

## **Casting Aspersions: Solving a Problem or Creating a New One with Caste as a Novel Protected Class?**

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### **ABSTRACT**

*In the past few years, there has been a flood of media coverage asserting the prevalence of widespread caste-based discrimination in the U.S., particularly in Silicon Valley where a significant number of Indian Americans and workers of Indian origin are employed. While this recent deluge is not the first time the topic of caste has arisen, it is now increasingly being discussed in legal and regulatory settings across the country. This article will examine the applicability of existing federal and state civil rights laws to cases of alleged caste-based discrimination as well as the viability of caste as a stand-alone category in anti-discrimination policies in educational institutions, government bodies and corporate settings. Specifically, it will argue that cases alleging caste-based discrimination can be litigated effectively under existing federal and state non-discrimination statutes covering national origin and national origin adjacent categories such as ancestry and ethnicity. It will also demonstrate that the addition of “caste” as a separate protected class or the equating of caste with race, color and religion, if successful, raises important constitutional freedom of religion, equal protection, and due process concerns while simultaneously risking the institutionalizing of inaccurate, racial science theories about people of Indian origin and descent.*

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## I. INTRODUCTION

*“The Hindoos err because they are ignorant; and their errors have never been fairly laid before them. The communication of our light and knowledge to them, would prove the best remedy for their disorders.” — Charles Grant, British Parliamentarian and Chairman at the East India Company (1792)*<sup>1</sup>

The spring of 2020 brought a flood of media coverage asserting the prevalence of widespread caste-based discrimination in the U.S., particularly in Silicon Valley where a significant number of Indian Americans and workers of Indian origin are employed. While this recent deluge is certainly not the first time the issue of caste has been raised in the public sphere, it is now increasingly being discussed in legal and regulatory settings across the country.

The issue first took center stage in 2020 with a high-profile lawsuit filed by then California Department of Fair Employment and Housing (now California Civil Rights Department or CRD) against Cisco Systems alleging caste-based discrimination against an Indian origin employee.<sup>2</sup> In addition to this case, there have been a number of legislative and administrative moves to add caste as a stand-alone protected category to anti-discrimination policies at Brown University, Brandeis University, Columbia University, Harvard University, Georgetown University, University of California at Davis and Berkeley, the California State University system, University of Michigan, Santa Clara County, the City of Seattle and the states of California and Oregon, just to name a few. Caste

<sup>1</sup> Charles Grant, OBSERVATIONS ON THE STATE OF SOCIETY, 148 (1792).  
<https://archive.org/details/observationsonst00gran/page/n13/mode/2up>

<sup>2</sup> Paresh Dave, *California Accuses Cisco of Job Discrimination Based on Indian Employee's Caste*, REUTERS (July 1, 2020, 8:45 PM), <https://www.reuters.com/article/us-cisco-lawsuit/california-accuses-cisco-of-job-discrimination-based-on-indian-employees-caste-idUSKBN2423YE>.

as a novel protected class has also made its way into graduate and faculty collective bargaining agreements.<sup>3</sup> Even the State of California's Democratic Party announced in August of 2021, that it too had added caste to its non-discrimination policies.<sup>4</sup>

These institutions, along with CRD, have relied heavily on a single survey conducted by an entity known as Equality Labs,<sup>5</sup> to justify their assertions about caste and discrimination in the Indian diaspora (according to the 2020 census, there are 4,397,737 Asian Indians in the US, comprising approximately 1.3% of the US population).<sup>6</sup> A study released by the Carnegie Endowment for International Peace, however, not only dismisses the Equality Labs survey as non-representative, non-generalizable, and unscientific,<sup>7</sup> but also indicates that the majority of the over 4 million people of Indian descent in the US do not identify by caste and only 5% have anecdotally reported having faced alleged caste-based discrimination.<sup>8</sup> This study, along with data on caste identity and attitudes from a new Pew Survey in India, will be examined in more detail in subsequent sections.

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<sup>3</sup> Sakshi Venkatraman, *Harvard Adds Caste Bias Protections for Graduate Student Workers*, (Dec. 2, 2021), <https://www.nbcnews.com/news/asian-america/harvard-adds-caste-bias-protections-graduate-student-workers-rcna7279> (last visited Aug. 1, 2024).

<sup>4</sup> Ritu Jha, *California Democratic Party Bans Caste Discrimination*, INDICA NEWS (Sept. 2, 2021), <https://indicanews.com/2021/09/02/california-democratic-party-bans-caste-discrimination/>.

<sup>5</sup> Maari Zwick-Maitreyi et al., *Caste in the United States: A Survey of Caste Among South Asian Americans*, EQUALITY LABS (2018).

<sup>6</sup> U.S. Census Bureau, *2020 Census* (2020), <https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census-main.html>.

<sup>7</sup> Sumitra Badrinathan et al., *Social Realities of Indian Americans: Results From the 2020 Indian American Attitudes Survey*, 55 n.29, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (June 9, 2021), <https://carnegieendowment.org/2021/06/09/social-realities-of-indian-americans-results-from-2020-indian-american-attitudes-survey-pub-84667>.

<sup>8</sup> See *id.* at 45.

Caste is one of the most complicated and misunderstood concepts encountered when attempting to understand India and Hinduism, and by extension the Indian and Hindu diasporas. Nonetheless, it has become the singular most common feature associated with both.

As the world's oldest religion, with over 1.2 billion adherents, Hinduism represents a broad, pluralistic family of traditions. Its diversity is bound together by certain ancient, core teachings, about the inherent divine essence of all beings, *dharma* (selflessness) and pluralism, and not a single spiritual leader, institution or book. It developed over millennia through the meditations, experiences and faith of its sages, teachers, lay leaders and practitioners, with Hindus experiencing its wisdom based on their own understanding and practices of its precepts.<sup>9</sup>

Today, there are numerous traditions and lineages (*sampradaya* and *parampara*) and various schools of philosophy (*darshana*) with devotees numbering in the millions that emphasize Hindu teachings about the equal presence of the Divine in all beings. These traditions and lineages are led by and bring together Hindus of diverse backgrounds, including but not limited to race, tribe, ethnicity, community, class, language, and region, for

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<sup>9</sup> *Hinduism Basics*, HINDU AM. FOUND., <https://www.hinduamerican.org/hinduism-basics> (last visited Aug. 1, 2024).



spiritual study and practice, worship and fellowship.<sup>10</sup> Many trace their origins back thousands of years.<sup>11</sup>

This in no way denies that prejudices, discrimination or exploitation on the basis of various perceived differences in different quarters and levels of Indian society existed (and continues to exist) and that some groups or communities suffer more than others at different points in time. There is also a long history of Hindus being at the forefront of combating such social ills on the foundation of the core teachings and values of Hinduism. Lastly, a legacy of colonialism very much informs not only the understanding of India and Hinduism to date, but also impacts contemporary caste and religious dynamics in the subcontinent.

Accordingly, we argue that any discussions of caste must be rooted in an accurate understanding of the history and background of “caste” and a “caste system” in the Indian subcontinent, and the extent and nature to which it exists in the U.S. More importantly, any and all legal and regulatory remedies for allegations of caste-based discrimination must comport with long established constitutional principles.

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<sup>10</sup> Christopher Patrick Miller et al., *Beacons of Dharma: Spiritual Exemplars for the Modern Age*, 19-101, LEXINGTON BOOKS (2020); Himanshu Bhatt, *Dalit Hindu Saints*, HINDUPEDIA, THE HINDU ENCYCLOPEDIA, [http://www.hindupedia.com/en/Dalit\\_Hindu\\_saints](http://www.hindupedia.com/en/Dalit_Hindu_saints) (last visited Aug. 1, 2024). See e.g., *Statements from Hindu Leaders Against Caste Discrimination*, HINDU AM. FOUND., <https://www.hinduamerican.org/hindu-leaders-statements-against-caste-discrimination> (last visited Sept. 30, 2024); *Hindu Leaders' Reflections on Oneness*, HINDU AM. FOUND., <https://www.hinduamerican.org/oneness> (last visited Sept. 30, 2024); Sudarshan Ramabadran, *Social Reformation Is the Core of India's Spirituality*, TIMES OF INDIA BLOG (May 8, 2020), <https://timesofindia.indiatimes.com/blogs/the-vantage-viewpoint/social-reformation-is-the-core-of-indias-spirituality/>; Rita DasGupta Sherma & Purusottama Bilimoria, *Contemplative Studies & Hinduism: Meditation, Devotion, Prayer, & Worship*, ABINGDON, OXON: ROUTLEDGE (2021).

<sup>11</sup> Rita DasGupta Sherma & Purusottama Bilimoria, *Contemplative Studies and Hinduism: Meditation, Devotion, Prayer, and Worship*, ABINGDON, OXON: ROUTLEDGE (2021).

In Part II, we discuss the CRD's lawsuit against Cisco, its case history, and the serious constitutional implications for Hindus of Indian or South Asian origin raised by the manner in which the state pleaded its case. In Part III, we delve into why the CRD's conflation of caste with religion not only contravenes free exercise, but also perpetuates colonial policies based on European theories about people of Indian origin and Hinduism. In Part IV, we explore why the CRD's equating of caste with race or color is erroneous in the absence of observable traits, and also perpetuates racialized theories about people of Indian origin. Then in Part V, we discuss national origin as the best, yet imperfect avenue to litigate claims of alleged caste discrimination under Title VII. In Part VI, we problematize caste as a stand-alone category under non-discrimination policy as seen in state and local governments as well as higher education settings, and the adverse implications it has on due process, equal protection, and religious liberty so much so that such policies may not withstand either facial or as applied challenges. Part VII explores the few data sets available on Indian and Indian American social realities and attitudes, which show that, contrary to the CRD, activists, and media's claims, the prevalence of caste discrimination is virtually non-existent in the United States. And finally in Part VIII, we discuss the practical difficulties in enforcing caste policies.

## II. CISCO SYSTEMS: LITIGATING CASTE DISCRIMINATION UNDER EXISTING ANTI-DISCRIMINATION LAWS

There is no precedent or case law directly on caste discrimination claims in the U.S. *CRD v. Cisco Systems* is the first major case that examines whether and how caste-based discrimination fits under federal and state non-discrimination statutes.

In *CRD v. Cisco Systems*, the State of California's Civil Rights Department, previously known as Department of Fair Employment and Housing, filed four causes of action against Cisco Systems under Title VII in federal court in June 2020 over a claim by an Indian-origin

employee that two managers, also of Indian origin, allegedly discriminated against him on the basis of his presumed caste.<sup>12</sup> The State subsequently withdrew the case and re-filed in California state court in October 2020,<sup>13</sup> accusing the company of engaging in unlawful employment practices on the bases of religion, ancestry, national origin/ethnicity, and race/color.<sup>14</sup> It alleged that Cisco Systems Inc. failed to adequately address a claim of discrimination based on an Indian origin employee's ostensible caste. That employee claimed that two of his managers, also of Indian origin, discriminated against him by divulging to other employees that he was "not on the main list."<sup>15</sup>

Cisco System filed a Demurrer in November 2020 requesting the CRD to provide evidence to support its purely conclusory allegations, including but not limited to dates, names of witnesses and timelines, none of which were provided despite seven years of Doe's employment with Cisco.<sup>16</sup> Cisco also filed a Motion to Compel as late as May 2024, again seeking production of evidence the CRD was ostensibly relying upon for its claims. The court

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<sup>12</sup> *DFEH Sues Cisco Systems, Inc. And Former Managers For Caste-Based Discrimination*, CAL. DEP'T OF FAIR EMP. & HOUS. (June 30, 2020), [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/06/Cisco\\_2020.06.30.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/06/Cisco_2020.06.30.pdf).

