco engaged in, and by its refusal to comply with the law, demonstrated it will continue to engage in, unlawful employment discrimination described herein unless it is enjoined pursuant Title VII. Unless Defendant Cisco is enjoined from failing or refusing to comply with the mandates of Title VII, Doe and other persons' rights to seek or hold employment free of unlawful discrimination will continue to be violated.

58. Plaintiff lacks any plain, speedy, and adequate remedy at law to prevent such harm, injury, and loss that is the subject of this complaint and will continue until this Court enjoins the unlawful conduct and grants other injunctive relief as prayed for herein.

///

///

///

///

**SECOND CAUSE OF ACTION**

**Violation of Title VII: Harassment on the Basis of Religion, Ancestry, National Origin/Ethnicity,  
and Race/Color  
(42 U.S.C. § 2000e-2(a))  
Against Defendant Cisco**

59. The DFEH incorporates and realleges all previous allegations as if fully set forth herein.

60. Title VII prohibits harassment as a form of discrimination when it creates a hostile work environment. Employers are liable for the harassment of their supervisors. 42 U.S.C. § 2000e-2(a).

61. As alleged above, as supervisors for Cisco's team, Defendants Iyer and Kompella subjected Doe to offensive comments and other misconduct based on his caste, which includes his religion, ancestry, national origin/ethnicity, and race/color, so severe or pervasive that it created a hostile work environment. Among other things, Iyer and Kompella's comments and conduct include revealing Doe's caste to his colleagues, disparaging him to the team, isolating him from the rest of the team, reducing his role to that of an independent contributor, giving him assignments that were impossible to complete under the circumstances, and requiring him to submit weekly status reports. Such a work environment where a stigmatizing personal characteristic such as caste is publicized and used to subjugate an individual in order to maintain a centuries-old hierarchy is hostile, intimidating, offensive, oppressive, and abusive. Other employees corroborated that Doe was isolated from the rest of the team and that Iyer and Kompella were responsible for it. These were observations Cisco was made aware of during its internal investigations. As evidenced by Doe's repeated internal complaints, he in fact considered the work environment to be hostile, intimidating, offensive, oppressive, and abusive.

62. As a direct result of these unlawful employment practices, Doe suffered economic injuries including, but not limited to, lost wages and other compensation, in an amount to be proven at trial.

63. As a direct result of these unlawful employment practices, Doe suffered emotional distress including, but not limited to, emotional pain, suffering, mental anguish, humiliation, and hopelessness, in an amount to be proven at trial.

64. Defendant Cisco's actions were willful, malicious, fraudulent, and oppressive, and were committed with the wrongful intent to injure Doe and in conscious disregard of his rights.

65. Defendant Cisco engaged in, and by its refusal to comply with the law, demonstrated it will continue to engage in, unlawful employment discrimination described herein unless it is enjoined pursuant to Title VII. Unless Defendant Cisco is enjoined from failing or refusing to comply with the mandates of Title VII, Doe and other persons' rights to seek or hold employment free of unlawful discrimination will continue to be violated.

66. Plaintiff DFEH lacks any plain, speedy, and adequate remedy at law to prevent such harm, injury, and loss that is the subject of this complaint and will continue until this Court enjoins the unlawful conduct and grants other injunctive relief as prayed for herein.

**THIRD CAUSE OF ACTION**  
**Violation of Title VII: Retaliation**  
**(42 U.S.C. § 2000e-3(a))**  
**Against Defendant Cisco**

67. The DFEH incorporates and realleges all previous allegations as if fully set forth herein.

68. Title VII prohibits employers from discriminating against an employee because the employee opposed any practice made unlawful by Title VII. Employers are liable for the retaliatory conduct of their supervisors. *Id.* § 2000e-3(a).

69. As alleged above, as supervisors for Cisco, Defendants Iyer and Kompella retaliated against Doe for opposing their discriminatory and harassing conduct by confronting Iyer and filing internal discrimination complaints. Among other things, Doe engaged in protected activity by confronting Iyer about disclosing his caste to colleagues and by repeatedly trying to bring the caste-based and related discrimination and harassment to Cisco's attention. Immediately afterwards, Iyer and Kompella subjected Doe to adverse employment actions including reassigning his job duties, isolating him from colleagues, giving him assignments that were impossible to complete under the circumstances, denying him work opportunities that could have led to a raise, denying him a raise, and denying him promotions. Cisco aided the retaliation.

70. As a direct result of these unlawful employment practices, Doe suffered economic injuries including, but not limited to, lost wages and other compensation, in an amount to be proven at trial.

71. As a direct result of these unlawful employment practices, Doe suffered emotional distress including, but not limited to, emotional pain, suffering, mental anguish, humiliation, and hopelessness, in an amount to be proven at trial.

72. Defendant Cisco's actions were willful, malicious, fraudulent, and oppressive, and were committed with the wrongful intent to injure Doe and in conscious disregard of his rights.

73. Defendant Cisco engaged in, and by its refusal to comply with the law, demonstrated it will continue to engage in, unlawful employment discrimination described herein unless it is enjoined pursuant to Title VII. Unless Defendant Cisco is enjoined from failing or refusing to comply with the mandates of Title VII, Doe and other persons' rights to seek or hold employment free of unlawful discrimination will continue to be violated.

74. Plaintiff DFEH lacks any plain, speedy, and adequate remedy at law to prevent such harm, injury, and loss that is the subject of this complaint and will continue until this Court enjoins the unlawful conduct and grants other injunctive relief as prayed for herein.

**FOURTH CAUSE OF ACTION**

**Violation of FEHA: Discrimination on the Basis of Religion, Ancestry, National Origin/Ethnicity,  
and Race/Color  
(Cal. Gov't Code § 12940(a))  
Against Defendant Cisco**

75. The DFEH incorporates and realleges all previous allegations as if fully set forth herein.

76. The FEHA guarantees all employees a workplace free from unlawful discrimination and harassment based on the employee's religion, ancestry, national origin/ethnicity, and race/color. Cal. Gov't Code § 12940(a).

77. Cisco subjected Doe to discriminatory comments and conduct because of his religion, ancestry, national origin/ethnicity, and race/color, as alleged above and in the First Cause of Action.

78. The alleged discriminatory comments and conduct constitute unlawful discrimination for which Defendant Cisco is liable under Cal. Gov't Code § 12940(a).

79. As a direct result of these unlawful employment practices, Doe suffered economic injuries including, but not limited to, lost wages and other compensation, in an amount to be proven at trial.

80. As a direct result of these unlawful employment practices, Doe suffered emotional distress including, but not limited to, emotional pain, suffering, mental anguish, humiliation, and hopelessness, in an amount to be proven at trial.

81. Defendant Cisco's actions were willful, malicious, fraudulent, and oppressive, and were committed with the wrongful intent to injure Doe and in conscious disregard of his rights.

82. Defendant Cisco engaged in, and by its refusal to comply with the law, demonstrated it will continue to engage in, the unlawful employment discrimination described herein unless it is enjoined pursuant to the FEHA. Unless Defendant Cisco is enjoined from failing or refusing to comply with the mandates of the FEHA, Doe and other persons' rights to seek or hold employment free of unlawful discrimination will continue to be violated.

83. Plaintiff DFEH lacks any plain, speedy, and adequate remedy at law to prevent such harm, injury, and loss that is the subject of this complaint and will continue until this Court enjoins the unlawful conduct and grants other injunctive relief as prayed for herein.

**FIFTH CAUSE OF ACTION**  
**Violation of FEHA: Harassment on the Basis of Religion, Ancestry, National Origin/Ethnicity, and Race/Color**  
**(Cal. Gov't Code § 12940(j))**  
**Against All Defendants**

84. The DFEH incorporates and realleges all previous allegations as if fully set forth herein.

85. The FEHA prohibits harassment based on the employee's protected characteristics including, but not limited to, their caste, which includes religion, ancestry, national origin/ethnicity, and race/color. Cal. Gov't Code § 12940(j). Employers are liable for the harassment of their supervisors. *Id.* (j)(1). Employees and supervisors are liable for their own harassing conduct. *Id.* (j)(3).

86. As supervisors for Cisco, Defendants Iyer and Kompella subjected Doe to offensive comments and other misconduct based on his caste, which includes his religion, ancestry, national origin/ethnicity, and race/color, so severe or pervasive that it created a hostile work environment, as alleged above and in the Second Cause of Action.

87. Defendants Iyer and Kompella are individually liable for their own harassing conduct in violation of the FEHA.

1 88. Because Defendants Iyer and Kompella were supervisors within the meaning of the  
2 FEHA, Defendant Cisco is liable for their harassing conduct. Defendant Cisco knew or should have  
3 known of the conduct as a result of Doe's internal complaints and is liable for its failure to take  
4 immediate and appropriate corrective action.

5 89. As a direct result of these unlawful employment practices, Doe suffered economic  
6 injuries including, but not limited to, lost wages and other compensation, in an amount to be proven at  
7 trial.

8 90. As a direct result of these unlawful employment practices, Doe suffered emotional  
9 distress including, but not limited to, emotional pain, suffering, mental anguish, humiliation, and  
10 hopelessness, in an amount to be proven at trial.

11 91. Defendant Cisco's actions were willful, malicious, fraudulent, and oppressive, and were  
12 committed with the wrongful intent to injure Doe and in conscious disregard of his rights.

13 92. Defendant Cisco engaged in, and by its refusal to comply with the law, demonstrated it  
14 will continue to engage in, the unlawful employment discrimination described herein unless it is  
15 enjoined pursuant to the FEHA. Unless Defendant Cisco is enjoined from failing or refusing to comply  
16 with the mandates of the FEHA, Doe and other persons' rights to seek or hold employment free of  
17 unlawful discrimination will continue to be violated.

18 93. Plaintiff DFEH lacks any plain, speedy, and adequate remedy at law to prevent such  
19 harm, injury, and loss that is the subject of this complaint and will continue until this Court enjoins the  
20 unlawful conduct and grants other injunctive relief as prayed for herein.

21 **SIXTH CAUSE OF ACTION**  
22 **Violation of FEHA: Retaliation**  
23 **(Cal. Gov't Code § 12940(h))**  
24 **Against Defendant Cisco**

25 94. The DFEH incorporates and realleges all previous allegations as if fully set forth herein.

26 95. California law also guarantees each employees' right to a workplace and business  
27 environment free from unlawful retaliation because the employee opposed discriminatory or harassing  
28 practices that are unlawful under the FEHA. Employers are liable for the retaliatory conduct of  
supervisors. *Id.* § 12940(h).

96. As supervisors for Cisco, Defendants Iyer and Kompella retaliated against Doe for opposing their discriminatory and harassing conduct by confronting Iyer and filing internal discrimination complaints and Cisco aided the retaliation, as alleged above and in the Third Cause of Action.

97. Defendant Cisco is liable for the retaliatory conduct of Defendants Iyer and Kompella.

98. As a direct result of these unlawful employment practices, Doe suffered economic injuries including, but not limited to, lost wages and other compensation, in an amount to be proven at trial.

99. As a direct result of these unlawful employment practices, Doe suffered emotional distress including, but not limited to, emotional pain, suffering, mental anguish, humiliation, and hopelessness, in an amount to be proven at trial.

100. Defendant Cisco's actions were willful, malicious, fraudulent, and oppressive, and were committed with the wrongful intent to injure Doe and in conscious disregard of his rights.

101. Defendant Cisco engaged in, and by its refusal to comply with the law, demonstrated it will continue to engage in, the unlawful employment discrimination described herein unless it is enjoined pursuant to the FEHA. Unless Defendant Cisco is enjoined from failing or refusing to comply with the mandates of the FEHA, Doe and other persons' rights to seek or hold employment free of unlawful discrimination will continue to be violated.

102. Plaintiff DFEH lacks any plain, speedy, and adequate remedy at law to prevent such harm, injury, and loss that is the subject of this complaint and will continue until this Court enjoins the unlawful conduct and grants other injunctive relief as prayed for herein.