<sup>13</sup> Sunita Sohrabji, *Does Caste Discrimination Exist in Silicon Valley Firms? Indian Americans Divided Over Issue at Santa Clara County Human Rights Commission Hearing*, INDIA WEST (May 12, 2021), <https://indiawest.com/does-caste-discrimination-exist-in-silicon-valley-firms-indian-americans-divided-over-issue-at-santa-clara-county-human-rights-commission-hearing/>.

<sup>14</sup> Dep't of Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022).

<sup>15</sup> Dep't Fair Emp. & Hous. v. Cisco Sys., Inc. et al., No. 5:20-cv-04374 (N.D. Cal. 2020). The "main list" refers to a general merit rank based on the results of a national, competitive entrance exam students take for admission to the Indian Institutes of Technology. There are quotas or reserved seats for those designated as members of a "Scheduled Caste", "Other Backward Classes", or "Scheduled Tribes," women, people of foreign origin, people with disabilities, and members of the military.

<sup>16</sup> Mem. Points & Authorities, Nov. 3, 2020, Dep't. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022), No. 20CV372366.

granted the motion with a 35-day deadline, which the CRD has failed to comply with as of the time of this writing.<sup>17</sup> It is also noteworthy that in April 2023, the CRD dismissed with prejudice its claims against Iyer and Kompella, though not Cisco,<sup>18</sup> after the defendants filed a Motion for Sanctions a few months prior alleging that the CRD had engaged in prosecutorial abuse, fabrication and suppression of key evidence; that the CRD's claims lacked legal basis; and that the CRD's claims were "contrary to the undisputed facts obtained during this litigation and Plaintiff's prior investigation of Doe's administrative complaints."<sup>19</sup>

Although the specific claims in this case were brought under the *California Fair Employment and Housing Act*, *Cal. Gov't Code, 12940, subd. (a) (FEHA)*,<sup>20</sup> they would also have implications on the applicability of *Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII)*<sup>21</sup> to caste-based discrimination cases, which prohibits employment discrimination based on race, color, religion, sex and national origin.<sup>22</sup>

Thus far, the case has almost entirely been analyzed and covered by the media in the context of two specific themes: (1) the alleged prevalence of caste-based discrimination in American technology companies and

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<sup>17</sup> See Stipulation Regarding Cisco's Mot. To Compel, May 15, 2024, Dep't. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022), No. 20CV372366.

<sup>18</sup> See Request for Dismissal, Apr. 6, 2023, Dep't. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022), No. 20CV372366 (Public court records from Dec. 30, 2022, indicated that the CRD was prepared to voluntarily dismiss Defendants Iyer and Kompella from the case).

<sup>19</sup> See Mot. for Sanctions by Defs., Jan. 11, 2023, Dep't. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022), No. 20CV372366.

<sup>20</sup> Dep't. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022).

<sup>21</sup> 42 U.S.C. § 2000e.

<sup>22</sup> *Id.*

broadier society;<sup>23</sup> and (2) the applicability of current civil rights laws to caste-based discrimination.<sup>24</sup> The former has been briefly addressed in the previous section above, while the latter will be discussed below.

A third, yet equally important issue that this case raises is the constitutional implications of how the State has framed its claims. In this regard, in January 2021, the Hindu American Foundation (HAF) filed a legal motion in Santa Clara County Superior Court to intervene in the case as a third party to protect the constitutional rights of the broader Hindu American community.<sup>25</sup> Subsequently on September 20, 2022, HAF filed a Section 1983 Civil Rights claim directly against CRD in federal court based largely on the same constitutional grounds as in the motion to intervene.<sup>26</sup>

California attempted to make its claim against Cisco and the individual defendants by asserting a definition of caste as follows:

[a]s 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. At the bottom of the Indian hierarchy is the Dalit, typically the darkest complexion caste, who

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<sup>23</sup> See e.g., Shwanika Narayan & Chase DiFelicianantonio, *Activists Push Tech to Address Caste Discrimination After Cisco Lawsuit*, S.F. CHRON. (Aug. 13, 2020), <https://www.sfchronicle.com/business/article/Activists-push-tech-to-address-caste-15479743.php>.

<sup>24</sup> Charanya Krishnaswami & Guha Krishnamurthi, *Title VII and Caste Discrimination*, 134 HARV. L. REV. F. 456 (June 20, 2021).

<sup>25</sup> Mem. Points & Authorities in Supp. of Hindu American Foundation's Mot. for Leave to Intervene, Jan. 7, 2021, Dep't. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022), No. 20CV372366.

<sup>26</sup> Robert Iafolia, *California Caste-Bias Case Misrepresents Hinduism, Suit Says*, BLOOMBERG L. DAILY LABOR REP., (Sept. 22, 2022, 4:34 PM), <https://news.bloomberglaw.com/daily-labor-report/california-caste-bias-case-misrepresents-hinduism-suit-says>.

were traditionally subject to “untouchability” practices which segregated them by social custom and legal mandate.<sup>27</sup>

California further explained in footnote 2 that the caste to which someone belongs is immutable and social stratification and discrimination based on caste persists in the U.S.<sup>28</sup> Additionally, California maintained that “Cisco failed to take any steps whatsoever to prevent ‘. . . inequalities associated with [c]aste status, ritual purity, and social exclusion [from] becom[ing] embedded . . .’ at the company.”<sup>29</sup> There are several other, even more overt and egregious instances in the CRD’s filings, including the amended complaint, motions and declarations where the State not only interferes in Hindu religious doctrine, but supports a disfavorable view of Hinduism.<sup>30</sup>

“California’s assertion as a state body to resolve questions of religious doctrine as well as its ‘failure to provide any definition or workable method to determine anyone’s caste’ raises serious constitutional problems.”<sup>31</sup> “The practical implications of the state seeking to legally define caste, which has no universally accepted definition, is not an immutable characteristic, is not outwardly recognizable, nor is it something that can be presumed to be core to an individual’s self-identity or their interactions with others, also cannot be ignored. In the absence of legal precedent, the State attempts to equate caste with all of the following categories: religion, race, color, ancestry, national origin, and ethnicity and asks the court to insert

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<sup>27</sup> Dep’t Fair Emp. & Hous. v. Cisco Sys., Inc., et al., No. 5:20-cv-04374 (N.D. Cal. 2020).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> Decl. of Rumduol Vuong Supp. Mot. Leave to Amend & File Am. Second Compl., Oct. 16, 2020.

Dep’t. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022), No. 20CV372366; First Am. Compl., Sept. 21, 2023, Hindu Am. Found., Inc. et al. v. Kevin Kish et al., No. 2-22-CV-01656-DAD-JDP (E.D. Cal.).

<sup>31</sup> Mem. from the Hindu Am. Found. at 4 (Feb. 8, 2022), available at <https://acrobat.adobe.com/link/review?uri=urn%3Aaaid%3Aasc%3AUS%3A861f5412-913f-3fdd-9143-018cb60884d8>.

into law a concept that lacks a precise objective definition, let alone a commonly understood one[.]” yet is tied inextricably with a particular religion, national origin, and ethnicity.<sup>32</sup>

As a result, people of South Asian descent generally and Hindus specifically would effectively lose their rights to religious liberty, equal protection and due process rights by the state government 1) illegally asserting a right prohibited by the First Amendment’s Establishment and Free Exercise clauses; 2) creating a de facto suspect class subject to unique and targeted monitoring and policing; 3) fostering workplaces which would “likely lead employers to actively discriminate against Hindus and South Asian Americans in order to avoid the undefined maze of legal uncertainty that would be California’s caste-discrimination bar; and 4) endangering Indian Americans with state overreach where the state assigns a caste.”<sup>33</sup>

On November 16, 2023, Santa Clara Superior Court Judge Amber Rosen dismissed the Hindu American Foundation’s Motion to Intervene in state court.<sup>34</sup> Subsequently, on December 11, 2023, the CRD voluntarily filed a motion to amend their complaint against Cisco Systems and removed one line asserting that caste and caste discrimination is an essential part of Hindu religious teachings and practices. However, other instances where the State has endorsed particularly negative and inaccurate definitions of Hindu doctrine and disfavorable views of it are still found in the amended complaint, motions and declarations available in the public record.<sup>35</sup>

Despite these developments, the Section 1983 claim is still pending in federal court and was amended on September 21, 2023. Specifically, several Indian and Hindu Americans joined as individual plaintiffs in the case,<sup>36</sup> as did Sundar Iyer and Ramana Kompella, the two Cisco

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Min. Order at 3, Nov. 16, 2023, Dep’t. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022), No. 20CV372366.

<sup>35</sup> *Id.*; *supra* note 30.

<sup>36</sup> *Id.*

engineers initially accused by the CRD of caste-based discrimination, but who were removed from the case.

Accordingly, the subsequent section will utilize the CRD's complaint to analyze the caste discrimination claims in the context of religion. Furthermore, the CRD's case continues to rely on many inaccurate racial assertions about people of South Asian origin as well as the questionable implication that caste discrimination in India is tied to skin color, in an attempt to draw direct parallels with skin color-based racism in the United States.

### III. CASTE IS NOT RELIGION: STATE INTERVENING IN RELIGIOUS DOCTRINE AND FIRST AMENDMENT IMPLICATIONS

#### *A. The State's Attempt to Define Hindu Religious Doctrine Contravenes the Free Exercise Clause*

Under the California Fair Employment and Housing Act (FEHA),

“Religious creed” includes any traditionally recognized religion as well as beliefs, observances, or practices, which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. It encompasses all aspects of religious belief, observance, and practice, including religious dress and grooming practices, as defined by Government Code section 12926.<sup>37</sup>

As part of its religious discrimination claim under FEHA, the State explicitly defined caste as an inherent part of Hindu “religious belief, observance, and practice.” Specifically, it claimed that “[a]s a strict Hindu social and religious hierarchy, India’s caste system defines a person’s status based on their religion.” It went further in tying

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<sup>37</sup> CAL CODE REGS. tit. 2, § 11060 (2024).



caste discrimination to Hinduism by asserting that caste involves “ritual purity” and a caste hierarchy enforced by a “legal mandate” within Hinduism. And in the process of force-fitting its allegations into a claim of religious discrimination, the State not only defined Hindu beliefs and practices, but attributed a caste identity to Hindu workers of Indian origin at Cisco, as well as assigned each a religious status of “higher” or “lower.” It made the unconstitutional assumption that “...Hindus of South Asian, in particular Indian, descent must all necessarily identify as part of a specific caste and must engage in discrimination based on caste as an inherent or mandated part of their religious beliefs and practices.”<sup>38</sup>

Beyond assertions made in the complaint and even amended complaint, the State supports a disfavorable view of Hinduism through a number of citations, motions and declarations submitted to the court. These submissions make numerous false and disparaging statements about Hindus and Hinduism, including but not limited to:

- “If Hindus migrate to other regions on earth, Caste would become a world problem.”
- “Caste is a structure of oppression that affects over 1 billion people across the world. It is a system of religiously codified exclusion that derives from Hindu scripture. At birth, every child inherits his or her ancestor’s caste, which determines social status and assigns spiritual purity and their deeds in past lives.”
- “Brahmins [Hindu priests], who founded India’s caste system, are at the top of the caste system and have benefited from centuries of privilege, access, and power because of it.”
- “Caste Apartheid is the system of religiously codified exclusion that was established in Hindu scripture. Hindu origin myths state that different people were created from different parts of God Brahma’s body and were to be ranked hierarchically according to ritual status, purity, and occupation.”

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<sup>38</sup> *Supra* note 30.

- “India’s caste system is a complex yet stratified hierarchical order...It emanates from the Hindu alias Brahminical books of rule that have provided certain qualifiers — such as one’s ancestry — to ascribe caste status and religion.”
- “Religion is another significant factor in deciding one’s caste status because it provides the origin of caste values. In India’s Hindu - based caste system to which the Complainant belongs, the ancient Hindu texts, especially Vedas, amplify the distinction of humans based on their qualities of hierarchy.”
- “Caste and untouchability are constructions of Hinduism.”

The CRD further compares Hinduism unfavorably with Buddhism — “Of the reformers of Brahmanism [Hinduism], Buddhism is seen today as the most promising for a theology of liberation for India.” As a result, the CRD treats Hinduism and Hindus in a manner that it does not treat any other religion or its adherents.

Rather than making overarching and inaccurate claims about Hinduism and its purported connection to caste or endorsing unfavorable views towards Hinduism in contrast to other religions or none, the State could have merely tied its allegations of caste-based discrimination to the individual defendants’ religious beliefs or proceeded on the basis of protected classes other than religion.<sup>39</sup> As the Equal Employment Opportunity Commission guidance on religion under Title VII provides, “[t]he test under Title VII’s definition of religion is whether the beliefs are, in the

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<sup>39</sup> Incidentally, the key defendant, Sundar Iyer, is a self-professed agnostic as per a webpage he created twenty years prior as a graduate student at Stanford University. That the State characterized Sundar Iyer as Hindu in spite of his publicly available disavowal of Hinduism raises troubling questions of state overreach as well as a violation of Sundar Iyer’s First Amendment’s right to free exercise. Sundar Iyer, *The Serious Side*, <http://yuba.stanford.edu/~sundaes/serious.html> (last modified Aug. 20, 2001).

individual's "own scheme of things," religious."<sup>40</sup> California, however, "[did] what the First Amendment says it cannot, assert a government right to resolve questions of religious doctrine."<sup>41</sup>

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 (1976) 426 U.S. 696, 708-09, 96 S. Ct. 2372, 2380.)<sup>42</sup>

More specifically, the State, contrary to Supreme Court precedent, was "imposing a special disabilit[y] on the basis of religion" by wrongly defining its beliefs and then labeling those beliefs as inherently and illegally discriminatory.<sup>43</sup> The idea of a social and religious hierarchy or a "caste system" is inaccurate and antagonistic to Hindu scriptures and teachings; every person's divine essence is entitled to equal worth, dignity and mutual respect and every individual is ethically and morally obligated to ensure the same.<sup>44</sup>

California not only defined Hinduism in contradiction to the precepts of the religion and the beliefs of an overwhelming number of its own adherents, but did so in violation of the First Amendment rights of Hindu Americans to be free from government intrusion in matters of their religious doctrine.<sup>45</sup>

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<sup>40</sup> Janet Dhillon, *Section 12: Religious Discrimination*, EEOC (Jan. 15, 2021), <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#:~:text=Overview%3A%20Religion%20is%20very%20broadly.preferences%20are%20not%20religious%20beliefs>.

<sup>41</sup> Compl. at 2, Hindu Am. Found. v. Kevin Kish et al., No. 2:22-at-00971 (E.D. Cal. Sept., 2022), <https://www.courthousenews.com/wp-content/uploads/2022/09/hindu-american-foundation-kish-california-complaint.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2.

***B. The State's Inaccurate Definitions of Hinduism and Caste are Rooted in Colonial Policies Based on Inaccurate European Theories about Hinduism.***

The contemporary term caste originates from the Portuguese word, *casta*, which is loosely defined as lineage, breed, or race. While Europeans used the term to describe and subjugate the highly complex and localized social groupings they witnessed in their earliest contact with Indian society, their assumptions were deeply informed by the antisemitic 15th -century Iberian doctrine of blood purity (*limpieza de sangre*) and later iterations which classified humans by descent.<sup>46</sup>

There is no exact equivalent concept in any Indian language, and the various definitions of caste used by sociologists, anthropologists, historians, Indologists, and even in common parlance may include but are not limited to concepts such as tribe, vocation or guild affiliation, class, sect, religion, endogamy, community, kinship, birth, other indigenous social markers.<sup>47</sup> “Caste” may also be used in reference to administrative designations under Indian law as the imposed European colonial categorization of “caste” was adopted by the Indian polity and today exists as a legal fiction and political category under Indian law, bringing together various and diverse indigenous social groupings under two of three administrative classes. The Government of India, however, does not actually define caste.

The CRD's description of a “caste system” and Hinduism come from European notions of an unchanging, oppressive, and hereditary pan-Indian four tiered social hierarchy that was (and is) religiously mandated by and for Hindus. These notions were not grounded in Hindu teachings nor Indian history, but were instead a product of Indian religions and society being defined through the

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<sup>46</sup> Sumit Guha, *What Did Europeans Contribute to the Caste System in India?* J. OF THE HIST. & IDEAS BLOG (May 30, 2018), <https://jhiblog.org/2018/05/30/what-did-europeans-contribute-to-the-caste-system-in-india/>.

<sup>47</sup> Padmanabh Samarendra, *Census in Colonial India and the Birth of Caste*, 46 ECON. & POL. WKLY. 51, 51-58 (2011).

subjective bias of Christian concerns as well as European society and history.<sup>48</sup> Indian society at the time consisted of thousands of groups and subgroups, akin to tribes and tribal confederations, that coalesced around a variety of social markers, not four.<sup>49</sup> But rather than exploring the lived realities and religious understandings of Indians of diverse backgrounds, Europeans resorted to confirming their own biases with their own interpretations of complex philosophical and abstract concepts in languages in which they did not have fluency in their attempts to regulate Indian society.<sup>50</sup>

After the East India Company seized control of large swaths of the Indian subcontinent, for example, British administrators specifically sought out Hindu texts, looking for something akin to Abrahamic laws found in the Torah or Commandments, in order to rule over Hindu society.<sup>51</sup> The British relied heavily on one ancient text in particular, the Manusmriti, which was unknown to a vast majority of Hindus and had no authoritative role in contemporary Hindu life at the time.<sup>52</sup> Nonetheless, it was made out to be the singular source of pan-Hindu law, especially where it seemed to validate British insistence on the existence of a formal system of four hierarchical castes in the way they envisioned it to be from time immemorial.<sup>53</sup>

At its core was the assumed existence of four religiously prescribed “castes” within a pyramid structure

<sup>48</sup> A. M. Hocart, *Caste, A Comparative Study*, (Russell & Russell, 2nd ed. 1968). See also, Sumit Guha, *Beyond Caste: Identity and Power in South Asia, Past and Present*, Ranikhet, India: Permanent Black in association with Ashoka Univ., (2016) (2013), passim.

<sup>49</sup> Samarendra, *supra* note 47.

<sup>50</sup> *Id.*

<sup>51</sup> J.D. Roover & S. Claerhout, *The Caste Connection. On the Sacred Foundations of Social Hierarchy*, UNIV. OF PARDUBICE, *Theatrum Historiae*, vol. 17 (2015).

<sup>52</sup> Donald R. Davis, Jr., *The Spirit of Hindu Law*, CAMBRIDGE UNIV. PRESS (2010) (“...there is no historical evidence for either an active propagation or implementation of Dharmasastra (Manusmriti) by a ruler or any state.”)

<sup>53</sup> Samarendra, *supra* note 47. Incidentally, the Manusmriti is part of a corpus of texts known as the Dharmashastras, which, according to tradition, are subject to re-interpretation to suit contextual differences in time and place.

which included *Brāhmins* (“priests”) depicted as being at the top, followed by *Kshatriyas* (“warriors”), then *Vaishyas* (“traders”), and then *Shudras* (“laborers”). A fifth caste category at the bottom of the pyramid was reserved for “Untouchables” or those that fall outside this caste structure or system—otherwise known as outcastes.<sup>54</sup> In spite of British administrators witnessing thousands of groupings, groups deemed “outcastes” would later be included as members of a legal classification by the British called Scheduled Castes.<sup>55</sup>

Ironically, the CRD, the state agency charged with enforcing California’s civil rights laws, seems complicit in perpetuating false and racist theories about Indians and Hindus in its zealous advocacy.

Indeed, various Hindu texts describe the concept of *varna*, which has a variety of meanings, (including form, figure, character, and hue) to describe a way of understanding human diversity and purpose.<sup>56</sup> Simply put, *varna* are akin to psychological personality types or vocational callings.<sup>57</sup> This ancient typology describes some individuals as being more adept in intellectual pursuits and sharing knowledge and wisdom (*brāhmana/brāhmin*); some who are more capable in governance and exercising power to protect society (*kshatriya*); others who gravitate towards wealth creation and commerce to support society (*vaishya*); and those who are skilled to work with their hands, or otherwise contribute to society as artisans,

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<sup>54</sup> *What Is India’s Caste System?* BBC NEWS, (June 19, 2019), <https://www.bbc.com/news/world-asia-india-35650616>; J. D. Roover, *Scheduled Castes vs. Caste Hindus: About a Colonial Distinction and Its Legal Impact*, SOCIO-LEGAL REV., 1st ed., Vol. 13, pp. 23-50, Lucknow, India: Eastern Book Company (2017).

<sup>55</sup> Simon Charsley, “Untouchable”: *What Is in a Name?*, 2 THE J. OF THE ROYAL ANTHROPOLOGICAL INST. 1, 1-23 (Mar. 1996); Roover, *supra* note 51, at 37.

<sup>56</sup> John D. Mayer, *Hindu Personality Types Travel West*, PSYCH. TODAY (Mar. 2, 2009), <https://www.psychologytoday.com/us/blog/the-personality-analyst/200903/hindu-personality-types-travel-west>.