**SEVENTH CAUSE OF ACTION**

**Violation of FEHA: Failure to Take All Reasonable Steps to Prevent Discrimination, Harassment, and Retaliation  
(Cal. Gov't Code § 12940(k))  
Against Defendant Cisco**

103. The DFEH incorporates and realleges all previous allegations as if fully set forth herein.

104. California Government Code section 12940(k) provides that it is an unlawful employment practice for an employer to fail to take all reasonable steps necessary to prevent discrimination, harassment, and retaliation from occurring. Employers have the affirmative duty to take

all reasonable steps to prevent and promptly correct discriminatory, harassing, and retaliatory conduct. Cal. Code Regs. tit. 2, § 11023(a). Cisco's conduct, as described above, constitutes a failure to take all reasonable steps necessary to prevent discrimination, harassment, and retaliation in violation of Cal. Gov't Code § 12940(k).

105. An actionable claim for violation of California Government Code section 12940(k) on behalf of a complainant exists when an underlying claim of discrimination, harassment, or retaliation is established. Cal. Code Regs. tit. 2, § 11023(a)(2).

106. As alleged above, Defendant Cisco failed to take all reasonable steps necessary to prevent discrimination, harassment, and retaliation from occurring within its South Asian Indian workforce. Among other things, Defendant Cisco failed to develop anti-discrimination and anti-harassment policies and practices that recognize and prohibit caste discrimination as a form of unlawful discrimination under state and federal law. Defendant Cisco also failed to provide appropriate training to managers, supervisors employees, human resources, and employee relations personnel on how to identify, investigate, remediate, and prevent caste-based discrimination and harassment, or retaliation against employees or persons who oppose discriminatory and harassing practices that are unlawful under the FEHA.

107. Defendant Cisco failed to prevent discrimination and harassment by its managers and supervisors against Doe because of his caste.

108. Defendant Cisco failed to prevent retaliation by its managers and supervisors against Doe because he opposed discriminatory and harassing practices that are unlawful under the FEHA.

109. As a direct result of Cisco's failures, Doe was subjected to unlawful discrimination, harassment, and retaliation by Cisco's managers and supervisors, suffering economic injuries including, but not limited to, lost wages and other compensation, in an amount to be proven at trial.

110. As a direct result of Cisco's failures, Doe was subjected to unlawful discrimination, harassment, and retaliation by Cisco's managers and supervisors, suffering emotional distress including, but not limited to, emotional pain, suffering, mental anguish, humiliation, and hopelessness, in an amount to be proven at trial.

111. Defendant Cisco's actions were willful, malicious, fraudulent, and oppressive, and were committed with the wrongful intent to injure Doe and in conscious disregard of his rights.

112. Defendant Cisco engaged in, and by its refusal to comply with the law, demonstrated it will continue to engage in, the unlawful employment discrimination described herein unless it is enjoined pursuant to the FEHA. Unless Defendant Cisco is enjoined from failing or refusing to comply with the mandates of the FEHA, Doe and other persons' rights to seek or hold employment free of unlawful discrimination will continue to be violated.

113. Plaintiff DFEH lacks any plain, speedy, and adequate remedy at law to prevent such harm, injury, and loss that is the subject of this complaint and will continue until this Court enjoins the unlawful conduct and grants other injunctive relief as prayed for herein.

**EIGHTH CAUSE OF ACTION**

**Violation of FEHA: Failure to Take All Reasonable Steps to Prevent Discrimination, Harassment, and Retaliation  
(Cal. Gov't Code § 12940(k))  
Against Defendant Cisco**

114. The DFEH incorporates and realleges all previous allegations as if fully set forth herein.

115. In an exercise of the DFEH's police powers, the DFEH may independently seek additional remedies for a violation of Cal. Gov't Code § 12940(k). Cal. Code Regs. tit. 2, § 11023(a)(3). As the agency of the State of California charged with the administration, interpretation, investigation, and enforcement of FEHA, the DFEH brings this claim in the name of the DFEH on behalf of all Indian persons who are or are perceived to be Dalit, of lower castes, or who fall outside the caste system, who are employed by or may seek employment with Cisco in the future.

116. As alleged above, Defendant Cisco failed to take all reasonable steps necessary to prevent discrimination, harassment, and retaliation from occurring within its South Asian Indian workforce. Among other things, Defendant Cisco failed to develop anti-discrimination and anti-harassment policies and practices that recognize and prohibit caste discrimination as a form of unlawful discrimination under state and federal law. Defendant Cisco also failed to provide appropriate training to managers, supervisors employees, human resources, and employee relations personnel on how to identify, investigate, remediate, and prevent caste-based discrimination and harassment, or retaliation against

employees or persons who oppose discriminatory and harassing practices that are unlawful under the FEHA.

117. Cisco's failure to take any reasonable steps to prevent, deter, remedy, or monitor casteism and related violations in its workforce exposes a significant portion of its South Asian Indian workforce to the risk of discrimination, harassment, and retaliation on the basis of their caste and related characteristics.

118. Defendant Cisco engaged in, and by its refusal to comply with the law, demonstrated it will continue to engage in, the unlawful employment discrimination described herein unless it is enjoined pursuant to the FEHA. Unless Defendant Cisco is enjoined from failing or refusing to comply with the mandates of the FEHA, Doe and other persons' rights to seek or hold employment free of unlawful discrimination will continue to be violated.

119. Plaintiff DFEH lacks any plain, speedy, and adequate remedy at law to prevent such harm, injury, and loss that is the subject of this complaint and will continue until this Court enjoins the unlawful conduct and grants other injunctive relief as prayed for herein.

#### **PRAYER FOR RELIEF**

WHEREFORE, the DFEH respectfully requests that this Court:

1. Grant a permanent injunction enjoining Defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, from engaging in discrimination and harassment based on religion, ancestry, national origin/ethnicity, and race/color.

2. Grant a permanent injunction enjoining Defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, from engaging in retaliation.

3. Order Defendants to institute and carry out policies, practices, and programs that provide equal employment opportunities for individuals regardless of their religion, ancestry, national origin/ethnicity, and race/color, and that eradicate the effects of their past and present unlawful employment practices

4. Order Defendants to make Doe whole, by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other injunctive relief necessary to eradicate the effects of Defendants' unlawful employment practices.

5. Order Defendants to make Doe whole, by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described herein, in amounts to be determined at trial.

6. Order Defendants to make Doe whole, by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices complained of herein, including losses such as emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation, in amounts to be determined at trial.

7. Order Defendants to pay Doe punitive damages for their malicious and/or reckless conduct described herein, in amounts to be determined at trial.

8. Grant such further relief as the Court deems necessary and proper in the public interest.

9. Award the DFEH its costs of this action, including reasonable attorneys' fees, as provided by statute.


**JURY TRIAL DEMAND**

The DFEH requests a jury trial on all questions of fact raised by its complaint.

Dated: June 30, 2020

CALIFORNIA DEPARTMENT OF FAIR  
EMPLOYMENT AND HOUSING

By:

  
JEANETTE HAWN  
Staff Counsel  
Attorneys for the DFEH

## CIVIL COVER SHEET

Case 2:22-cv-01656-DAD-JDP Document 1-2 Filed 09/20/22 Page 1 of 1

The JS 44 civil cover sheet and instructions are to be used by the filer to provide information to the court and the public. It is not to be used for filing and is not to be filed with the court. It is required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

## I. (a) PLAINTIFFS

Hindu American Foundation, Inc., a Florida Not For Profit Corporation.

(b) County of Residence of First Listed Plaintiff District of Columbia County  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Narayan Travelstead, P.C.  
Timothy C. Travelstead (SBN 215260) | Scott Ku (SBN 314970)  
7901 Stoneridge Drive, Suite 230, Pleasanton, CA 94588 650-403-0150

## DEFENDANTS

Kevin Kish, in his official capacity as Director of the California Civil Rights Department (formerly known as the Department of Fair Employment and Housing).

County of Residence of First Listed Defendant Sacramento County  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                                   | DEF                                   |   | PTF                                   | DEF                                   |
|---|---------------------------------------|---------------------------------------|---|---------------------------------------|---------------------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1            | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4            | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State                | <input checked="" type="checkbox"/> 2 | <input type="checkbox"/> 2            | Incorporated and Principal Place of Business In Another State | <input checked="" type="checkbox"/> 5 | <input type="checkbox"/> 5            |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3            | Foreign Nation  | <input type="checkbox"/> 6            | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>INTELLECTUAL PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

## V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
42 U.S.C. § 1983

## VI. CAUSE OF ACTION

Brief description of cause: Free Exercise, Due Process, and Equal Protection

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE  
September 20, 2022

SIGNATURE OF ATTORNEY OF RECORD

*Scott Ku*, Attorney for Hindu American Foundation Inc.

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

HINDU AMERICAN FOUNDATION,  
INC.,

Plaintiff,

v.

KEVIN KISH,

Defendant.

No. 2:22-cv-01656-DAD-JDP

ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS

(Doc. No. 8)

This matter is before the court on defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) on the grounds that plaintiff lacks standing and under Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiff's complaint fails to state a claim upon which relief can be granted. (Doc. No. 8.) On August 24, 2023, the court took the matter under submission pursuant to Local Rule 230(g). (Doc. No. 19.) For the reasons explained below, the court will grant defendant's motion to dismiss, in part.

**BACKGROUND**

On September 20, 2022, plaintiff Hindu American Foundation, Inc. initiated this action seeking declaratory and injunctive relief against Kevin Kish, in his official capacity as the director of the California Civil Rights Department ("Department"), for allegedly violating the constitutional rights of all Hindu Americans. (Doc. No. 1.)

////

1 In its complaint, plaintiff alleges as follows. The Department is pursuing enforcement  
 2 actions brought under the California Fair Employment and Housing Act (“FEHA”) that are  
 3 wrongly asserting “that a caste system and caste-based discrimination are integral parts of Hindu  
 4 teachings and practices.” (*Id.* at 2.) In those enforcement actions, the Department purportedly  
 5 “alleges that a caste system is ‘a strict Hindu social and religious hierarchy,’ which requires  
 6 discrimination by ‘social custom and legal mandate’ and that Hindu Americans, therefore, adhere  
 7 to this strict and discriminatory religious hierarchy in violation of the FEHA.” (*Id.*) According to  
 8 plaintiff, it is “the largest and most respected Hindu educational and advocacy institution in North  
 9 America” and it has consistently maintained throughout its history that a caste system or  
 10 discrimination based on caste is not a legitimate part of Hindu beliefs, teachings, or practices;  
 11 vehemently opposes all types of discrimination; and “takes great exception to the State of  
 12 California defaming and demeaning all of Hinduism by attempting to conflate a discriminatory  
 13 caste system with the Hindu religion.” (*Id.*) Plaintiff specifically identifies only one enforcement  
 14 action that the Department initiated in the Santa Clara County Superior Court.<sup>1</sup> (*Id.* at ¶ 9.)

15 Plaintiff also alleges that through its enforcement action the Department is seeking to  
 16 “adopt a legal definition of Hinduism that incorrectly includes caste, a caste system and caste-  
 17 based discrimination.” (*Id.* at ¶ 13.) In doing so, the Department is “attempting to define  
 18 Hinduism against the beliefs of an overwhelming number of its own adherents” and “in direct  
 19 violation of the constitutional right[s] . . . of all Hindu Americans.” (*Id.* at ¶¶ 14–15.) In fact,  
 20 according to plaintiff, by wrongly seeking to define Hinduism to include a caste system, the  
 21 Department is encouraging discrimination on the basis of caste because employers could be  
 22 required, in accordance with state and federal law, to accommodate a religious belief that  
 23

---

24 <sup>1</sup> Plaintiff purports to attach a copy of the Department’s complaint filed in the Santa Clara  
 25 County Superior Court as Exhibit A to its complaint in this action, but the Exhibit A attached is  
 26 actually a complaint filed by the Department in the United States District Court for the Northern  
 27 District of California. (Doc. Nos. 1 at ¶ 9; 1-1.) The attached federal complaint was brought  
 28 against Cisco Systems, Inc. (“Cisco”) as well as two individual supervisors and alleges unlawful  
 employment practices on the bases of religion, ancestry, national origin/ethnicity, and race/color.  
 (Doc. No. 1-1 at ¶ 1.) The correct complaint that was filed in Santa Clara County Superior Court  
 is included in defendant’s unopposed request for judicial notice, addressed below. (Doc. No. 10.)

embraces caste discrimination. (*Id.* at ¶¶ 16–22.) The result, plaintiff alleges, is that employers “might arguably be required to accommodate” employee requests to avoid working with, being supervised by, or supervising a person perceived to be of the “wrong” caste. (*Id.* at ¶¶ 21–22.) Thus, according to plaintiff, by “wrongly tying Hindu beliefs and practices to the abhorrent practice of caste-discrimination” the Department is undermining the laudable goal of stopping caste-based discrimination while also violating the constitutional rights of all Hindu Americans. (*Id.* at 3.)

Based on these allegations, plaintiff brings three claims against defendant under 42 U.S.C. § 1983 for: (1) violation of the Free Exercise Clause of the First Amendment; (2) denial of procedural due process (without reference to a provision of the U.S. Constitution); and (3) violation of the Equal Protection Clause of the Fourteenth Amendment. (Doc. No. 1 at ¶¶ 23–47.) As to each of its three claims, plaintiff alleges that it has “associational standing to bring this claim on behalf of its Hindu American members.” (*Id.* at ¶¶ 24, 32, 43.) In terms of relief, plaintiff seeks an order (i) declaring that the Department’s actions, as described in its complaint, violate the First Amendment, due process, and equal protection rights of Hindu Americans, and (ii) enjoining the Department from: (a) “engaging in any act or practice that seeks to define Hinduism as including a caste system or any other belief or practice”; (b) “bringing any religious discrimination action based on the premise that Hindu belief and practice includes a caste system”; and (c) “ascribing religious or moral beliefs or practices to persons or groups who expressly disclaim any such beliefs or practices.” (*Id.* at 12.)

On February 2, 2023, defendant filed a motion to dismiss plaintiff’s complaint pursuant to Rules 12(b)(1) and 12(b)(6) and a request for judicial notice. (Doc. Nos. 8, 10.) On June 29, 2023, plaintiff filed its opposition to defendant’s pending motion and its own request for judicial notice. (Doc. No. 15, 16.) Defendant filed his reply on August 4, 2023. (Doc. No. 18.)

### REQUESTS FOR JUDICIAL NOTICE

Both defendant and plaintiff filed unopposed requests for judicial notice in support of their motion to dismiss and opposition brief, respectively. (Doc. Nos. 10, 16.)

////

1 “Judicial notice under Rule 201 permits a court to notice an adjudicative fact if it is ‘not  
2 subject to reasonable dispute.’” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th  
3 Cir. 2018) (quoting Fed. R. Evid. 201(b)). “A fact is ‘not subject to reasonable dispute’ if it is  
4 ‘generally known,’ or ‘can be accurately and readily determined from sources whose accuracy  
5 cannot reasonably be questioned.’” *Id.* (quoting Fed. R. Evid. 201(b)(1)–(2)). The court “must  
6 take judicial notice if a party requests it and the court is supplied with the necessary information.”  
7 Fed. R. Evid. 201(c)(2).

8 In defendant’s unopposed request for judicial notice, he requests that the court take notice  
9 of the following five documents: (1) the Department’s state court complaint against Cisco  
10 Systems, Inc., and of its two supervisors (collectively “Cisco”), which was filed in the Santa  
11 Clara County Superior Court on October 16, 2020 (*CRD v. Cisco Systems, Inc., et al.*, Case No.  
12 20-cv-372366) (“Santa Clara action”), and is referenced in plaintiff’s complaint (Doc. No. 1 at ¶  
13 9); (2) plaintiff’s motion to intervene and its proposed complaint in intervention, which were filed  
14 in the Santa Clara action on January 7, 2021; (3) plaintiff’s filed IRS Form 990 for Tax Year 2019  
15 as published by the IRS (retrieved from the IRS’s website on January 16, 2023); (4) plaintiff’s  
16 filed IRS Form 990 for Tax Year 2020 as published by the IRS (retrieved from the IRS’s website  
17 on January 16, 2023); and (5) plaintiff’s filed IRS Form 990 for Tax Year 2021 as published by  
18 the IRS (retrieved from the IRS’s website on January 16, 2023). (Doc. No. 10.)

19 In plaintiff’s unopposed request for judicial notice, it requests that the court take notice of  
20 the following three documents: (1) non-party Catholic League’s filed IRS Form 990 for Tax Year  
21 2019 as published by the IRS (retrieved from the IRS’s website on June 28, 2023); (2) the IRS’s  
22 instructions for Form 990 Return of Organization Exempt Form Income Tax for Tax Year 2019,  
23 which are posted on the IRS’s website (retrieved from the IRS’s website on June 28, 2023); and  
24 (3) the IRS’s instructions for Form 990 Return of Organization Exempt Form Income Tax for Tax  
25 Year 2022, which are posted on the IRS’s website (retrieved from the IRS’s website on June 28,  
26 2023). (Doc. No. 16.)

27 The court will grant both defendant’s and plaintiff’s unopposed requests to notice all of  
28 the documents described above, which are properly the subject of judicial notice as public

1 records, court documents, and government documents obtained from the IRS’s official public  
 2 website. *See Lemoon v. Cal. Forensic Med. Grp., Inc.*, 575 F. Supp. 3d 1212, 1230 (N.D. Cal.  
 3 2021) (“[A] court may judicially notice court documents that are already in the public record or  
 4 have been filed in other courts.”) (citing *Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002));  
 5 *Full Circle of Living & Dying v. Sanchez*, No. 2:20-cv-01306-KJM-KJN, 2023 WL 373681, at \*2  
 6 (E.D. Cal. Jan. 24, 2023) (taking judicial notice of handbook obtained from a state government  
 7 website because it fell “within the realm of public records and government documents available  
 8 from reliable sources on the Internet, which includes websites run by governmental agencies”)  
 9 (citations, internal quotation marks, and brackets omitted); *Africare, Inc. v. Xerox Complete*  
 10 *Document Sols. Maryland, LLC*, 436 F. Supp. 3d 17, 45 n.21 (D.D.C. 2020) (taking judicial  
 11 notice of revenue statements from a party’s IRS Tax Form 990).

12 In addition to its request for judicial notice, defendant contends that the complaint filed in  
 13 the Santa Clara action should be considered as incorporated by reference into plaintiff’s  
 14 complaint. (Doc. No. 10 at 3.) “The doctrine of incorporation by reference is distinct from  
 15 judicial notice.” *Al -Ahmed v. Twitter, Inc.*, 603 F. Supp. 3d 857, 866 (N.D. Cal. 2022). “[T]he  
 16 requirements for the documents that are relied on by the complaint to be incorporated is that: ‘(1)  
 17 the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3)  
 18 no party questions the authenticity of the copy attached to the 12(b)(6) motion.’” *Id.* (quoting  
 19 *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)). Documents that are incorporated by  
 20 reference “may be considered as ‘part of the complaint,’ without converting the Rule 12(b)(6)  
 21 motion into one for summary judgment . . . [and] may be assumed to be true for purposes of  
 22 deciding a Rule 12(b)(6) motion.” *Id.* (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th  
 23 Cir. 2003)).

24 Here, the state court complaint filed in the Santa Clara action is directly referenced in  
 25 plaintiff’s complaint by its case number; it is central to plaintiff’s action because the allegations  
 26 contained within that state court complaint purportedly caused plaintiff to initiate the present  
 27 action; and defendant’s request to deem that document incorporated by reference into plaintiff’s  
 28 complaint is unopposed, nor is there any other reason to doubt the authenticity of the publicly

1 filed court document. (Doc. Nos. 1 at ¶¶ 9–10; 10-1 at 5–23.) Accordingly, defendant’s request  
 2 is granted. The court will consider the complaint filed by the Department in the Santa Clara  
 3 action as incorporated by reference into plaintiff’s complaint filed in this action.

#### 4 **LEGAL STANDARD<sup>2</sup>**

5 “Federal courts are courts of limited jurisdiction and are presumptively without  
 6 jurisdiction over civil actions.” *Howard Jarvis Taxpayers Ass’n v. Cal. Secure Choice Ret. Sav.*  
 7 *Program*, 443 F. Supp. 3d 1152, 1156 (E.D. Cal. 2020) (citing *Kokkonen v. Guardian Life Ins.*  
 8 *Co.*, 511 U.S. 375, 377 (1994)), *aff’d*, 997 F.3d 848 (9th Cir. 2021). Federal courts “possess only  
 9 that power authorized by Constitution and statute, which is not to be expanded by judicial  
 10 decree.” *Kokkonen*, 511 U.S. at 377 (internal citations omitted). Subject matter jurisdiction is  
 11 required; it cannot be forfeited or waived. *Howard Jarvis Taxpayers Ass’n*, 443 F. Supp. 3d at  
 12 1156. Indeed, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the  
 13 court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

14 Rule 12(b)(1) of the Federal Rules of Civil Procedure provides that a party may  
 15 “challenge a federal court’s jurisdiction over the subject matter of the complaint.” *Nat’l Photo*  
 16 *Grp., LLC v. Allvoices, Inc.*, No. 3:13-cv-03627-JSC, 2014 WL 280391, at \*1 (N.D. Cal. Jan. 24,  
 17 2014). “A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the  
 18 challenger asserts that the allegations contained in a complaint are insufficient on their face to  
 19 invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)  
 20 (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). A party making a facial attack does  
 21 not submit supporting evidence with the motion because jurisdiction is challenged based solely on  
 22 the pleadings. *Howard Jarvis Taxpayers Ass’n*, 443 F. Supp. 3d at 1156; *see also Diva*  
 23 *Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074, 1084 (N.D. Cal. 2019) (“[C]ourts do  
 24 not consider evidence outside the pleadings when deciding a facial attack.”) (citation omitted).  
 25 Important for purposes of resolving the pending motion, it has been recognized that “[t]he district  
 26

---

27 <sup>2</sup> This order does not address the legal standard governing consideration of motions to dismiss  
 28 brought under Rule 12(b)(6) because, as explained below, the court does not reach defendant’s  
 12(b)(6) arguments.

1 court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): [a]ccepting the  
2 plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the  
3 court determines whether the allegations are sufficient as a legal matter to invoke the court's  
4 jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). However, the court need  
5 not assume the truth of legal conclusions cast in the form of factual allegations. *Warren v. Fox*  
6 *Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

7 "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by  
8 themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at  
9 1039. In ruling on a party's factual attack, district courts "may review evidence beyond the  
10 complaint without converting the motion to dismiss into a motion for summary judgment." *Id.*  
11 The movant may "rely on affidavits or any other evidence properly before the court," and the  
12 party opposing the motion must then "present affidavits or any other evidence necessary to satisfy  
13 its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *St. Clair v.*  
14 *City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (citing *Thornhill Publ'g Co. v. Gen. Tel. & Elec.*  
15 *Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)).

16 Here, the court construes defendant's motion as posing a facial attack under Rule 12(b)(1)  
17 because in it defendant contends that the allegations of plaintiff's complaint are insufficient for  
18 purposes of Article III standing. (Doc. No. 8 at 15–24.) Although defendant does rely on  
19 documents outside of the complaint, the only such documents are the subject of defendant's  
20 request for judicial notice (Doc. No. 10), which are ordinarily considered by the court when it is  
21 analyzing the face of the complaint. *See Carpenter v. OneWest Bank, FSB*, No. 12-cv-00895-  
22 MMM-OP, 2012 WL 13012420, at \*2 (C.D. Cal. Apr. 25, 2012) ("Even when deciding a facial  
23 attack, however, a court can look beyond the complaint to consider documents that are proper  
24 subjects of judicial notice.") (collecting cases); *see also Leite*, 749 F.3d at 1121 ("The district  
25 court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6)."); *Skilstaf, Inc.*  
26 *v. CVS Caremark Corp.*, 669 F.3d 1005, 1016 n.9 (9th Cir. 2012) (explaining that matters  
27 properly the subject of judicial notice may be considered along with the complaint when deciding  
28 a Rule 12(b)(6) motion).