<sup>57</sup> H.G. Coward, *Jung and Eastern Thought*, (State Univ. of New York Press 1985); Huston Smith, *The World’s Religions: Our Great Wisdom Traditions*, (Harper San Francisco 1991).

farmers, and laborers (*shudra*).<sup>58</sup> At the same time, individuals may exhibit aspects of different *varna* with one or two dominating; personality or temperament may change over time; and the social functions one takes up are not mutually exclusive to any one individual or group.<sup>59</sup>

Conceptually *varna* is not familial or hereditary nor is it a determinant of any established social hierarchy.<sup>60</sup> As explained through countless Hindu sources of knowledge and commentaries, stories, and poetry, and the teachings of widely revered Hindu spiritual teachers, both past and present, *varna* is based on *guna* (qualities/virtues) and *karma* (thoughts, words, actions).<sup>61</sup> The Bhagavad Gita, for example, very explicitly states that a person is referred to by his *varna* based on their *karma* and *guna* and not based on their familial birth.<sup>62</sup> Any reference to the Bhagavad Gita's support of some type of a hereditary *varna* "system" is based on inaccurate interpretations of the text—interpretations which also contradict those of the most respected historical and contemporary Hindu thinkers.<sup>63</sup>

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<sup>58</sup> *The Influence of Hinduism on Personality Assessments*, HINDU AM. FOUND., <https://www.hinduamerican.org/varna-theory-personality-types> (last visited Sept. 21, 2024).

<sup>59</sup> There are numerous examples throughout Hindu sacred texts demonstrating the change. See e.g., *Srimad Bhagavata Purana* VII.11.35; *Srimad Bhagavata Purana*, V.4.8-13; *Mahabharata*, *Vana Parva*, Section LXXXVII.

<sup>60</sup> Acharya Shunya, *Vedic Culture - A Truly Liberal Tradition of Humanity*, AWAKENED SELF FOUND. (Feb. 7, 2018) <https://www.acharyashunya.com/post/2018/02/07/vedic-culture-a-truly-liberal-tradition-of-humanity>.

<sup>61</sup> Compl. at 4, Hindu Am. Found. v. Kevin Kish et al., No. 2:22-at-00971 (E.D. Cal. Sept., 2022), <https://www.courthousenews.com/wp-content/uploads/2022/09/hindu-american-foundation-kish-california-complaint.pdf>.

<sup>62</sup> Swami Mukundananda, *Bhagavad Gita: The Song of God*, Ch. 4, Verse 13, <https://www.holy-bhagavad-gita.org/chapter/4/verse/13> (last visited Aug. 1, 2024).

<sup>63</sup> Charanya Krishnaswami & Guha Krishnamurthi, *Title VII and Caste Discrimination*, 134 HARV. L. REV. F. 456, 477 (June 20, 2021), <https://harvardlawreview.org/2021/06/title-vii-and-caste-discrimination/>; Arvind Sharma, *Classical Hindu Thought: An Introduction*, 141, NEW DELHI: OXFORD UNIV. PRESS (2000).

Indian society, from historical accounts, was never organized nor functioned on the basis of the four *varna*.<sup>64</sup> That is not to say, however, that some Indians didn't associate their social groups or tribes, of which there are thousands, with a particular *varna*. However, the British misunderstanding and overgeneralization of *varna* and attempt to forcibly place Indians into a rigid and hierarchical four or five tiered classification system through decades of census exercises was neither inherent nor natural to Hinduism or Indian society.<sup>65</sup>

#### IV. CASTE IS NOT RACE/COLOR UNDER TITLE VII AND STATE LAW: THE CHALLENGES OF OBSERVABLE TRAITS

##### *A. Equating caste with race or color under Title VII or state law is erroneous in the absence of observable traits.*

Race and color under existing civil rights law have been defined and interpreted to focus on physical traits and characteristics. It is heavily dependent on specific observable traits and characteristics, and more particularly, the idea of the immutability of those traits and characteristics. According to current legal doctrine, "a trait is immutable if it is beyond the power of an individual to change or if it is fundamental to personal identity."<sup>66</sup>

A recent 11th Circuit Court of Appeals case, *EEOC v. Catastrophe Management Solutions*, interpreting Title VII regulations, defined race as "common physical

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<sup>64</sup> Samarendra, *supra* note 47, at 53.

<sup>65</sup> Nicholas B. Dirks, *Castes of Mind*, 37 IMPERIAL FANTASIES & POSTCOLONIAL HIST. 56, 73. (1964). *See also* Samarendra, *supra* note 47.

<sup>66</sup> Nicholas Serafin, *In Defense of Immutability*, 2 BYU L. REV. 8, 275 (2020).



characteristics shared by a group of people and transmitted by their ancestors over time.”<sup>67</sup>

Similarly, Justice Alito’s dissenting opinion in *Bostock v. Clayton County, Georgia*, affirmed that race discrimination includes discriminating against employees based on their interracial relationships), indicating that race discrimination is largely dependent on some type of observable and physical traits.<sup>68</sup>

Even the expansion of what constitutes racial discrimination under FEHA to include “traits historically associated with race, such as hair texture and protective hairstyles,”<sup>69</sup> while not necessarily focused on “immutability” is still centered on observable physical traits.

Caste is a conglomeration of a variety of social markers including but not limited to clan, class, language, lineage, tribe, region of origin, religion, vocation, guild affiliation, or other locally recognized groupings. Traits associated with any of these markers are not ordinarily observable. Moreover, the fact that social groups and legal caste designations in India do change further challenges the argument that caste is immutable like race or color. Similarly, as the Carnegie study indicates, caste identity is not prevalent amongst a majority of people of Indian descent or origin in the US and becomes even less relevant with subsequent generations in this country.<sup>70</sup>

Legal caste designations in India today are based on “schedules” created through British census exercises. During their implementation from the 1870s to the early 1930s, which were intended to collect information to categorize the Indian people based on four “castes,” British

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<sup>67</sup> Jade Shaffer, *Defining Race: Muting All That is Not Immutable*, LOUISIANA L. REV. (2017) <https://lawreview.law.lsu.edu/2017/04/04/defining-race-muting-all-that-is-not-immutable/>.

<sup>68</sup> *Bostock v. Clayton Cnty.*, 590 U. S. 644, 701 (2020) (Alito J., dissenting).

<sup>69</sup> S.B. 188, Reg. Sess. 2019-2020 (Cal. 2019), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB188](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB188).

<sup>70</sup> Badrinath, *supra* note 7.

officials acknowledged that their theories about Indian society did not comport with the lived and ground realities of the Indian people.<sup>71</sup>

In fact, responses to census questions about caste were wholly inconsistent. Indians who responded, self-identified by a variety of the aforementioned social markers. The boundaries between groups coalescing around these markers were also not well-defined, but intersected and overlapped, and were amorphous, permeable, and mutable. Community associations and affiliations often shifted with migration or changes in wealth, class, or trade.<sup>72</sup>

Relations amongst and between communities were greatly influenced by local historical, social, economic, and political dynamics. Perceptions of inter- and intra-community hierarchies across differences in wealth, political influence, social capital, or cultural practices were highly localized and fluid.<sup>73</sup> And, as is true in all human societies throughout history, such perceived differences and notions of hierarchy could contribute to prejudicial or discriminatory treatment within and amongst different groups, but this too varied greatly by locality, and such dynamics did change over time. In short, identifying discrete castes in a uniform pan-Indian caste system as envisioned by colonial administrators proved not only contentious, but a complete failure.<sup>74</sup>

At the end of Britain's experiment, thousands of "castes" were enumerated, not four.<sup>75</sup> A few census officials also sought ranking by status of these groups. Some with the help of native informants who themselves may have, in the context of the real asymmetries of power, been offering their colonizers what they knew or felt the colonizers sought, or were seeking to secure, or simply improve their

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<sup>71</sup> Samarendra, *supra* note 47.

<sup>72</sup> *Id.* at 52.

<sup>73</sup> Charsley, *supra* note 55.; Roover, *supra* note 51.

<sup>74</sup> Samarendra, *supra* note 47, at 54.

<sup>75</sup> C. J. Fuller, *Ethnographic Inquiry in Colonial India: Herbert Risley, William Crooke, and The Study of Tribes and Castes*, 23 J. OF THE ROYAL ANTHROPOLOGICAL INST. 3, 603-621 (2017).

own social standing.<sup>76</sup> The absence of any objective or meaningful way of assigning status became obvious when Indians across the subcontinent filed petitions and complaints disputing the ranks assigned to them.<sup>77</sup>

Observations shared by the Superintendent of the Government of India, ML Middleton, in a 1921 Census Report shed light on the inherent arbitrariness and haphazardness of caste categories that were created and assigned by the British and later adopted by Indian polity after Independence:

[W]e pigeon-holed everyone by castes and when we could not find a true caste for them labelled them with the name of an hereditary occupation. We deplore the caste system and its effect on social and economic problems, but we are largely responsible for the system which we deplore...Personally I am strongly in favour of all caste statistics being abandoned at the next census, though in this I probably go further than most Europeans. Government's passion for labels and pigeon-holes has led to a crystallisation of the caste system, which, except amongst the aristocratic castes, was really very fluid under indigenous rule.<sup>78</sup>

As such, if caste designations were arbitrary in the first place, changed historically, and continue to change under Indian law, and if caste identities are increasingly irrelevant or abandoned in the US over time, how can it be considered a fixed immutable characteristic for the purposes of the law?

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<sup>76</sup> *Id.* 27-29.

<sup>77</sup> *Id.* 22-23.

<sup>78</sup> L. Middleton, *Census of India 1921 vol. 5 Punjab and Delhi; pt. 1, (Report)*, 343, INTERNET ARCHIVE, <https://archive.org/details/in.gov.ignca.31078>, (last visited Aug. 1, 2024).

*B. The state's inaccurate definitions of caste as race or color are rooted in racial theories about Indians and Hindus.*

The State's equating caste with color under FEHA is predicated on the entirely unsupported contention that "Dalit[s] [are] typically the darkest complexion caste."<sup>79</sup> And the State goes even further to claim that "Doe has a darker complexion relative to other persons of non-Dalit Indian descent"<sup>80</sup> without any semblance of evidence or understanding of the wide range of skin color amongst the estimated 4.9 million people of Indian origin in the US, nor the over 1 billion in India. Notably, the State does not even mention the color or complexion of the two individual defendants to show that it is significantly different from John Doe. And as the EEOC guidance shows, "color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person."<sup>81</sup>

The State's allegations rest not on legal precedent nor science. Rather they rest on racial theories that emerged in the 1700 and 1800s -- theories which sought to prove European superiority and justify the colonial projects in India, Africa, Australia, and the Americas that relied on beliefs about the inferiority of non-European peoples.

Informed by 18th- and 19th- century beliefs in European and Christian superiority over "dark" races<sup>82</sup> and adherents of non-Christian religions around the world,<sup>83</sup> Europeans theorized that the whole of Indian society was actually organized as a four-fold system with a class of "untouchable" castes outside the main four

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<sup>79</sup> *Supra* note 27.

<sup>80</sup> *Id.*

<sup>81</sup> Cari M. Dominguez, *Section 15 Race and Color Discrimination*, EEOC (Apr. 19, 2006), <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#11>.

<sup>82</sup> *Supra* note 76; *supra* note 66.

<sup>83</sup> J. D. Roover, *A Nation of Tribes and Priests: The Jews and the Immorality of the Caste System*, WESTERN FOUNDATIONS OF THE CASTE SYSTEM 1, 11-12 (Prakash Shah, Dunkin Jalki, Sufiya Pathan & Martin Farék eds., 2017).

“castes.” Embedded in these ideas was a racialized theory about these four purported castes — the “upper” castes consisting of light-skinned, more evolved, Caucasians or Indo-Europeans from a superior, northern civilization who, after invading the Indian subcontinent, relegated the indigenous, inferior, and less evolved dark-skinned people to the “lower” castes and “outcastes.”<sup>84</sup> This now debunked theory is often referred to as the Aryan Invasion Theory.<sup>85</sup>

The assertion that status is somehow linked to skin complexion is contrary to the ground realities in both the Indian subcontinent and the diaspora. As with humans more generally, skin pigmentation and color in India are closely linked to the country’s various geographic regions and climates. As the Smithsonian notes, “[v]ariations in human skin color are adaptive traits that correlate closely with geography and the sun’s ultraviolet (UV) radiation.”<sup>86</sup>

Accordingly, various tribes, castes, or communities from the same geographic region will share similar skin color, compared to a single caste, group, or community having the same pigmentation across all regions and climates in India. In fact, it is common to find darker-skinned Indians amongst the undesignated “General Category” communities or social groups while many lighter-skinned Indians may be from designated “depressed castes.” That caste is not related to either category can also be observed in the various skin tones or

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<sup>84</sup> Vishwa Adluri & Joydeep Bagchee, *German Indology, Aryanism and Anti-Semitism*, (2020), [https://www.academia.edu/16637955/German\\_Indology\\_Aryanism\\_and\\_Anti\\_Semitism](https://www.academia.edu/16637955/German_Indology_Aryanism_and_Anti_Semitism).

<sup>85</sup> See, Edwin. F. Bryant, *The Indo-aryan Controversy: Evidence & Inference in Indian History.*, 50-104 ROUTLEDGE (2008). See also, Murali Balaji, *Not Caste in Color: Dispelling Myths in Our Classrooms*, HINDU AM. FOUND. (Jan. 24, 2014), <https://www.hinduamerican.org/blog/not-caste-in-color-dispelling-classroom-myths>.

<sup>86</sup> *Modern Human Diversity - Skin Color*, SMITHSONIAN NATIONAL MUSEUM OF NATURAL HISTORY, <https://humanorigins.si.edu/evidence/genetics/human-skin-color-variation/modern-human-diversity-skin-color>. (last visited Jun. 17, 2020).

hues that present within even a single family of subcontinental origin.

### V. CASTE AS NATIONAL ORIGIN: THE BEST YET IMPERFECT AVENUE

While the categories of religion, race, and color are problematic in drawing a parallel with caste, the best avenue to bring caste discrimination claims under FEHA (or an equivalent state law) and Title VII (as well as Title VI in the context of educational institutions) would be national origin.

Case law on the category of national origin has encompassed attributes such as birthplace, ethnicity, language, descent, ancestry, even tribe.<sup>87</sup> In fact, national origin has been interpreted broadly to include, "certain traits or characteristics that can be linked to one's place of origin, as opposed to a specific country or nation."<sup>88</sup>

Furthermore, while national origin discrimination primarily entails discrimination based on a person being from or appearing to be from a particular region or having ancestors from that region or country, it has been interpreted to include linguistic and cultural traits such as accent, inability to speak English, and dress in addition to immigration/citizenship status.<sup>89</sup> Courts have also held

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<sup>87</sup> *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring) (stating "...that the line between discrimination based on 'ancestry or ethnic characteristics,' . . . and discrimination based on 'place or nation of . . . origin,' . . . is not a bright one" because "[o]ften . . . the two are identical as a factual matter"; thus, "...national origin claims have been treated as ancestry or ethnicity claims in some circumstances")(citing 29 C.F.R. § 1606.1); *Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 937 (7th Cir. 2012) (stating that "...national origin discrimination as defined in Title VII encompasses discrimination based on one's ancestry..."). See *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1119 (9th Cir. 1998).

<sup>88</sup> *Kanaji v. Children's Hosp.*, 276 F. Supp. 2d 399, 401-02 (E.D. Pa. 2003).

<sup>89</sup> *National Origin Discrimination*, Office of the Assistant Secretary for Administration & Management, U.S. Department of Labor, <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/National-Origin-Discrimination> (last visited Aug. 1, 2024).

that employers may discriminate against members of their own race or national origin.<sup>90</sup>

Although the argument can be made to bring caste discrimination claims under national origin, caste itself is a legal fiction and political category under Indian law which conflates various indigenous social group markers. Many of these markers, however, could arguably overlap with attributes such as language, descent, or ancestry.

Under current Indian law, there is no legal definition of caste, but there are administrative designations—that of Scheduled Caste (SC), Scheduled Tribe (ST), and Other Backward Castes (OBC)—which include thousands of groups and subgroups.<sup>91</sup> For instance, the classification of SC, referred to as “Untouchables” or “Dalits” in the Complaint by the State of California, includes some 1,200 different groups or communities that have very different histories, traditions, and socio-economic realities from one another. What they share, however, is the fact that their respective communities are designated as SC.<sup>92</sup> The list, which originated in early 20th century British census exercises as detailed above, and British orders from 1936,<sup>93</sup> was adopted by Indian law makers shortly after gaining independence from Britain.<sup>94</sup>

Subsequent to its initial adoption, 15 additional Constitutional orders and amendments have been issued

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<sup>90</sup> See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (stating “. . . 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.”).

<sup>91</sup> *List of Scheduled Castes*, Department of Social Justice and Empowerment, Ministry of Social Justice and Empowerment, Government of India., <https://socialjustice.gov.in/common/76750> (last updated Feb. 15, 2024); *Central List of OBCs*, National Commission for Backward Classes, Government of India, [https://www.ncbc.nic.in/User\\_Panel/CentrallistStateView.aspx](https://www.ncbc.nic.in/User_Panel/CentrallistStateView.aspx) (last visited Aug. 1, 2024).

<sup>92</sup> Roover, *supra* note 55.

<sup>93</sup> *The Government of India (Scheduled Castes) Order, 1936*, THE GAZETTE OF INDIA, (June 6, 1936).

<sup>94</sup> *The Constitution (Scheduled Castes) Order, 1950*, THE GAZETTE OF INDIA, (Aug. 11, 1950).

to add groups to the list of Scheduled Castes.<sup>95</sup> In addition to the list of SC and ST groups, the administrative category of OBC is also considered “depressed castes.” Similarly, OBC groups may have no connection to one another other than the fact that they have been deemed socially and economically “depressed” or “backwards.”<sup>96</sup>

One concept that is perhaps more closely linked with caste is that of *jāti* or tribe. *Jāti* too encompasses a variety of social markers including class, language, lineage, tribe, region of origin, religion, vocation or guild affiliation, and other only locally recognizable markers.<sup>97</sup> Some *jāti* identify as belonging to a particular guild, adhere to different religions (Hindu, Muslim, Sikh, Jain, Christian, Buddhist, etc.),<sup>98</sup> and/or their individual members engage in a variety of work.<sup>99</sup> Some *jāti* share rituals, common ancestry, or adherence to a particular lineage, but are otherwise diverse in terms of their traditional vocations or guild affiliations and the work they engage in currently, region, language, etc. Some *jāti* practice endogamy across varying social markers and perceived social standing. Others do not.<sup>100</sup> Boundaries between and amongst *jāti* are also not always apparent nor discreet.<sup>101</sup>

Norms within and between various *jāti* are not tied to sacred texts or written social codes — they have been passed down historically through oral traditions and

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<sup>95</sup> *List of Scheduled Castes*, Department of Social Justice and Empowerment, Ministry of Social Justice and Empowerment, Government of India (Oct. 26, 2017), <http://socialjustice.nic.in/UserView/index?mid=gov.id/common/76750>.

<sup>96</sup> See, e.g., *Central List of OBCs*, NATIONAL COMMISSION FOR BACKWARDS CLASSES, [http://ncbc.nic.in/User\\_Panel/CentralListStateView.aspx](http://ncbc.nic.in/User_Panel/CentralListStateView.aspx) (last visited Aug. 1, 2024).

<sup>97</sup> Padmanabh Samarendra, *Concept of Caste and Practices of Jati: Exploring Roots of Incomparability*, in CONTEMPORARY READINGS IN MARXISM: A CRITICAL INTRODUCTION, 342 (Ravi Kumar, et al., 2016).

<sup>98</sup> See, e.g., Soheb Niazi, *Sayyids and Social Stratification of Muslims in Colonial India: Genealogy and Narration of the Past in Amroha*, 30 J. ROYAL ASIATIC SOC'Y, 467 (2020).

<sup>99</sup> Samarendra, *supra* note 97, at 343; A. M. HOCART, *Caste: A Comparative Study*, 1 (Methuen & Co. Ltd., 1950).

<sup>100</sup> Samarendra, *supra* note 97, at 345.

<sup>101</sup> *Id.*; Charsley, *supra* note 55.



customs.<sup>102</sup> These may include origin stories, shared histories, language and dialect, culture, local deities, special festivals and rites, and other social customs and norms.<sup>103</sup> Some of the Europeans' understanding of caste emerged from observing the norms and traditions within and amongst different *jāti*, as well as other local forms of social organization and identity such as *kula* (clan), *gotra* (patrilineage), or *birādāri* (kinship), that they encountered. There are thousands of *jāti* and other indigenous social groupings on the Indian subcontinent across all religions.

Indeed, members of particular *jāti* may hold perceptions of difference and hierarchy in relation to others. They may also express preferences in regards to forming social networks or in marriage. And members of one *jāti* may also hold prejudices or treat members of other *jāti* on that basis. Such perceptions, however, were and are highly localized, and could be informed by a variety of factors ranging from personal, social, economic, political, historical, even religious.<sup>104</sup> That said, members of poorer or marginalized *jāti* also did not (and do not) simply concede an attributed inferior status claim by others nor simply accept the claimed superiority of others over them.<sup>105</sup> The social standing of a *jāti* in one region may be very different from a similar or even the same *jāti* living in another region, and social standing changed over time or when a local *jāti* moved from one area to another.<sup>106</sup> Essentially, actual standing in any local hierarchy, even rivalries and frictions, have been complex, nebulous at

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<sup>102</sup> Simon Charsley, *Interpreting Untouchability: The Performance of Caste in Andhra Pradesh, South India*, 63 *ASIAN FOLKLORE STUD.*, 267 (2004).

<sup>103</sup> Badri Narayan, *Why Dalit Is No Longer an Empowering Word for Some Marginalised Communities in Up*, *THE INDIAN EXPRESS*, (Aug. 10, 2021), <https://indianexpress.com/article/opinion/columns/dalit-caste-names-up-marginalised-community-7446182/>.

<sup>104</sup> Fuller, *supra* note 75, at 608-09; Charsley, *supra* note 55, at 1.

<sup>105</sup> Charsley, *supra* note 102.

<sup>106</sup> Charsley, *supra* note 55, at 3.

best, and mobile over time, as similar social groupings have been in other parts of the world.<sup>107</sup>

In the US, a similarly complex situation arises with tribal affiliation amongst Native Americans. Akin to the use of political and social classifications to designate caste groups under current law in India, various Native American tribes have been recognized as distinct political and social entities, giving rise to conflicting opinions on whether they meet the criteria for national origin claims under Title VII.