## ANALYSIS

As noted, defendant brings the pending motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), arguing that plaintiff's entire complaint is subject to dismissal. (Doc. No. 8 at 10–11.) Because the portion of defendant's motion to dismiss brought under Rule 12(b)(1) raises questions with respect to this court's subject matter jurisdiction over this action, the court will first address that aspect of defendant's motion. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

### A. Motion to Dismiss Pursuant to Rule 12(b)(1): Article III Standing

"[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *see also Matter of E. Coast Foods, Inc.*, 66 F.4th 1214, 1218 (9th Cir. 2023) (explaining that "standing is an 'essential and unchanging' requirement . . . [thus] a party must establish an Article III case or controversy before we exert subject matter jurisdiction") (citations omitted); *City of Oakland v. Lynch*, 798 F.3d 1159, 1163 (9th Cir. 2015) ("A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit.") (quoting *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004)). An actual case or controversy will be held to exist when a plaintiff establishes standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Standing, in turn, "requires that (1) the plaintiff suffered an injury in fact, i.e., one that is sufficiently 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical,' (2) the injury is 'fairly traceable' to the challenged conduct, and (3) the injury is 'likely' to be 'redressed by a favorable decision.'" *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (*en banc*) (citing *Lujan*, 504 U.S. at 560–61). "Standing must be shown with respect to each form of relief sought, whether it be injunctive relief, damages or civil penalties." *Id.* "[T]o establish standing to pursue injunctive relief . . . [plaintiff] must demonstrate a real and immediate threat of repeated injury in the future." *Chapman v. Pier 1*

1 *Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (citation and internal quotations omitted).

2 “To determine whether organizational standing requirements have been satisfied, [courts]  
3 ‘conduct the same inquiry as in the case of an individual: Has the plaintiff alleged such a  
4 personal stake in the outcome of the controversy as to warrant his invocation of federal-court  
5 jurisdiction?’” *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021) (quoting  
6 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982)). “[W]here the plaintiff is an  
7 organization, the standing requirements of Article III can be satisfied in two ways. Either the  
8 organization can claim that it suffered an injury in its own right or, alternatively, it can assert  
9 ‘standing solely as the representative of its members.’” *Students for Fair Admissions, Inc. v.*  
10 *President & Fellows of Harvard Coll.*, \_\_\_ U.S. \_\_\_, 143 S. Ct. 2141, 2157 (2023) (citation  
11 omitted); *see also E. Bay Sanctuary Covenant*, 993 F.3d at 662 (“Organizations can assert  
12 standing on behalf of their own members, or in their own right.”) (internal citations omitted);  
13 *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1134 (9th Cir. 2019) (“[A]bsent a member with  
14 standing, . . . an organizational plaintiff ‘may have standing in its own right to seek judicial relief  
15 from injury to itself and to vindicate whatever rights and immunities the association itself may  
16 enjoy.’”) (citation omitted).

17 Here, plaintiff alleges in its complaint that it has organizational standing on behalf of its  
18 members and argues in its opposition to the pending motion that it also has standing to bring this  
19 action based on an injury to itself. (Doc. Nos. 1 at ¶¶ 24, 32, 43; 15 at 7–10.) Accordingly, the  
20 court will address both of plaintiff’s theories as to its standing to bring this action.

21 1. Whether Plaintiff Has Organizational Standing on Behalf of its Members

22 To invoke organizational standing on behalf of its members, the plaintiff must allege facts  
23 demonstrating that: “(1) its members would otherwise have standing to sue in their own right; (2)  
24 the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the  
25 claim asserted nor the relief requested requires the participation of individual members in the  
26 lawsuit.” *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096 (9th Cir. 2021) (citing *Hunt v.*  
27 *Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)).

28 /////

1 “Implicit in the first prong of this test is the requirement that an organization must  
2 generally have ‘members’ to bring suit on their behalf.” *Or. Moms Union v. Brown*, 540 F. Supp.  
3 3d 1008, 1013 (D. Or. May 20, 2021). However, a formal membership is not always required for  
4 organizational standing: a plaintiff-organization that does not allow for membership may have  
5 standing, “so long as ‘the organization is sufficiently identified with and subject to the influence  
6 of those it seeks to represent as to have a personal stake in the outcome of the controversy.’” *Am.*  
7 *Unites for Kids*, 985 F.3d at 1096 (internal citations omitted) (quoting *Or. Advoc. Ctr. v. Mink*,  
8 322 F.3d 1101, 1111 (9th Cir. 2003)). “Courts look at whether the individuals the organization  
9 purports to represent possess ‘the indicia of membership’ to satisfy the purposes undergirding the  
10 concept of associational standing.” *Or. Moms Union*, 540 F. Supp. 3d at 1013 (quoting *Or.*  
11 *Advoc. Ctr.*, 322 F.3d at 1111). For example, the Ninth Circuit has found that a non-membership  
12 organization had standing because it “serve[d] a specialized segment of Oregon’s community:  
13 the disabled in general, including the mentally ill and, more specifically, incapacitated criminal  
14 defendants. Those groups [were] the primary beneficiaries of [plaintiff’s] activities, ‘including  
15 the prosecution of this kind of litigation,’” which sought to expedite the transfer of mentally  
16 incapacitated defendants from jails to state hospitals for evaluation and treatment. *Or. Advoc.*  
17 *Ctr.*, 322 F.3d at 1111–12 (quoting *Hunt*, 432 U.S. at 344).

18 In defendant’s pending motion, he argues that plaintiff lacks standing because it has no  
19 members, pointing to a dearth of allegations discussing its members in the complaint and  
20 plaintiff’s tax records that have been judicially noticed. (Doc. No. 8 at 16–17.) In its opposition,  
21 plaintiff argues that formal membership is not required for standing and that it “represents the  
22 interest of Hindu Americans throughout the United States, including those working at Cisco” as  
23 well as its “board members, employees, leadership and advisory council members, donors,  
24 newsletter readers and scholars residing in California. . . .” (Doc. No. 15 at 10–12.) In his reply,  
25 defendant concedes that the Ninth Circuit has found organizational standing in cases even where  
26 the organization in question had no formal membership, but contends that plaintiff has not alleged  
27 facts indicating that it is “sufficiently identified with and subject to the influence of” a non-

28 /////

1 member constituency, nor has it even identified an individual belonging to that constituency.  
2 (Doc. No. 18 at 8–9.)

3 In its complaint, plaintiff alleges that it is “the largest and most respected Hindu  
4 educational and advocacy institution in North America,” “acts to protect the religious freedoms of  
5 Hindu Americans, and all Americans of faith,” “is not affiliated with any other religious or  
6 political organization,” and “works with a wide range of people and groups that are committed to  
7 promoting dignity, mutual respect, and pluralism, working across all sampradaya (Hindu religious  
8 traditions) regardless of race, color, national origin, citizenship, ancestry, gender, sexual  
9 orientation, age and/or disability.” (Doc. No. 1 at 2, ¶ 5.) In this regard, plaintiff appears to  
10 allege that it represents “all Hindu Americans” and “all Americans of faith” (*id.* at 3, ¶ 15), yet  
11 there are no allegations in the complaint indicating that plaintiff represents Hindus (or anyone  
12 else) employed at Cisco, nor are there any allegations describing or identifying plaintiff’s “board  
13 members, employees, leadership and advisory council members, donors, newsletter readers and  
14 scholars residing in California.”<sup>3</sup>

15 Due to these pleading deficiencies, the court concludes that plaintiff’s complaint fails to  
16 allege facts that, if proven, would show that plaintiff is “sufficiently identified with and subject to  
17 the influence” of the individuals it seeks to represent in this lawsuit. *Or. Advoc. Ctr.*, 322 F.3d at  
18 1112. Indeed, it is unclear even which specific individuals plaintiff seeks to represent in this  
19 action because its complaint merely alleges that it seeks to protect the constitutional rights of “all  
20 Hindu Americans” and “all Americans of faith.” However, “all Hindu Americans” or “all  
21 Americans of faith” would amount to a constituency that is significantly larger and more diffuse  
22

---

23 <sup>3</sup> The board members, employees, advisory council members, donors, and newsletter-readers that  
24 plaintiff seeks to represent are mentioned in the declaration of Suhag A. Shukla, a co-founder,  
25 and the executive director of plaintiff, that was attached to plaintiff’s opposition brief. (Doc. No.  
26 15-1.) However, because this Rule 12(b)(1) motion is a facial attack on the pleadings, that  
27 declaration must be disregarded. *See Timboe v. Clark*, No. 3:20-cv-08719-WHO, 2022 WL  
28 991721, at \*2 (N.D. Cal. Mar. 31, 2022) (disregarding a declaration attached to an opposition  
brief “on a 12(b)(6) motion because it is not part of the complaint or subject to judicial notice”).  
Even if such categories of individuals were described and identified in plaintiff’s complaint, the  
court remains somewhat skeptical that such allegations would remedy the remainder of the  
pleading deficiencies identified below.

1 than those found appropriate for purposes of organizational standing in the cases relied upon by  
2 plaintiff. *See Or. Advoc. Ctr.*, 322 F.3d at 1111–12 (the plaintiff’s constituency defined as  
3 mentally incapacitated criminal defendants in Oregon); *Am. Unites for Kids*, 985 F.3d at 1096–97  
4 (the plaintiff’s constituency defined as public employees, in particular teachers, at the Malibu  
5 campuses of a school district); *Cath. League for Religious & C.R. v. City & Cnty. of San*  
6 *Francisco*, 624 F.3d 1043, 1048, 1063–64 (9th Cir. 2010) (*en banc*) (“*Catholic League*”) (the  
7 plaintiff’s constituency defined as being devout Catholics in San Francisco, which purportedly  
8 was comprised of 6,000 individuals).

9       Moreover, even though plaintiff alleges it is “the largest and most respected Hindu  
10 educational and advocacy institution in North America,” it does not allege what activities, if any,  
11 it engages in that relate to “all Hindu Americans,” how it is funded, what interaction it has with  
12 the Hindu American community, or any facts indicating that it is “sufficiently identified with and  
13 subject to the influence” of all adherents of an entire faith such that it plausibly could represent  
14 them in this lawsuit. *See Meister v. City of Hawthorne*, No. 14-cv-01096-MWF-SH, 2014 WL  
15 3040175, at \*8–9 (C.D. Cal. May 13, 2014) (dismissing an action brought by the advocacy and  
16 service organization “Greater Los Angeles Agency on Deafness, Inc.” (“GLAD”) for lack of  
17 standing because its complaint alleged “only that GLAD seeks to represent deaf and hearing-  
18 impaired persons, but not that any relevant persons have the requisite indicia of membership to  
19 confer standing on GLAD”); *cf. Or. Advoc. Ctr.*, 322 F.3d at 1111–12 (holding that the plaintiff-  
20 organization created and primarily funded by federal statute to advance the rights of individuals  
21 with mental health disabilities could be considered to represent the mentally incapacitated  
22 criminal defendants in Oregon whose constitutional rights the plaintiff-organization sought to  
23 vindicate). Relatedly, plaintiff also has failed to explain how “all Hindu Americans”—or  
24 whatever constituency it seeks to represent—constitute a “specialized segment” of the community  
25 affected by the complaint filed in the Santa Clara action, nor does plaintiff’s complaint identify  
26 how its purported constituency would be the “primary beneficiaries” of this lawsuit. *Cf. Am.*  
27 *Unites for Kids*, 985 F.3d at 1097 (holding that the plaintiff-organization had standing when it  
28 served “a ‘specialized segment’ of the community: public employees concerned about exposure

1 to environmental risk at work” and teachers working on defendants’ school campuses “were the  
 2 ‘primary beneficiaries’ of [the plaintiff-organization’s] activities,” including its lawsuit brought  
 3 against the defendant school district for environmental contamination on its campuses). Without  
 4 factual allegations connecting the plaintiff organization with the particular constituency that it  
 5 seeks to represent here, the court cannot plausibly infer that plaintiff is “sufficiently identified  
 6 with and subject to the influence of” “all Hindu Americans.”