In *Dawavendewa v. Salt River*,<sup>108</sup> for example, the ninth circuit found that:

Because the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a "national origin" claim under Title VII. The fact that "new political structures and boundaries" now exist has no significance. Further, even if the various tribes never enjoyed formal "nation" status, Section 1606.1 of the regulations makes clear that discrimination based on one's ancestor's "place of origin" is sufficient to state a cause of action. Accordingly, under the case law and the regulations interpreting Title VII, tribal affiliation easily falls within the definition of "national origin."<sup>109</sup>

On the other hand, in *EEOC v. Peabody Western Coal Company*, the court held that tribal distinctions and hiring preferences for the Navajo tribe was "...a political

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<sup>107</sup> *Poll Report on Perception on Tribal Discrimination in Nigeria*, NOI POLLS, (Sept. 10, 2019), <https://noi-polls.com/poll-report-on-perception-on-tribal-discrimination-in-nigeria/>.

<sup>108</sup> *Dawavendewa v. Salt River*, *supra* note 87.

<sup>109</sup> *Id.*

classification, rather than a classification based on national origin, and therefore did not violate Title VII.”<sup>110</sup>

And, in *Kahawaiolaa v. Norton*, the question of which groups constitute Native American tribes, in the context of native Hawaiians, raised additional “questions of considerable moment and difficulty,” and was ultimately “a matter of some dispute.”<sup>111</sup>

These cases demonstrate the challenges in adjudicating national origin claims with complex classification groups, such as tribal affiliation. As the Ninth Circuit further noted in *Kahawaiolaa v. Norton*, “...the United States has struggled to find an adequate definition of an Indian tribe. There is no universally recognized legal definition of the phrase, and no single federal statute defining it for all purposes.”<sup>112</sup> Caste similarly has no universal definition nor legal precedent in American law and doesn’t fit neatly into national origin under Title VII or Title VI for that matter.

National origin and its adjacent categories of ancestry, language, descent, and culture is the most viable, albeit imperfect, option and would largely rest on the individual facts and surrounding circumstances of any allegation of caste-based discrimination.

## VI. CASTE AS A SEPARATE ANTI-DISCRIMINATION CATEGORY IN STATE AND LOCAL GOVERNMENTS AND HIGHER EDUCATION SETTINGS

Beyond litigating alleged caste-based discrimination under existing civil rights laws, there has been a strong push to add caste as a stand-alone category to non-discrimination policies on college campuses and state and local governments. For example, Brandeis University, persuaded by numerous South Asian student and scholar-activists, added “caste” to their non-discrimination policy, despite a lack of actual incidents of caste-based

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<sup>110</sup> EEOC v. Peabody W. Coal Co., 773 F.3d 977 (9th Cir. 2014).

<sup>111</sup> *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004).

<sup>112</sup> *Id.*

discrimination occurring on campus. According to one news report, “As a practical matter, however, Brandeis isn’t facing a scourge of caste-based discrimination. The school has in past years learned of social ostracism on campus, but serious infractions such as denying someone a job on the basis of caste are unknown.”<sup>113</sup> Brown University also announced the addition of caste to its non-discrimination policies in the last few years.<sup>114</sup>

University of California Davis added a parenthetical after “national origin” that specifies caste, but no other categories, according to social media posts, while Cal State University (CSU) added it to a parenthetical to “Race or Ethnicity” alongside color and ancestry.<sup>115</sup> The CSU policy became the subject of Section 1983 civil rights claim by two Hindu professors and is now pending at the Ninth Circuit Court of Appeals.<sup>116</sup> Harvard University’s Graduate Student Union announced the ratification of a four-year contract that recognized caste as a protected category.<sup>117</sup> There are numerous such examples.

A proposal to add caste to non-discrimination policies in Santa Clara County in California, home to Silicon Valley and one of the largest populations of people

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<sup>113</sup> G. Jeffrey MacDonald, *Brandeis University stands by caste-bias ban despite pushback from Hindu activists*, RELIGION NEWS SERVICE, (Oct. 19, 2020),

<https://religionnews.com/2020/10/19/brandeis-university-stands-by-caste-discrimination-ban-despite-criticism-from-hindu-activists/>.

<sup>114</sup> S. Shukla, *Brown University Discriminates Against South Asians*, WALL ST. J., (Dec. 21, 2022, 6:00 PM),

<https://www.wsj.com/articles/brown-university-discriminates-against-south-asians-caste-india-affirmative-action-britain-census-court-11671634272>.

<sup>115</sup> CAL. STATE UNIV. LONG BEACH, CAMPUS REGULATIONS, REGULATION XIV (2023); *Equality Labs Commends UC Davis Move Towards Caste Protections*, EQUALITY LABS (Oct. 2021),

<https://www.equalitylabs.org/media/2021/10/equality-labs-commends-uc-davis-move-towards-caste-protections/>.

<sup>116</sup> Kumar v. Koester, No. 2:22-CV-07550 (C.D. Cal. filed Dec. 26, 2023).

<sup>117</sup> Manavi Kapur, *Harvard Is the First Ivy League University to Recognise Caste-Based Discrimination*, QUARTZ (Dec. 7, 2021), <https://qz.com/india/2099391/harvard-university-recognises-caste-as-a-protected-class>.

of Indian origin in the country, was similarly pursued in 2021. This was followed by the passage of caste policies in the cities of Seattle, WA<sup>118</sup> and Fresno, CA,<sup>119</sup> while similar legislation was introduced but not adopted in California<sup>120</sup> and Oregon.<sup>121</sup>

Activist groups like Equality Labs, activist-scholars, and their allies have been involved in most if not all of campaigns on college campuses, cities, counties, and states, and are also increasingly pressuring corporations to do the same.

Broadly speaking, caste as a specific non-discrimination category is problematic for a number of reasons. For one, as the local and state proposals demonstrate, the term “caste” for purposes of non-discrimination policies are either vaguely defined, or include inconsistent and even conflicting definitions. For instance, the professors in their lawsuit against their employer, CSU, argued that the “Policy contains no definition of caste and CSU has consistently waffled on the term’s meaning. Thus, without a clear definition, Plaintiffs are left self-censoring their religious practices to avoid running afoul of the Policy’s unconstitutionally vague scope. Consequently, the amended Policy violates Plaintiffs’ Free Exercise, Establishment Clause and Due Process rights.”<sup>122</sup>

The definition of caste in SB-403 changed multiple times as the bill was amended throughout the process. In the final legislative text, caste was defined in an overly

<sup>118</sup> SEATTLE WASH. MUN. CODE § 14.04.020 (LEXIS through Ordinance No. 126887 (Supp. No. 33)).

<sup>119</sup> Tanay Gokhale, *Caste Discrimination Banned by Fresno City Council*, ETHNIC MEDIA SERVICES (Oct. 4, 2023), <https://ethnicmediaservices.org/spotlight-ethnic-media/caste-discrimination-banned-by-fresno-city-council/>.

<sup>120</sup> S. B. 403, Reg. Sess. 2023-2024 (Cal. 2024), [https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=202320240SB403](https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202320240SB403).

<sup>121</sup> H.B. 3612, 82nd Or. Legis. Assemb. Reg. Sess. (Or. 2023), <https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB3612>.

<sup>122</sup> Appellants’ Opening Brief at 2, *Kumar v. Koester*, 703 F. Supp. 3d 1140 (C.D. Cal. 2023) (No. 2:22-CV-07550-RGK-MAA).

broad manner as an “individual’s perceived position in a system of social stratification on the basis of inherited status,” which “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.”<sup>123</sup>

Secondly, where caste has been described or defined, it has not been in a manner that is facially neutral nor generally applicable, and instead creates a suspect class singling out and targeting only people of Indian or subcontinental descent. This should naturally raise concerns of non-neutrality and disparate impact both facially and as applied. The singular association of caste and a caste system with the Indian subcontinent is a lasting colonial construction that is continually perpetuated and cemented through state mandated public school content standards,<sup>124</sup> compounding such descriptions. In Oregon’s House Bill 3612, for example, caste is heavily associated with South Asia in the Findings section, where it defines caste “as a structure of oppression that has existed in South Asia for more than 2,000 years and continues to play a prominent role in society and politics today, affecting over one billion people worldwide...Caste discrimination is present across South Asia and among the South Asian diaspora. Dalits, who are those individuals belonging to the most oppressed stratum of caste and Adivasis, who are those indigenous individuals of the Indian subcontinent, are particularly victimized by caste oppression and are often forced into segregated

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<sup>123</sup> S. B. 403, Reg. Sess. 2023-2024 (Cal. 2024), [https://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=202320240SB403](https://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill_id=202320240SB403)

<sup>124</sup> Academic Standards Commission, *History–Social Science Content Standards for California Public Schools, Kindergarten Through Grade Twelve*, CAL. DEPT OF EDUC. (Oct. 9, 1998), <https://www.cde.ca.gov/be/st/ss/documents/histsocscistnd.pdf>.

schools, villages and places of worship and are denied access to basic public amenities in South Asia.”<sup>125</sup>

And while similar language was eventually removed from California Senate Bill 403, earlier versions were replete with associations of caste with South Asia and numerous unsubstantiated claims about specifically South Asians engaging in caste-based harassment, bias, and wage theft; caste discrimination in various sectors, including education, employment, housing; as well as in caste based human trafficking and gender, physical and psychological violence.<sup>126</sup>

Noted constitutional law expert, Professor Vikram David Amar, Distinguished Professor of Law at UC Davis School of Law and a Professor of Law and Former Dean at the University of Illinois observed in an article he penned on SB403:

[W]hen we delve into the gloss on the definition of caste in the text of the law, South Asian communities seem to be singled out, suggesting at least the possibility that caste discrimination itself is something that, definitionally, can be practiced only by people of certain ethnicities. Caste discrimination (presumably as defined by the bill), we are told by the text of the statute, is present across ‘South Asia and the South Asian diaspora.’ ‘Similar systems,’ the text teaches, exist in other parts of the world. But a ‘similar’ system arguably is, by definition, not itself a ‘caste’ system, and therefore would fall outside SB 403’s prohibitions. (Note also that such ‘similar’ systems that are mentioned themselves seem to be limited to parts of the

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<sup>125</sup> H.B. 3612, 82nd Or. Legis. Assemb. Reg. Sess. (Or. 2023), <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB3612/Introduced>

<sup>126</sup> S. B. 403, Reg. Sess. 2023-2024 (Cal. 2023), [https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill\\_id=202320240SB403&cversion=20230SB40398AMD](https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=202320240SB403&cversion=20230SB40398AMD) (Mar. 22, 2023 version).

world also populated by persons of color—no mention is made of caste or even caste-like systems in Europe or North America, even though titles of nobility and other Western social systems are also premised on inherited social statuses.)<sup>127</sup>

The California Assembly Judiciary consultant similarly found that both SB-403's author and primary sponsor, Equality Labs, recognized "caste" as racially loaded. Specifically, he stated: "However broadly the bill in print might define the term, the letters and background information provided to the Committee by the author and supporters reinforce the association of caste and South Asians."<sup>128</sup>

A number of the colleges and universities that have added caste as either a stand-alone protected class or clarification in their respective non-discrimination policies similarly suffer from facial non-neutrality, or worse, discriminatory intent in the impetus and formulation of their policies, and in the context of state funded institutions, also potentially intrude into matters of religious doctrine in violation of the First Amendment and respective state constitutions.