7 More importantly, even if the court were to assume plaintiff could assert claims on behalf  
 8 of “all Hindu Americans,” plaintiff must still allege facts suggesting that a member of that  
 9 constituency “suffers an injury-in-fact that is traceable to the defendant and likely to be redressed  
 10 by a favorable decision.” *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal.*  
 11 *Dep’t of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013); *see also Summers v. Earth Island Inst.*,  
 12 555 U.S. 488, 498 (2009) (explaining that “the law of organizational standing . . . [has] required  
 13 plaintiff-organizations to make specific allegations establishing that at least one identified  
 14 member had suffered or would suffer harm”). “To establish injury in fact, a plaintiff must show  
 15 that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and  
 16 particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*,  
 17 578 U.S. 330, 339 (2016). The “threatened injury must be *certainly impending* to constitute  
 18 injury in fact, and [] allegations of *possible* future injury are not sufficient.” *Clapper v. Amnesty*  
 19 *Int’l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks and brackets omitted) (quoting  
 20 *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

21 Here, plaintiff’s complaint alleges that the Department has asserted in the Santa Clara  
 22 action, “that a caste system and caste-based discrimination are integral parts of Hindu teachings  
 23 and practices” and “the caste system [is] ‘a strict Hindu social and religious hierarchy,’ which

24 /////

25 /////

26 /////

27 /////

28 /////

requires discrimination by ‘social custom and legal mandate.’”<sup>4</sup> (Doc. No. 1 at 2.) Plaintiff alleges that these assertions “wrongly [tie] Hindu beliefs and practices to the abhorrent practice of caste-discrimination,” thereby undermining the goal of ending caste-based discrimination and violating “the First Amendment rights of all Hindu-Americans,” which “can only lead to a denial of due process and equal protection to Americans based on their religious affiliation and national origin.” (*Id.*) However, as defendant correctly points out in his pending motion to dismiss, there are no factual allegations of actual or imminent harm to anyone resulting from the Department’s allegations in its state court complaint, let alone actual harm to any individuals that plaintiff seeks to represent in this action. (Doc. No. 8 at 18); *see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (“[I]t is the burden of the ‘party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute . . . . If they fail to make the necessary allegations, they have no standing.”) (internal citations, quotations, brackets omitted).

At most, plaintiff alleges a purely hypothetical theory of harm, i.e., “[b]y wrongly attempting to define Hinduism to include caste, the [Department] would actually require the very discrimination that it seeks to ban.” (Doc. No. 1 at ¶ 16.) According to plaintiff’s complaint, “employers *might arguably* be required to accommodate an employee’s request not to work with someone the employee believes to be of the ‘wrong’ caste” as a religious accommodation under state and federal law. (*Id.* at ¶ 21) (emphasis added). But the notion that the Department’s allegations in the state court complaint—a civil rights enforcement lawsuit seeking to stop and

////

////

---

<sup>4</sup> The portion of the complaint filed in the Santa Clara County Superior Court action that plaintiff is quoting from actually alleges as follows: “As a strict Hindu social and religious hierarchy, India’s caste system defines a person’s status based on their religion, ancestry, national origin/ethnicity, and race/color—or the caste into which they are born—and will remain until death.” (Doc. No. 10-1 at 6) (citing Human Rights Watch & Center for Human Rights and Global Justice at New York University School of Law, *Hidden Apartheid: Caste Discrimination against India’s “Untouchables,”* at 45 (2007)). “At the bottom of the Indian hierarchy is the Dalit, typically the darkest complexion caste, who were traditionally subject to ‘untouchability’ practices which segregated them by social custom and legal mandate.” (*Id.*)

1 prevent caste-based discrimination<sup>5</sup>—would somehow lead other Hindu Americans to make  
 2 religious accommodation requests to discriminate against co-workers based on their perceived  
 3 caste and that employers might then actually grant those requests due to their interpretation of the  
 4 Department’s allegations in the Santa Clara action is both highly speculative and seemingly  
 5 implausible. Such an attenuated chain of events without connection to any individual facing this  
 6 purported and speculative harm is plainly insufficient to establish standing. *See Summers*, 555  
 7 U.S. at 495–96 (finding that a vague plan to visit unnamed National Forests “some day” did not  
 8 establish “actual or imminent injury” for purposes of establishing the plaintiff’s standing to  
 9 challenge government action affecting a particular forest); *Clapper*, 568 U.S. at 410–11 (finding  
 10 that the “respondents’ theory of standing, which relies on a highly attenuated chain of  
 11 possibilities, does not satisfy the requirement that threatened injury must be certainly  
 12 impending”). Here, plaintiff’s alleged harm is also contrary to the premise of its own complaint,  
 13 which is that the Department’s “depiction of the caste system . . . is not based on any universal  
 14 understanding among Hindus about their own beliefs and traditions” and is contrary to the beliefs  
 15 of “an overwhelming number of [Hinduism’s] own adherents.” (Doc. No. 1 at ¶¶ 12, 14.)

16 In addition, plaintiff has failed to allege any injury that is plausibly connected to the three  
 17 constitutional violations that it asserts in its complaint. (Doc. No. 1 at ¶¶ 23–48); *see Or.*  
 18 *Prescription Drug Monitoring Program v. U.S. Drug Enf’t Admin.*, 860 F.3d 1228, 1233 (9th Cir.  
 19 2017) (“[T]he standing inquiry requires careful judicial examination of a complaint’s allegations  
 20 to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims*  
 21 asserted.”) (emphasis in original). First, as to its free exercise claim, plaintiff fails to allege facts  
 22

---

23 <sup>5</sup> The Department brought the Santa Clara action on behalf of John Doe who is “Dalit Indian, a  
 24 population once known as the ‘Untouchables,’ who are the most disadvantaged people under  
 25 India’s centuries-old caste system” and in it alleges that John Doe is “Dalit because of his  
 26 religion, ancestry, national origin/ethnicity, and race/color.” (Doc. No. 10-1 at ¶ 1 n.2.) The  
 27 Department further alleges in that case that Cisco engaged in unlawful employment practices  
 28 against John Doe by subjecting him to disparate employment conditions because of his status as a  
 Dalit Indian in violation of the FEHA. (*Id.* at ¶¶ 51–60.) Among other things, the suit alleges  
 that Cisco reassigned Doe’s job duties and isolated him from his other colleagues, denied him a  
 raise, promotion, and work opportunities, and subjected him to offensive comments, including  
 publicizing his caste to co-workers. (*Id.* at ¶¶ 53, 61–71.)

1 showing how “wrongly defin[ing] Hindu Beliefs, teachings and practices to include an abhorrent  
 2 practice of discrimination,” (Doc. No. 1 at ¶ 29), burdens, operates against, or otherwise infringes  
 3 on the practice of Hinduism by any individual it seeks to represent in bringing this action. *See*  
 4 *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222–23 & 224 n.9 (1963); *see also Kumar*  
 5 *v. Koester*, \_\_\_ F. Supp.3d \_\_\_, 2023 WL 4781492, at \*4 (C.D. Cal. July 25, 2023) (finding that  
 6 the university professor Hindu plaintiffs lacked standing to assert a free exercise challenge to the  
 7 use of “caste” in the university’s anti-discrimination policy because the plaintiffs’ “emphatically  
 8 denounce[d] the caste system and reject[ed] the notion that it is part of their religion” and thus the  
 9 policy did “not threaten any of Plaintiffs’ rights to practice their religion”).

10 Second, plaintiff’s mischaracterized “procedural due process” claim actually appears to be  
 11 a void for vagueness challenge to the Department’s alleged “position” that seeks to “legally  
 12 define Hinduism to include belief and practice in caste and a caste system” under the Fourteenth  
 13 Amendment’s Due Process Clause. (Doc. No. 1 at ¶¶ 33–34.) “A plaintiff has standing to bring a  
 14 pre-enforcement challenge to a vague law on due process grounds where ‘the litigant is chilled  
 15 from engaging in constitutionally protected activity.’” *Montclair Police Officers’ Ass’n v. City of*  
 16 *Montclair*, No. 2:12-cv-06444-PSG-PLA, 2012 WL 12888427, at \*4 (C.D. Cal. Oct. 24, 2012)  
 17 (quoting *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1350 (11th Cir. 2011)). Here,  
 18 however, plaintiff has not identified any activity that it alleges has been chilled by the  
 19 Department’s allegations advanced in its state court complaint against Cisco, let alone a  
 20 constitutionally protected activity.

21 Third, in regard to its equal protection claim, plaintiff’s complaint does not allege any  
 22 facts plausibly suggesting that defendant “has applied the [FEHA] in a discriminatory manner  
 23 against Hindu Americans” but not as to Americans of other faiths because of their faith. (Doc.  
 24 No. 1 at ¶ 48.) *See Citizens for Fair Representation v. Padilla*, 815 F. App’x 120, 123 (9th Cir.  
 25 2020) (holding that the plaintiff lacked standing to assert an equal protection challenge to  
 26 California’s constitutional cap on the number of its state legislative districts as racially  
 27 discriminatory because “they have not adequately alleged that some votes are weighted less than

28 /////

others based on race”).<sup>6</sup> Nor does plaintiff allege a concrete injury stemming from the alleged discriminatory enforcement of the FEHA against Hindu Americans, except for plaintiff’s general disagreement with the Department’s allegations in the Santa Clara complaint in which it is vaguely suggested that a caste system is related to Hinduism. *See Kumar*, 2023 WL 4781492, at \*3 (finding that Hindu university professors lacked standing to assert an equal protection challenge to a university’s antidiscrimination policy’s use of the term “caste” when the plaintiffs merely alleged that “the Policy impermissibly stigmatizes individuals of South Asian descent and Hindu practitioners” and that “the policy could be enforced unevenly”).

Finally, plaintiff’s reliance on the Ninth Circuit’s decision in *Catholic League* does not serve to remedy the pleading deficiencies with respect to standing identified above. 624 F.3d at 1047–48 (holding that “a Catholic civil rights organization and two devout Catholics [members] who live in San Francisco” had standing to bring an Establishment Clause challenge to a resolution adopted by the San Francisco Board of Supervisors denouncing the Archdiocese of San Francisco’s decision to not place children for adoption in homosexual households). Unlike *Catholic League*, plaintiff is not asserting an Establishment Clause challenge here, and even if it was, the specific psychological harm the plaintiffs in *Catholic League* allegedly suffered—“exclusion or denigration on a religious basis within the political community” based upon extensive and detailed factual allegations—is absent from the allegations of plaintiff’s complaint. 624 F.3d at 1052–53; *see Schempp*, 374 U.S. at 225 n.9 (“[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed.”). Moreover, were plaintiff to allege a psychological injury as did the plaintiffs in *Catholic League*, it does not appear that it would be sufficiently concrete to confer standing for the type of claims that plaintiff has asserted here. *See Kumar*, 2023 WL 4781492, at \*3–4 (finding Hindu professors lacked

////

////

---

<sup>6</sup> Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule 36-3(b).

standing to assert free exercise and equal protection claims where they alleged “abstract stigmatic injuries” regarding an antidiscrimination policy’s use of the term “caste”).<sup>7</sup>

In summary, plaintiff’s complaint fails to allege that: (i) plaintiff has any members or is “sufficiently identified with and subject to the influence of” a constituency from a specialized segment of the community that would primarily benefit from this lawsuit; and (ii) any individual members of such a constituency have suffered or will suffer an injury-in-fact. Plaintiff has thus failed to allege facts that would satisfy the first prong of organizational standing, i.e., “its members would otherwise have standing to sue in their own right.” *Am. Unites for Kids*, 985 F.3d at 1096. For this reason, the court need not address the second and third prongs that must also be satisfied to demonstrate organizational standing. *See Am. ’s Frontline Drs. v. Wilcox*, No. 21-cv-01243-JGB-KK, 2022 WL 1514038, at \*6 (C.D. Cal. May 5, 2022) (“Plaintiffs fail to allege the first *Hunt* requirement, thus the Court declines to address the remaining two requirements.”).

Accordingly, defendant’s motion to dismiss the complaint for failure to adequately allege Article III standing predicated on organizational standing will be granted.

## 2. Whether Plaintiff Has Standing on Behalf of Itself

An organization has standing on its own behalf if it can show: (1) that the defendant’s actions have frustrated its mission; and (2) that it has spent resources counteracting that frustration of mission. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013); *see also E. Bay Sanctuary Covenant*, 993 F.3d at 663. “Of course, organizations cannot ‘manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all[.]’” *E. Bay Sanctuary Covenant*, 993 F.3d at 663 (quoting *La Asociacion de Trabajadores de Lake Forest v. Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)). Rather, an organizational plaintiff must “show they ‘would have suffered some

---

<sup>7</sup> Additionally, the undersigned observes that plaintiff’s complaint is clearly distinguishable from that before the court in *Catholic League* because the individual plaintiffs in that case were members of the organizational plaintiff and resided in the “political community” affected by the resolution that they alleged caused them religious-based exclusion and denigration within that political community. *Cf. Catholic League*, 624 F.3d at 1048.

1 other injury’ had they ‘not diverted resources to counteracting the problem.’” *Id.* at 974 (quoting  
 2 *La Asociacion*, 624 F.3d at 1088). Thus, “[a]n organization may sue only if it was *forced* to  
 3 choose between suffering an injury and diverting resources to counteract the injury.” *La*  
 4 *Asociacion*, 624 F.3d at 1088 n.4 (emphasis added).

5 Although plaintiff’s complaint alleges it has “associational standing” to bring its claims  
 6 “on behalf of its Hindu American members,” plaintiff has argued in its opposition to the pending  
 7 motion to dismiss that it also has “direct standing” to bring its claims against defendant. (Doc.  
 8 Nos. 1 at ¶ 43; 15 at 7–10.) As defendant correctly points out in his reply brief, however,  
 9 plaintiff’s complaint is devoid of any allegations addressing how “the Department’s alleged  
 10 mischaracterizations in a state court pleading against a third party” have caused or threatened  
 11 injury to plaintiff’s mission or what steps it has been forced to take to avoid such harm. (Doc.  
 12 No. 18 at 12); *see also La Asociacion*, 624 F.3d at 1088 n.4. In fact, plaintiff’s complaint does  
 13 not even clearly allege what its mission is. (*See* Doc. No. 1 at ¶ 5.) At most, plaintiff argues in  
 14 its opposition brief that its “board members, employees, leadership and advisory council  
 15 members, donors, newsletter readers and scholars residing in California have been directly  
 16 harmed by the [Department’s] actions, *requiring significant redeployment of [plaintiff] resources*  
 17 *and personally subjecting them to the emotional and spiritous injuries of [the Department’s] gross*  
 18 *mischaracterization of Hindu teachers.*” (Doc. No. 15 at 11) (emphasis added). These assertions  
 19 are not alleged in plaintiff’s complaint, and in any event, are entirely conclusory. *See Our Watch*  
 20 *With Tim Thompson, v. Bonta*, \_\_\_ F. Supp.3d \_\_\_, 2023 WL 4600117, at \*6 (E.D. Cal. July 18,  
 21 2023) (dismissing a complaint for lack of standing where the plaintiff-organization challenging  
 22 the constitutionality of a state law failed to allege “what plaintiff’s regular activities are and how  
 23 [the state law’s] enactment specifically impacts the organization’s functions”). Thus, plaintiff’s  
 24 attempt to invoke an alternative theory of standing through its opposition brief is unavailing.<sup>8</sup>

25 /////

---

26 <sup>8</sup> If plaintiff intends to pursue this theory of standing in a first amended complaint, it is directed  
 27 to review this court’s decision in *Our Watch With Tim Thompson*, 2023 WL 4600117, at \*5–10,  
 28 in which the undersigned addressed the law governing a plaintiff-organization’s direct standing to  
 bring suit in some detail.

1 Accordingly, defendant's motion to dismiss the complaint for failure to allege Article III  
2 standing predicated on plaintiff's direct standing will also be granted.

3 Because the court concludes that plaintiff lacks Article III standing to bring this action and  
4 that defendant's motion to dismiss pursuant to Rule 12(b)(1) must be granted, the court need not  
5 reach defendant's arguments in support of his motion to dismiss pursuant to Rule 12(b)(6).  
6 Accordingly, defendant's motion to dismiss pursuant to Rule 12(b)(6) will be denied as having  
7 been rendered moot by this order.

8 **B. Leave to Amend**

9 Plaintiff has indicated that it desires leave to file a first amended complaint in the event  
10 that the court grants defendant's motion to dismiss. (Doc. No. 15 at 10 fn.2 & 16 n.3.) "Courts  
11 are free to grant a party leave to amend whenever 'justice so requires,' and requests for leave  
12 should be granted with 'extreme liberality.'" *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th  
13 Cir. 2009) (citations omitted). There are several factors a district court considers in determining  
14 whether to grant leave to amend, including undue delay, the movant's bad faith or dilatory  
15 motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice  
16 to the opposing party, and futility. *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th  
17 Cir. 2020) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

18 Although the court is somewhat skeptical that plaintiff will be able to remedy all of the  
19 pleading deficiencies described in this order, plaintiff has not yet had any opportunity to amend  
20 its complaint. Defendant—though he opposes leave to amend—has also not asserted that he  
21 would be unduly prejudiced by granting plaintiff leave to file a first amended complaint. (Doc.  
22 No. 18 at 14–15.) Rather, in his reply brief, defendant contends that permitting amendment  
23 would be futile, arguing that "'a citizen lacks standing to contest the policies of the prosecuting  
24 authority when he himself is neither prosecuted nor threatened with prosecution' because he  
25 'lacks a judicially cognizable interest in the prosecution or non-prosecution of another.'" (*Id.* at  
26 15) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). However, plaintiff has not had  
27 an opportunity to fully respond to this argument advanced by defendant and it is unclear whether  
28 the decision in *Linda R.S.* has applicability to the claims asserted by plaintiff in this case. For

these reasons, the court will grant plaintiff leave to amend. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) ("It is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, absent a clear showing that amendment would be futile.").

### CONCLUSION

For the reasons stated above:

1. Defendant's and plaintiff's requests for judicial notice (Doc. No. 10, 16) are granted;
2. Defendant's motion to dismiss plaintiff's complaint due to plaintiff's lack of Article III standing (Doc. No. 8) is granted, with leave to amend;
3. The remainder of defendant's motion to dismiss (Doc. No. 8) is denied as having been rendered moot by this order;
4. Plaintiff shall file its first amended complaint, or alternatively, a notice of its intent not to do so, within twenty-one (21) days from the date of entry of this order; and
5. Plaintiff is warned that its failure to comply with this order may result in dismissal of this action due to plaintiff's failure to prosecute.

IT IS SO ORDERED.

Dated: August 30, 2023

  
UNITED STATES DISTRICT JUDGE

2025 WL 779687

Only the Westlaw citation is currently available.

United States Court of Appeals, Ninth Circuit.

Sunil KUMAR, Ph.D., Praveen  
Sinha, Ph.D., Plaintiffs-Appellants,

v.

Dr. Jolene KOESTER, in her official capacity as  
Chancellor of California State University; Larry  
Adamson; Diana Aguilar-Cruz; Diego Arambula; Jack  
B. Clarke, Jr.; Douglas Faigin; Jean P. Firstenberg;  
Wenda Fong; Leslie Gilbert-Lurie; Lillian Kimbell;  
Maria Linares; Julia I. Lopez; Jack Mcgrory; Anna  
Ortiz-Morfit; Yammilette Rodriguez; Romey Sabalius;  
Lateefah Simon; Christopher Stein Hauser; Jose  
Antonio Vargas, in their official capacities as trustees  
of California State University, Defendants-Appellees.

No. 23-4363

|

Argued and Submitted January  
16, 2025 Pasadena, California

|

Filed March 12, 2025

**Synopsis**

**Background:** Professors filed § 1983 action alleging that state university's inclusion of caste as protected class in its anti-discrimination and harassment policy stigmatized their Hindu religion and caused them to self-censor certain religious practices, in violation of Due Process, Free Exercise, and Establishment Clauses and state law. The United States District Court for the Central District of California, [R. Gary Klausner, J.](#), granted in part university's motion for judgment on pleadings, [683 F.Supp.3d 1108](#), and, following bench trial, dismissed remaining claims, [703 F.Supp.3d 1140](#). Professors appealed.

**Holdings:** The Court of Appeals, Tallman, Circuit Judge, held that:

[1] professors failed to establish injury-in-fact required for standing to assert due process claim;

[2] professors failed to satisfy injury-in-fact requirement for standing to assert free exercise claim; and

[3] professors failed to satisfy injury-in-fact requirement for standing to assert Establishment Clause claim.

Affirmed and remanded.

**Procedural Posture(s):** On Appeal; Motion for Judgment on the Pleadings; Judgment.

West Headnotes (12)

[1] **Federal Courts** 🔑 Questions of Law in General

**Federal Courts** 🔑 "Clearly erroneous" standard of review in general

Court of Appeals reviews district court's conclusions of law de novo and its factual findings for clear error.

[2] **Federal Civil Procedure** 🔑 In general; injury or interest

**Federal Civil Procedure** 🔑 Causation; redressability

To establish Article III standing, plaintiffs must demonstrate that (1) they have suffered or likely will suffer injury in fact; (2) that injury likely was caused or will be caused by defendant; and (3) judicial relief would likely redress injury. [U.S. Const. art. 3, § 2, cl. 1](#).

[3] **Federal Civil Procedure** 🔑 In general; injury or interest

Article III standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim with manner and degree of evidence required at successive stages of litigation. [U.S. Const. art. 3, § 2, cl. 1](#).

[4] **Federal Civil Procedure** 🔑 In general; injury or interest

**Federal Civil Procedure** 🔑 Rights of third parties or public

Injury in fact is threshold requirement for Article III standing and can be difficult to satisfy; injury must be concrete to ensure that it is real and not abstract, and particularized so that it affects plaintiff in personal and individual way, as opposed to generalized grievance. [U.S. Const. art. 3, § 2, cl. 1.](#)

[5] **Constitutional Law** 🔑 **Criminal Law**

Plaintiffs have sufficient injury to establish Article III standing for pre-enforcement challenge where they allege (1) intention to engage in course of conduct arguably affected with constitutional interest, but (2) proscribed by threat there exists credible threat of prosecution thereunder. [U.S. Const. art. 3, § 2, cl. 1.](#)

[6] **Constitutional Law** 🔑 **Certainty and definiteness; vagueness**

It is basic principle of due process that enactment is void for vagueness if its prohibitions are not clearly defined. [U.S. Const. Amend. 14.](#)

[7] **Constitutional Law** 🔑 **Education**

Professors who were practicing Hindus failed to establish injury-in-fact required for Article III standing to assert claim that state university's inclusion of caste as protected class in its anti-discrimination and harassment policy was impermissibly vague under Due Process Clause, despite professors' contention that, because term "caste" was undefined, those subject to policy did not have notice of what constituted discrimination and harassment on basis of caste, absent showing that professors intended to engage in any religious practice that could reasonably constitute caste discrimination or harassment such that policy would be enforced against them. [U.S. Const. art. 3, § 2, cl. 1](#); [U.S. Const. Amend. 14.](#)

[More cases on this issue](#)

[8] **Constitutional Law** 🔑 **Neutrality; general applicability**

Free Exercise Clause prohibits government entities from burdening plaintiff's sincere religious practice pursuant to policy that is not neutral or generally applicable. [U.S. Const. Amend. 1.](#)

[9] **Federal Civil Procedure** 🔑 **In general; injury or interest**

District court should not bypass standing to decide non-jurisdictional issue.

[10] **Constitutional Law** 🔑 **Education**

Professors who were practicing Hindus failed to satisfy injury-in-fact requirement for Article III standing to assert claim that state university's inclusion of caste as protected class in its anti-discrimination and harassment policy violated Free Exercise Clause, even though they were offended by alleged association of caste system with Hinduism, absent showing that any of their religious practices were arguably proscribed by policy. [U.S. Const. art. 3, § 2, cl. 1](#); [U.S. Const. Amend. 1.](#)

[More cases on this issue](#)

[11] **Constitutional Law** 🔑 **Advancement, endorsement, or sponsorship of religion; favoring or preferring religion**

Under Establishment Clause, one religious denomination cannot be officially preferred over another. [U.S. Const. Amend. 1.](#)

[12] **Constitutional Law** 🔑 **Education**

Professors who were practicing Hindus failed to satisfy injury-in-fact requirement for Article III standing to assert claim that state university's inclusion of caste as protected class in its anti-discrimination and harassment policy violated Establishment Clause, despite professors' contention that policy implied link to Hinduism, and thus government disapproval of their religion; policy did not mention Hinduism, "caste" was readily defined without reference to Hinduism, and there was no evidence

that university or faculty and student groups that supported policy expressed anti-Hindu sentiments. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

[More cases on this issue](#)

Appeal from the United States District Court for the Central District of California, Hon. [R. Gary Klausner](#), District Judge, Presiding, D.C. No. 2:22-cv-07550-RGK-MAA

### Attorneys and Law Firms

[Michael K. Twersky](#) (argued) and [Alberto M. Longo](#), Fox Rothschild LLP, Blue Bell, Pennsylvania; Meeghan Tirtasaputra and [John J. Shaeffer](#), Fox Rothschild LLP, Los Angeles, California; [Nathan Wilson](#), Fox Rothschild LLP, Raleigh, North Carolina; for Plaintiffs-Appellants.