For example, at CSU, although administrators failed to define caste explicitly in its policy, the student and faculty resolutions that were relied upon defined caste as a "structure of oppression" that is "present in the Hindu religion and common in communities in South Asia and in

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<sup>127</sup> Amar, Vikram David. *Preliminary Thoughts on Potential Constitutional Flaws in SB 403, a California Proposal to Prohibit Caste Discrimination*, VERDICT COMMENTS, (May 16, 2023), <https://verdict.justia.com/2023/05/16/preliminary-thoughts-on-potential-constitutional-flaws-in-sb-403-a-california-proposal-to-prohibit-caste-discrimination> (last visited Aug. 1, 2024).

<sup>128</sup> *SB-403 Assembly Judiciary Committee Analysis* (2023-2024), [https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=202320240SB403](https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240SB403).



the South Asian Diaspora.”<sup>129</sup> The Association of Students at UC Davis Senate’s resolution on caste, which preceded its policy, also stated that it aimed “to recognize the 2,500 years and counting of oppression and violence due to caste apartheid towards marginalized South Asian communities.”<sup>130</sup>

In Brown University’s statement announcing its policy change, it said that “the Vice President for Institutional Equity and Diversity Sylvia Carey-Butler, who developed the policy change presented to Brown University Corporation, said that as the South Asian population in the U.S. increases, caste discrimination is a growing issue on college and university campuses across the country...” and that “The previous policy would have protected people experiencing caste discrimination.”<sup>131</sup>

The Brown University statement makes several points worth noting: 1) Brown admitted that their existing policy already would protect against caste discrimination and that Brown had not actually faced any claims of caste discrimination; otherwise, the statement would have indicated that the previous policy *already had* protected such victims, rather than *would have*; 2) university officials believe that South Asian students have a unique and special propensity toward a peculiar form of discrimination and that this issue would only worsen with more South Asians on campus; and 3) because of this unique and

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<sup>129</sup> *Resolution in Support of Adding Caste as a Protected Category*, CAL. FACULTY ASS’N, [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) (last visited Sept. 28, 2024); Endorsement of the California State Student Association (CSSA), *Resolution Calling for the CSU to Include Caste in Anti-Discriminatory Policy*, AS-3527-22/EX (Rev) (Jan. 20-21, 2022), ACAD. SENATE, CAL. STATE UNIV., <https://www.calstate.edu/csu-system/faculty-staff/academic-senate/resolutions/2021-2022/3527.pdf>.

<sup>130</sup> *ASUCD Senate Resolution #8* (Feb. 1, 2021), UNIV. OF CAL. DAVIS, <https://docs.google.com/document/d/1ovl07-WLExQntFM3N84LeOvezDD5IHXI-iAZZt8pLmQ/edit> (last visited Sept. 28, 2024), accessed via <https://asucd.ucdavis.edu/government-documents>.

<sup>131</sup> Brown Corp., *Brown University Adds Caste to Nondiscrimination Policy*, (Dec. 1, 2022), <https://www.brown.edu/news/2022-12-01/caste> (last visited Aug. 1, 2024).

special propensity towards discrimination, a policy singling out and applying to only South Asian students and faculty was merited.

Professor Amar made similar observations in his critique of California's SB-403, that are applicable to Brown University and nearly every college and university that has added caste to its policies. He noted:

Moreover, facial non-neutrality is not the only way to bring a law down under equal protection. Even facially neutral laws are invalid if they have uneven, or disparate, effects along racial or ethnic lines, and are motivated by a desire to hurt or demean a particular racial or ethnic group. While invidious motive is generally quite hard to prove, can it be shown for SB 403 in its current form? Again, I think the answer is possibly yes. Start with the fact that the proposal is concededly merely declarative of law that already exists (e.g., a more neutral ban on all ancestry-based discrimination). The thinness of the clarification motive for the law's enactment opens the door to the possibility that the bill is intended to target and condemn particular communities with whom the word "caste" is deeply (and stereotypically) associated.<sup>132</sup>

It should be noted that in nearly every example provided here, those proposing the addition of caste express their ostensibly positive intentions of helping a very particular group of alleged victims. Perhaps they believe that any kind of positive intention absolves the need to scrutinize their intentional use of national origin. But this simply is not true. The Supreme Court, in *City of Richmond v. J.A. Croson Co.* and *Adarand Constructors, Inc., v. Peña*, has held that any intentional use of race, whether for

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<sup>132</sup> Amar, *supra* note 127.

benign or harmful motives, is subject to the most careful judicial scrutiny.<sup>133</sup>

Third, caste is a stereotype uniquely associated with Indians as well as Hindus and Hinduism. According to Merriam-Webster Dictionary, caste is “[o]ne of the hereditary social classes in Hinduism that restricted the occupation of their members and their association with members of other castes.”<sup>134</sup> As a result, this mis-conflation also raises serious First Amendment concerns in certain educational settings. While private universities are absolved from constitutional limits on intrusion into religious doctrine or bars on official favoring of or disfavoring towards any given belief system or lack thereof, local and state governments and state institutions are not.

The University of California, San Diego, is a public land-grant research university. In December 2013, its Ethnic Studies Department posted a statement announcing the addition of caste as a new protected class in its departmental non-discrimination policy. It stated, in part, “Against the commonly circulated idea that only South Asians—specifically Hindus—should care about caste, we understand caste as a 2,500-year-old system of dehumanization that made Dalits, those outside the Brahminical caste system, into “untouchables,” as non-humans who could be killed with impunity. Caste is a structure of violence that affects over 1 billion people across the world.”<sup>135</sup> “Brahminical” is a term used in the academic study of Hinduism and refers to Hindu priests or ritual specialists or a priestly class.<sup>136</sup> The official state university statement is in effect asserting that Hindus hold a unique responsibility for the caste system and

<sup>133</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 226 (1995).

<sup>134</sup> Caste, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/caste>.

<sup>135</sup> *Statement Against Caste and Caste-Based Discrimination*, ETHNIC STUDIES DEP'T. UNIV. OF CAL., SAN DIEGO (Dec. 13, 2021), <https://ethnicstudies.ucsd.edu/about/statements-commentaries.html#Statement-against-Caste-and-Cas>.

<sup>136</sup> Brahmanism, BRITANNICA, <https://www.britannica.com/topic/Brahmanism> (last visited Sept. 30, 2024).

simultaneously defining or equating dehumanization and murder with Hinduism.

Similarly, a Cal State University (CSU) Student Association resolution demanding the addition of caste to its system-wide nondiscrimination policies states, "Caste is a structure of oppression that affects over 1 billion people across the world based in birth that determines social status and assigns "spiritual purity"...There are four main caste groups: Brahmins, Kshatriyas, Vaishyas, and Shudras..." The four Sanskrit terms cited in the resolution are not "castes" but four traditional varna, and are both terms and concepts that originate and are expounded upon in Hindu sources of knowledge, so we see again, although not in as overt a manner as the CRD, a defining of Hinduism by a four-tiered structure of oppression. Some of the language in the resolution is similar to the CRD because students too relied on the Equality Labs report referenced earlier as indicated in footnotes.

In contrast to caste as a narrow category that exclusively targets a particular subset of the population, and that too a micro-minority of less than 1.3% of the US population, every protected class under current US civil rights law, namely race, national origin (ancestry/ethnicity), gender, religion, disability, age, and now sexual orientation are facially neutral, universal categories. They seek to address well documented bases of discrimination broadly. Caste discrimination in the United States is not widespread, as we will discuss further below. The power of existing law to provide protection against discrimination and mete out justice in its wake is that all protected classes are facially neutral and generally applicable, while caste is not.

Caste as a category posits that there is a prevalent form of prejudice and malice amongst only people of Indian descent (or those from the subcontinent) and Hindus that is so entirely different, abhorrent, and widespread that they should be marked a suspicious class on the basis of their race, national origin, ethnicity, or religion, and specifically monitored and policed in a perverse form ethno-religious profiling. Those championing such policies see discrimination as a supposed solution to

discrimination. It is not. Caste policies not only demonstrate facial non-neutrality; call for unequal treatment of Hindus and people of Indian origin; and entail government overreach into matters of faith, but exemplify discriminatory intent towards people of the Indian subcontinent in light of the fact that prejudice and discrimination based on social backgrounds such as clan, class, sect, tribe, or other factors is prevalent within all countries and cultures, yet, no similar state or federal laws exist that are only meant to police one ethnic and/or religious group.

#### VII. CONTRARY TO THE CRD, ACTIVISTS, AND MEDIA'S CLAIMS, CASTE BASED DISCRIMINATION IS VIRTUALLY NON-EXISTENT IN THE UNITED STATES

There is very little credible or reliable data on caste identity of immigrants coming to the United States from the Indian Subcontinent or their descendants, let alone the existence or extent of caste-based discrimination. While some immigrants may carry over various group identities and associated attitudes from their countries and communities of origin, cultural and religious organizations and institutions overwhelmingly bring together and serve people of all backgrounds. It is also true that some families, from every religious background, may still exhibit preferences towards marrying within particular *jāti* or *birādāri*, in addition to regional or linguistic communities, but for every example of this there are ones to the contrary.<sup>137</sup> Indeed, millions of SCs and OBCs in India openly identify as such and also express preferences to marry within other SC and OBC communities.<sup>138</sup>

Furthermore, for Hindu converts — those tens of thousands of people without any ethnic connection to India

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<sup>137</sup> Badrinath, *supra* note 7.

<sup>138</sup> See *SC Brides*, BHARAT MATRIMONY, <https://www.bharatmatrimony.com/sc-brides> (last visited Sept. 30, 2024).

or the subcontinent who have embraced Hinduism — “caste” or social markers relevant in the Indian subcontinent are entirely irrelevant, thus further validating the point that caste is not intrinsic to the teachings and practice of Hinduism as claimed by the State of California in its complaint against Cisco Systems, and the numerous colleges and universities who have adopted policies on the basis of student and faculty resolutions that make such claims.

The only scientific and representational study that delves into caste attitudes and caste-based discrimination in the U.S. is a recent study, *Social Realities of Indian Americans: Results from the 2020 Indian Americans Attitudes Survey*, by Johns Hopkins University, the University of Pennsylvania, and the Carnegie Endowment for International Peace.<sup>139</sup>

The study revealed three important findings on the issue of caste in America: (1) a majority of Hindu respondents (53 percent) do not identify with any caste group at all;<sup>140</sup> (2) within the group that does identify with a caste, there is a significantly lower number of U.S.-born Hindu Indian Americans who identify with a caste group (34 percent) versus those that are foreign-born (53 percent), which may indicate that caste identification will become increasingly less relevant with every generation; and (3) only 5% of Indian Americans reported encountering discrimination on the basis of caste, with almost half of those respondents reporting facing caste discrimination at the hands of non-Indians, indicating that caste may have been conflated with some other factor.