[Jeffrey P. Michalowski](#) (argued), Adrielli Ferrer, and [Matthew W. Burris](#), Quarles & Brady LLP, San Diego, California; [William C. Hsu](#), Office of General Counsel, California State University, Long Beach, California; for Defendants-Appellees.

[Bradley Girard](#) and Kalli A. Joslin, Americans United for Separation of Church and State, Washington, D.C., for Amicus Curiae Americans United for Separation of Church and State.

Before: [Richard C. Tallman](#), [Michelle T. Friedland](#), and [Mark J. Bennett](#), Circuit Judges

## OPINION

TALLMAN, Circuit Judge:

The central issue in this case is whether California State University (“CSU”) professors have Article III standing to bring Due Process, Free Exercise, and Establishment Clause claims alleging that CSU’s anti-discrimination and harassment policy (the “Policy”) attributes a caste system to Hinduism merely by adding “caste” as a protected class. Appellants allege that the Policy’s inclusion of “caste” stigmatized their religion and caused them to self-censor certain religious practices, like celebrating holidays and discussing religious texts. We hold that Appellants failed to demonstrate Article III standing to bring any of these claims.

## I

### A

\*2 We first provide background on the term “caste.” Following a bench trial on the briefs and record, the district court made the following factual findings regarding the definition and use of the term, which we adopt: “Caste” is an expansive term referring to social hierarchies that exist across the world in many religions and societies, including in the United States. The Oxford English Dictionary contains eight definitions of “caste,” one of which is “[a]ny of the (usually hereditary) classes or social ranks into which Hindu society is traditionally divided; a class of this sort forming part of a hierarchal social structure traditional in some parts of South Asia.” The parties here both acknowledge that caste systems impact Hindus as well as Christians, Buddhists, Sikhs, and Muslims.

But “caste” is not exclusively a religious concept. The Supreme Court has used the term to signify social class without reference to any particular religion. Justice Harlan’s dissent in *Plessy v. Ferguson* understood “caste” as a social concept, not a religious one. 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting). “Caste” was mentioned multiple times throughout the Supreme Court’s recent affirmative action decision without reference to religion. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023); *id.* at 239, 250, 258, 260, 278, 280–81, 143 S.Ct. 2141 (Thomas, J., concurring).

The existence of discrimination based on caste has received legal recognition both abroad and in the United States. There are also documented incidents of caste discrimination in the United States and recent lawsuits in California, New Jersey, and New York have alleged caste discrimination.

### B

We now turn to the facts before us. On January 1, 2022, CSU instituted an “Interim CSU Policy Prohibiting Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation based on listed protected classes.” In that interim policy, which

became final in January 2023, CSU added the word “caste” to further define the protected class of “Race or Ethnicity.” The relevant language states:

CSU prohibits the following conduct, as defined in Article VII. Discrimination based on any Protected Status: i.e., Age, Disability (physical and mental), Gender (or sex, including sex stereotyping), Gender Identity (including transgender), Gender Expression, Genetic Information, Marital Status, Medical Condition, Nationality Race or Ethnicity (including color, caste, or ancestry), Religion (or religious creed), Sexual Orientation, and Veteran or Military Status.

The Policy does not define “caste.” CSU released a “Q&A Caste Inclusion in CSU Discrimination Policy” document, which states that “[t]he inclusion of caste was not added as a specific and separate protected category, but as a parenthetical reference to clarify we consider caste, color and ancestry to be included within the already-existing categories of race or ethnicity.” Neither the Policy nor the Q&A document mention Hinduism.

CSU's Q&A explains that “the same analysis campus investigators use to determine other forms of discrimination will be applied to allegations of caste discrimination.” The Policy defines “Discrimination” as “Adverse Action(s) against a Complainant because of their Protected Status.” An “adverse action” is defined as:

[A]n action engaged in by the Respondent that has a substantial and material adverse effect on the Complainant's ability to participate in a university program, activity, or employment. Minor or trivial actions or conduct not reasonably likely to do more than anger or upset a Complainant does not constitute an Adverse Action. An adverse

employment action is any conduct or employment action that is reasonably likely to impair an employee's job performance or prospects for advancement or promotion.

**\*3** Additionally, the Policy prohibits harassment, which is defined as “unwelcome verbal, nonverbal or physical conduct engaged in because of an individual Complainant's Protected Status.” “Harassment includes, but is not limited to, verbal harassment (e.g., epithets, derogatory comments, or slurs), physical harassment (e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement), and visual forms of harassment (e.g., derogatory posters, cartoons, drawings, symbols, or gestures.)” However, “[s]ingle, isolated incidents will typically be insufficient to rise to the level of harassment.”

Plaintiff-Appellants Sunil Kumar and Praveen Sinha are CSU professors of Indian descent and adherents to the Hindu religion. On February 28, 2023, Appellants filed the operative First Amended Complaint (“complaint”) in the Central District of California against Defendant-Appellee Jolene Koester in her official capacity as Chancellor of CSU, alleging that she is responsible for “adopting and/or enforcing” the Policy.

The complaint alleges violations of the First and Fourteenth Amendments of the United States Constitution under [42 U.S.C. § 1983](#) and equivalent claims under the California Constitution. It seeks a declaratory judgment stating that the inclusion of the word “caste” in the Policy is unconstitutional, and an injunction to prevent Appellee from enforcing the “caste” provision of the Policy.

The complaint alleges that the Policy violates the Due Process Clause as unconstitutionally vague because the Policy does not define the term “caste,” and the term “is not ... understood by people of ordinary intelligence.” It alleges that the Policy violates the Religious Clauses of the First Amendment by defining the Hindu religion as including a caste system, and in doing so, “ascrib[es] an oppressive and discriminatory caste system to the entire Hindu religion.” This allegedly amounts to “singl[ing] out” Hinduism “for ridicule by ascribing [to it] tenets that are not part of” Hinduism and that Hindus “find repugnant.” The complaint alleges that the Policy violates the Equal Protection Clause because, by adding “caste,” the Policy “singles out” Hindus and those of “Indian/South Asian

origin” whereas “[n]o other Protected Status ... addresses any specific ethnicity, ancestry, religion or alleged religious practice[.]”

However, the complaint also alleges that Appellants “hold the sincere religious belief that neither caste nor a discriminatory caste system are in any way part of the Hindu religion or its teachings.” And “[t]o the contrary, [Appellants] abhor the notion that a caste system is a tenet of Hinduism and sincerely believe that the Hindu religion’s core principals are compassion, equanimity, generosity, and equal regard for all humans in order to honor the divine in everyone, which is directly contrary to a discriminatory caste system.”

On May 18, 2023, Appellee moved for judgment on the pleadings to dismiss all claims for lack of standing, and in the alternative, for failing to state a claim. The district court granted the motion in part and denied it in part. The court dismissed Appellants’ Equal Protection claim and the equivalent state law claim for lack of standing. The court dismissed Appellants’ Free Exercise claim and the equivalent state law claim for failing to state a claim without deciding standing. The court held that Appellants had standing to bring their Establishment Clause and Due Process claims and the equivalent state law claims. Those claims, along with the claim for declaratory relief, proceeded to a bench trial on the briefs.

In its bench trial opinion, the district court entered judgment for Appellee by dismissing the Due Process and Establishment Clause claims and the equivalent state law claims. The court first reversed its earlier ruling that Appellants had standing to bring their Due Process claim and equivalent state law claim. Applying the Supreme Court’s test for assessing injury in a pre-enforcement challenge, the court found that Appellants failed to demonstrate a sufficient injury. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 162, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (describing the test). The court declined to reexamine standing for the Establishment Clause claim and equivalent state law claim. Instead, it dismissed those claims on the merits, finding that the Policy does not impermissibly define Hinduism to include a discriminatory caste system, nor does it express government disapproval of the religion. The court dismissed Appellants’ declaratory relief claim because it was derivative of the dismissed claims.

\*4 Appellants timely appealed the dismissal of their Due Process, Free Exercise, and Establishment Clause claims.<sup>1</sup>

Appellants did not appeal the dismissal of their Equal Protection claim.

## II

[1] We review the district court’s conclusions of law de novo and its factual findings for clear error. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1167 (9th Cir. 2002) (citation omitted) (stating standard applies to orders for judgment on the pleadings); *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 612 (9th Cir. 2020) (citation omitted) (stating standard applies to actions decided by bench trial).

## III

[2] [3] This case hinges on Article III standing. “The fundamentals of standing are well-known and firmly rooted in American constitutional law.” *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024). A plaintiff must demonstrate that (1) they have suffered or likely will suffer an “injury in fact”; (2) that “the injury likely was caused or will be caused by the defendant”; and (3) that judicial relief would likely redress the injury. *Id.* (first citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009); and then citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). “[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim” “with the manner and degree of evidence required at the successive stages of the litigation.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021) (first citing *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008); and then quoting *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130).

[4] [5] Injury in fact is the threshold requirement for standing and can be difficult to satisfy. *Id.* at 429, 141 S.Ct. 2190. The injury must be “concrete” to ensure that it is “real and not abstract,” and “particularized” so that it “affect[s] ‘the plaintiff in a personal and individual way’ ” as opposed to a “generalized grievance.” *FDA*, 602 U.S. at 381, 144 S.Ct. 1540 (quoting *TransUnion LLC*, 594 U.S. at 424, 141 S.Ct. 2190; and then quoting *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. 2130). A plaintiff need not wait until the injury occurs as long it is “certainly impending.” *Driehaus*, 573 U.S. at 158–59, 134 S.Ct. 2334 (quoting *Clapper v. Amnesty Int’l*

*USA*, 568 U.S. 398, 414 n.5, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)). A plaintiff has a sufficient injury for a pre-enforcement challenge where they allege “[ (1) ] an intention to engage in a course of conduct arguably affected with a constitutional interest, but [ (2) ] proscribed by a statute, and [ (3) ] there exists a credible threat of prosecution thereunder.” *Id.* at 159–60, 134 S.Ct. 2334 (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)).

## A

[6] [7] We first explain why Appellants failed to demonstrate Article III standing for their Due Process claim. “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); see *id.* (“[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.” (citations omitted)). Appellants claim that the Policy violates the Due Process Clause because “caste” is a vague term, and that because it is not defined, those subject to the Policy do not have notice of what constitutes discrimination and harassment on the basis of caste. Without reaching the merits of this claim, the district court dismissed it on the ground that Appellants had not alleged a sufficient injury for a pre-enforcement challenge. We agree.

\*5 To be sure, Appellants satisfied the first *Driehaus* prong because they alleged “an intention to engage in a course of conduct arguably affected with a constitutional interest.” *Driehaus*, 573 U.S. at 159–60, 134 S.Ct. 2334. It is undisputed that Appellants are practicing Hindus. Practicing one’s religion is a protected First Amendment activity that satisfies the first prong. *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 59–60 (9th Cir. 2024) (holding first *Driehaus* prong was satisfied where Christian university brought Free Exercise pre-enforcement challenge to anti-discrimination law based on religiously motivated practice of prohibiting employees’ same-sex relationships); see also *Driehaus*, 573 U.S. at 162, 134 S.Ct. 2334 (“Because petitioners’ intended future conduct concerns political speech [under the First Amendment], it is certainly affected with a constitutional interest.” (internal quotation marks and citation omitted)).

But Appellants failed to satisfy the second *Driehaus* prong. Even after a fully developed record, Appellants failed to show that they intend to engage in any religious practice that could reasonably constitute caste discrimination or harassment such that the Policy would be enforced against them. In fact, the record suggests the opposite: Appellants intend to *comply* with the Policy, not to violate it. The complaint states that Appellants “applaud CSU’s effort to take a firm stance in favor of inclusion and against discrimination—something on which they are in complete agreement ....” This is because they “abhor” caste discrimination and do not believe that caste is “in any way part of the Hindu religion or its teachings.” Instead, Appellants insist that Hinduism’s “core principals are compassion, equanimity, generosity, and equal regard for all humans ... which is directly contrary to a discriminatory caste system.” Appellants maintained these assertions throughout the litigation.

Therein lies the standing conundrum. How can Appellants be injured by a policy prohibiting conduct that they have no intention to engage in? Appellants claim that their injury is self-censorship of nondiscriminatory religious conduct out of fear that such conduct could be misinterpreted as discriminatory given that “caste” is not defined. But self-censorship is only an injury in fact where Appellants demonstrate “an actual and well-founded fear that the law will be enforced against [them].” *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (quoting *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)); accord *Driehaus*, 573 U.S. at 159–60, 134 S.Ct. 2334 (stating constitutionally protected conduct must be “proscribed by a statute, and there exists a credible threat of prosecution thereunder” (internal quotation marks and citation omitted)). Although Appellants are not required “to confess that [they] will in fact violate that law,” this fear of prosecution must not be “imaginary or wholly speculative.” *Driehaus*, 573 U.S. at 160, 163, 134 S.Ct. 2334 (citation omitted).

Yet, even after full discovery, that is all Appellants have shown. Appellant Sinha expressly acknowledged that the Policy had no impact on his religious practices. Appellant Kumar testified at his deposition that he was “very worried” that celebrating a religious festival could “become a big problem” and that “there can be [a] complaint against me,” and so he does “not talk about” religious texts such as the Bhagavad Gita. But Appellants have not offered any evidence that celebrating a Hindu festival outside of their workplace, or speaking about doing so within their workplace, constitutes

discrimination or harassment as defined by the Policy on any basis, let alone on the basis of caste. See *Clapper*, 568 U.S. at 420, 133 S.Ct. 1138 (stating a plaintiff may not rely “on mere conjecture about possible governmental actions” to establish injury in fact, but must have “concrete evidence to substantiate their fears”). In fact, the district court made a factual finding that this conduct would be *protected* by the Policy, not *proscribed*, since the Policy prohibits discrimination and harassment based on religion. Nothing compels us to hold that this finding is clearly erroneous.

\*6 Appellants' fear that non-discriminatory practices could be misconstrued as discriminatory, even if “theoretically possible[,] is not reasonable or imminent” and thus is not enough to demonstrate injury in fact. *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (en banc); accord *Driehaus*, 573 U.S. at 159–60, 134 S.Ct. 2334. Because Appellants failed to meet the second *Driehaus* prong to demonstrate an injury, we have no reason to turn to the third prong, and their Due Process claim fails for lack of Article III standing.

## B

[8] We next explain why Appellants failed to demonstrate Article III standing for their Free Exercise claim. The Free Exercise Clause prohibits government entities from burdening a plaintiff's “sincere religious practice pursuant to a policy that is not ‘neutral’ or ‘generally applicable.’” *Loffman v. Cal. Dep't of Educ.*, 119 F.4th 1147, 1165 (9th Cir. 2024) (quoting *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022)). Without deciding standing, the district court dismissed this claim at the pleading stage for failing to state a claim because Appellants did not allege that the Policy burdened any of their religious practices. The court made two errors in its analysis.

[9] First, the court should not have bypassed standing to decide a non-jurisdictional issue. See *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (explaining that courts may assume standing only to resolve another jurisdictional issue, like mootness, because both “go[ ] to the Article III jurisdiction of this Court and the courts below, not to the merits of the case”). Second, the court erred in stating that the Free Exercise claim was subject to “relaxed justiciability requirements for a First Amendment facial challenge” instead of applying the *Driehaus* test for injury in a pre-enforcement challenge. *Driehaus* certainly

applies to First Amendment cases; it *was* a First Amendment case. *Driehaus*, 573 U.S. at 159, 134 S.Ct. 2334 (applying its test to pre-enforcement Freedom of Speech claim). We have since applied *Driehaus* to a pre-enforcement Free Exercise claim without question. See *Seattle Pac. Univ.*, 104 F.4th at 59. In applying *Driehaus* now, we hold that Appellants failed to establish an injury for their Free Exercise claim for the same reasons that they failed to do so for their Due Process claim.

As explained above, Appellants satisfied the first *Driehaus* prong because practicing their religion is a constitutionally protected activity. But they failed to satisfy the second prong because they have not demonstrated that any of their religious practices are arguably proscribed by the Policy. Compare *id.* (holding Christian university with employee conduct code that prevents same sex relationships met second *Driehaus* prong because that practice was religiously based and arguably proscribed by state law barring employment discrimination based on sexual orientation).

[10] We conclude that Appellants have alleged no injury to their ability to exercise their religion. Rather, their claims only indicate that they are offended by an alleged association of the caste system with Hinduism. This is the exact “moral, ideological, or policy objection to a particular government action” that the injury in fact requirement is meant to “screen[ ] out.” *FDA*, 602 U.S. at 381, 144 S.Ct. 1540. Because Appellants failed to satisfy the *Driehaus* test to demonstrate a pre-enforcement injury, their Free Exercise claim also fails for lack of Article III standing.

## C

\*7 [11] Finally, we explain why Appellants failed to demonstrate Article III standing for their Establishment Clause claim. The Establishment Clause prohibits governments from making any “law respecting an establishment of religion.” U.S. Const. amend. I. The Supreme Court has interpreted this to mean that “one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). Although the Policy does not reference Hinduism, Appellants argue that merely including the term “caste” creates an implied link to Hinduism. This, Appellants argue, defines Hinduism to include a discriminatory caste system, which amounts to government disapproval of the religion. After holding that Appellants established standing at

the pleading stage, the district court dismissed this claim on the merits in its bench trial opinion.

We acknowledge that “[c]ourts regularly have noted that it can be difficult to determine whether an Establishment Clause plaintiff has alleged an ‘injury in fact’ for purposes of Article III standing.” *Cath. League for Religious & C.R. v. City & County of San Francisco*, 624 F.3d 1043, 1065 (9th Cir. 2010) (en banc) (Graber, J., dissenting). “Unlike most other types of cases, in which the plaintiff suffers a physical injury or a pecuniary loss, the plaintiff in an Establishment Clause case usually does not suffer those types of harm.” *Id.* at 1066. Instead, Establishment Clause injury is often “spiritual or psychological” as a result of a government action that is not neutral toward a religion. *See id.* at 1050 (majority opinion). As such, applying *Driehaus* would do little to determine whether an Establishment Clause injury has occurred. Appellants allege that they suffered spiritual harm by the *existence* of a policy that defines and disparages their religion—whether the Policy is likely to be *enforced* against them has no bearing on that alleged spiritual injury. *See id.* at 1049–50 (collecting Establishment Clause cases where plaintiffs had standing “even though nothing was affected but the religious or irreligious sentiments of the plaintiffs”).

But the alleged hostility must have a plausible connection to the plaintiff. *Id.* at 1053 (holding San Francisco Catholics and local Catholic advocacy group had standing to sue city under Establishment Clause for an allegedly disparaging city resolution because complaint alleged “(1) [plaintiffs] live in San Francisco; (2) they are Catholics; (3) they have come in contact with the resolution; (4) the resolution conveys a government message of disapproval and hostility toward their religious beliefs; that (5) sends a clear message that they are outsiders, not full members of the political community; (6) thereby chilling their access to the government; and (7) forcing them to curtail their political activities to lessen their contact with defendants” (internal quotation marks omitted)); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 487, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (holding residents of Maryland and Virginia with organizational headquarters in Washington, D.C. lacked standing to challenge a property transfer in Pennsylvania in part because they lived beyond the community where the challenged law applied).

Likening Appellants’ claimed injury to the plaintiffs in *Catholic League*, the district court held that Appellants “demonstrate an injury in fact, as they plausibly allege that the

Policy stigmatizes Hinduism” and that the injury is concrete and particularized because Appellants “are CSU employees and practitioners of the Hindu faith.” We do not decide whether the complaint alleged sufficient facts to demonstrate Appellants’ alleged stigma at the pleading stage, because we hold that Appellants failed to maintain standing by the time of trial. The Supreme Court has made clear that “plaintiffs must demonstrate standing for each claim” “with the manner and degree of evidence required at the successive stages of the litigation.” *TransUnion LLC*, 594 U.S. at 431, 141 S.Ct. 2190 (citations omitted). “[I]n a case like this that proceeds to trial, the specific facts set forth by the plaintiff to support standing must be supported adequately by the evidence adduced at trial.” *Id.* (internal quotation marks and citations omitted).

\*8 The district court declined to reexamine standing at the trial stage after Appellee raised it, reasoning that “[t]he procedural posture of this case does not affect [Appellants’] standing because ‘[s]tanding is not about who wins the lawsuit; it is about who is allowed to have their case heard in court’ ” (third alteration in original) (quoting *Cath. League*, 624 F.3d at 1048). But the court took this language in *Catholic League* out of context. We were explaining the difference between analyzing standing at the pleading stage versus analyzing whether a complaint adequately states a claim for relief.<sup>2</sup> We were not discussing the requirement to maintain standing at a later stage in the proceedings; there was no need to since that case was dismissed at an early stage.

[12] Because Appellants’ alleged spiritual injury—stigma from belonging to a religion that CSU has impermissibly defined and disapproved of—is entangled with the merits of their Establishment Clause claim, the district court’s rationale for dismissing the claim on the merits explains why Appellants failed to maintain standing. After a fully developed record, the district court made a factual finding that the Policy had no hostility toward religion. It based that finding on (1) the fact that the Policy does not mention Hinduism; (2) dictionary definitions show “caste” is “readily defined without reference to Hinduism” as a “distinct class or rank in any society”; and (3) the absence of evidence that Appellee or the Policy’s stakeholders expressed “anti-Hindu sentiments.” The district court also concluded that Appellants did not offer any evidence connecting Appellee to allegedly anti-Hindu opinions expressed by faculty and student groups that supported the Policy. Because we hold that those findings were not clearly erroneous, they foreclose Appellants’ standing argument. If the Policy does not stigmatize Hinduism, Appellants have no spiritual injury. And

if there is no injury, there is no standing. *TransUnion LLC*, 594 U.S. at 417, 141 S.Ct. 2190. Appellants' Establishment Clause claim fails for lack of Article III standing.

#### D

Appellant also brought a claim for declaratory relief seeking a judgment that the Policy is unconstitutional. Because this claim merely seeks a particular remedy for Appellants' constitutional claims for which we affirm dismissal, the district court did not err in dismissing it. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72, 70 S.Ct. 876, 94 L.Ed. 1194 (1950) (explaining that the Declaratory

Judgment Act merely added a remedy to a federal court's set of remedial options).

#### IV

For the foregoing reasons, we AFFIRM judgement for Appellee and REMAND for entry of judgment of dismissal without prejudice. See *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (“In general, dismissal for lack of subject matter jurisdiction is without prejudice.”).

#### All Citations

--- F.4th ----, 2025 WL 779687

### Footnotes

- 1 Appellants have not made any arguments on appeal as to any of their state law claims and have therefore forfeited any appeal of the rulings on those claims. *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929–30 (9th Cir. 2003).
- 2 The full quote reads: “Standing, or the lack of it, may be intertwined with whether the complaint states a claim upon which relief can be granted, but it is not the same thing. Standing is not about who wins the lawsuit; it is about who is allowed to have their case heard in court.” *Cath. League*, 624 F.3d at 1048 (citations omitted).



## OFFICE OF THE GOVERNOR

OCT 07 2023

To the Members of the California State Senate:

I am returning Senate Bill 403 without my signature.

This bill would define "ancestry" for purposes of the Fair Employment and Housing Act, the Unruh Act, and the Education Code to include "caste" and other dimensions of ancestry.

In California, we believe everyone deserves to be treated with dignity and respect, no matter who they are, where they come from, who they love, or where they live. That is why California already prohibits discrimination based on sex, race, color, religion, ancestry, national origin, disability, gender identity, sexual orientation, and other characteristics, and state law specifies that these civil rights protections shall be liberally construed. Because discrimination based on caste is already prohibited under these existing categories, this bill is unnecessary.

For this reason, I cannot sign this bill.

Sincerely,

Gavin Newsom



## Recommended Reading