Importantly, the Carnegie study discredits a prior non-scientific survey by Equality Labs which is frequently cited to by the media, government bodies, educational institutions in an effort to demonstrate a widespread

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* The survey’s authors admit to not having asked questions related to caste-identity to those respondents not identifying as Hindu due to time constraints. Caste or community identities are commonplace amongst Buddhists, Christians, Jains, Muslim, and Christians.

prevalence of caste-based discrimination.<sup>141</sup> That highly flawed survey claimed that “67% of Dalits reported being treated unfairly at their American workplaces because of their caste and related characteristics,”<sup>142</sup> and was heavily relied upon by the CRD in its case against Cisco Systems to define caste as “religion, ancestry, national origin/ethnicity, and race/color” under existing law.<sup>143</sup>

Carnegie, however, noted that the Equality Labs survey “is not based on a representative sample, raising questions about the generalizability of its findings.”<sup>144</sup> It further noted,

This study relied on a nonrepresentative snowball sampling method to recruit respondents. Furthermore, respondents who did not disclose a caste identity were dropped from the data set. Therefore, it is likely that the sample does not fully represent the South Asian American population and could skew in favor of those who have strong views about caste. While the existence of caste discrimination in India is incontrovertible, its precise extent and intensity in the United States can be contested.<sup>145</sup>

Additionally, while dozens of South Asian organizations are listed as partner organizations for having assisted in distributing the survey, the survey authors did not invite any of the major national Hindu or Indian organizations, representing hundreds of thousands of Hindus and people of Indian origin, to participate.<sup>146</sup> Moreover, recent solicitations for petitions seeking reporting of incidents of alleged caste-based discrimination made by Equality Labs and allied organizations

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<sup>141</sup> Zwick-Maitreyi, *supra* note 5.

<sup>142</sup> *Id.*

<sup>143</sup> Compl., Oct. 16, 2020, Dep’t. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022), No. 20CV372366.

<sup>144</sup> Badrinath, *supra* note 7.

<sup>145</sup> *Id.*

<sup>146</sup> See Zwick-Maitreyi, *supra* note 5.

encouraged those reporting from outside the country to use the Santa Clara County Zip Code, 95134, ostensibly to artificially inflate numbers or a show of support.<sup>147</sup>

Consequently, the existing data on caste identity and discrimination in the U.S. is still very limited. What is available and conducted scientifically, however, does not seem to support the claim that caste-based discrimination is a rampant problem among the Indian and broader South Asian diaspora.

All of this also raises significant questions about how caste would actually be regulated on college campuses, in the workplace, and other settings. In order to regulate something, it first requires a definition. And as a prominent British professor and leading proponent of adding caste to federal anti-discrimination legislation in the United Kingdom, David Keane, conceded “[i]t is impossible to have a clear definition of what constitutes caste.”<sup>148</sup>

This inability to accurately define caste, amongst other reasons, led to the failure of legislating caste in the UK.<sup>149</sup>

As noted above, all the definitions that have been proposed across universities, cities, counties, states, and other settings have differed significantly and in some instances were overly vague or broad and in others overly narrow in mentioning South Asia explicitly in some cases Hindus or Hinduism more specifically.

Absent a historical or current basis to regulate caste in the United States and the lack of an agreed upon legal or sociological definition, the obvious resource is India's laws and regulations related to caste. Even in the Indian context, however, caste is a legal fiction and political category that is solely defined by administrative

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<sup>147</sup> EQUALITY LABS.

<https://mailchi.mp/equalitylabs/southasiantownhall-4131209?e=bea6c6de99> (last visited Sep. 24, 2024).

<sup>148</sup> David Keane, *Caste-based Discrimination in International Human Rights Law*, 7 (Routledge 2016) (2007).

<sup>149</sup> Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010*, 50 (United Kingdom: Palgrave Macmillan, 1st ed. 2015).



classifications that encompass thousands of caste groups for the purposes of both preventing discrimination and conferring affirmative action benefits.

The Indian Constitution guarantees equal rights to all citizens and prohibits discrimination on the grounds of caste, religion, race, sex, or place of birth. It also provides the state power to make special provisions for positive discrimination.<sup>150</sup> As such, groups listed or designated at the national or state level as SC, ST, or OBC are guaranteed certain legal protections and eligible for special provisions. The special provisions make up a system of affirmative action that is intended to increase access to opportunity and representation in education, employment, and government at both the state and union levels.<sup>151</sup>

In fact, there are many politically dominant communities from specific states who have lobbied to be added to the OBC list in order to avail themselves of such benefits.<sup>152</sup> Currently, there are 5,013 groups designated as OBC in India, whereas the Mandal Commission national list created in 1979-1980 contained 3,743 castes, and the initial Kala Kalelkar Commission in 1955 designated 2,399 groups as OBC.<sup>153</sup>

Consequently, the terms “Scheduled Caste,” “Untouchable,” “Dalit,” or “OBC” do not refer to any one static or stable and unchanging system, but rather an often fluid list of groups or communities that are diverse and subject to change based on a number of factors, including modern political and socioeconomic factors. There are also

<sup>150</sup> India Const. art.3, §15(6)(b).

<sup>151</sup> Bhojani et al., *Affirmative Action, Minorities, and Public Services in India: Charting a Future Research and Practice Agenda*, INDIAN J. MED. ETHICS 2 (Oct. 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7212055/pdf/EMS86312.pdf>.

<sup>152</sup> Rishi Iyengar, *Riots Break Out in India Over a Dominant Caste's Attempt to Gain 'Backward' Status*, TIME (Aug. 26, 2015, 5:51 AM), <https://time.com/4011001/hardik-patel-protest-arrest-gujarat-obc/>.

<sup>153</sup> *Time to Cast Away Caste Reservation Elevator to Success?*, TIMES OF INDIA (Oct. 12, 2015, 10:21 IST), <https://timesofindia.indiatimes.com/city/visakhapatnam/time-to-cast-away-caste-reservation-elevator-to-success/articleshow/49318108.cms>.

thousands of additional groups or communities that do not appear on any lists as the initial census exercises required a minimum number of “members” to be counted and listed.<sup>154</sup>

There is also a growing movement amongst communities designated as Scheduled Caste in many parts of India to move away from labels such as “Dalit,” which have become political identities that are increasingly viewed as disempowering and offensive.<sup>155</sup> These communities, in states such as Uttar Pradesh, have instead asserted their individual community identities and celebrated their related histories, traditions, and contributions.<sup>156</sup>

Interestingly, while there are numerous media reports of caste-based conflicts or incidents of discrimination in India, a new Pew Research survey there found that most Indians, including those from designated “depressed castes,” do not perceive widespread caste-based discrimination. Nineteen percent of the general category of castes or “Caste Hindus” believe that SCs, OBCs, and STs face caste-based discrimination.<sup>157</sup> Strikingly, this rises by seven to eight percent among those who are actually SC or ST.<sup>158</sup> Moreover, OBCs perceive even less discrimination against themselves (13%) than the general castes do (18%).<sup>159</sup>

### VIII. THE DIFFICULTIES OF ENFORCEMENT

Would companies or courts adopt and impose Indian administrative classifications in their hiring and firing practices and HR policies, on workers in the United States? Would American courts consult Indian law and

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<sup>154</sup> See Fuller, *supra* note 75, at 15-16.

<sup>155</sup> See Narayan, *supra* note 103.

<sup>156</sup> *Id.*

<sup>157</sup> Neha Sahgal et al., *Religion in India: Tolerance and Segregation*, PEW RSCH. CTR. (June 29, 2021), <https://www.pewforum.org/2021/06/29/religion-in-india-tolerance-and-segregation/>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

jurisprudence to make determinations related to allegations of caste discrimination? What evidentiary standards would be required for plaintiffs and defendants to prove or contest allegations made against them related to caste, including but not limited to awareness and knowledge of their own caste or the perceived status of one caste in relation to another when there are vastly different self-conceptions and external perceptions of that social status?

In fact, this is exactly what the CRD has done in the Cisco case. Not only did the agency assign a caste to the Defendants, but they classified every other employee of Indian origin in Doe's division as "higher caste" both directly and by referring to John Doe as the "lone Dalit."<sup>160</sup>

The author of SB-403 similarly explicitly identified "caste-oppressed Californians" in the legislative text and by default created a suspect class of caste-oppressor Californians.<sup>161</sup>

How would courts determine who is a caste-oppressor and who qualifies as caste-oppressed? How would it determine status if both a plaintiff and defendant originated from different regions in India, where any associations between a last name and caste or caste and perceptions of social status would likely be unfamiliar to one another? What if an employee with SC, ST, or OBC designation from India created a hostile environment for another employee without a similar administrative designation, meaning an employee who would be considered a "Caste Hindu"?

In terms of how to handle caste in corporate America, one scholar-activist who self-identifies as Dalit, has suggested that companies like Cisco be required to submit lists of all of its employees of Indian origin or ancestry and/or Hindus for caste audits, in which a caste

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<sup>160</sup> According to court filings, Doe was not the only self-identifying SC/Dalit. In fact, one of the three head positions was held by a self-identifying SC/Dalit. The other two head positions were also offered to this same individual. See Decl. of Sundar Iyer, Jan. 12, 2021, Dep't. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022), No. 20CV372366.

<sup>161</sup> See Gokhale, *supra* note 119.

identity would be assigned by caste “experts” to every individual based on their last name.<sup>162</sup> Beyond the odious nature of putting private company data targeting only Indian origin employees in the hands of supposed third-party “experts” and forcibly assigning and classifying these employees with a caste, (or compelling employees to identify with a caste), the likelihood of any expert or court being able to verify an individual’s caste outside their own assertion or assignment is highly doubtful and would raise significant evidentiary challenges.

It must be noted that last names can be indicators of numerous tribal and social group markers. They are not, however, entirely accurate indicators of background. For example, the same last names can often be found in multiple castes or communities and across various sects, religions, and regions. In some regions, the father’s first name is taken as the last name of the subsequent generation. Marriage can also be a factor in how an individual has chosen a last name, including hyphenating their last name.

By adding caste as a protected category, caste identities risk being crystalized and made rigid. Indeed in the Cisco case, Doe crystalizes his caste as “Dalit”, while the state enforces and assigns caste on a manager who has publicly rejected identifying by caste.<sup>163</sup> These are the very real implications and questions that are not being considered by the State of California, county officials, or college and corporate administrators on an issue that is still not well understood in the US.

More importantly, discrimination based on national origin is already prohibited under US law as is ancestry and ethnicity under many state laws and public and private sector employment policies. As noted above, national origin, ancestry, and ethnicity have been interpreted as protecting against discrimination on the basis of birthplace, ancestry, culture, or linguistic

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<sup>162</sup> Gregory Warner, *How to Be an Anti-Casteist*, ROUGH TRANSLATION: NATIONAL PUBLIC RADIO, (Sept. 30, 2020), [www.npr.org/transcripts/915299467](http://www.npr.org/transcripts/915299467).

<sup>163</sup> Decl. of Sundar Iyer, Jan. 12, 2021, Dep’t. Fair Emp. & Hous. v. Cisco Sys., Inc. et al., 297 Cal. Rptr. 3d 827 (2022), No. 20CV372366.

characteristics—all of which are social markers associated with the various indigenous communities that were conflated into the category of caste. Thus, existing laws can provide the legal avenue to address claims of caste-based discrimination.

## IX. CONCLUSION

Caste is a complex and little understood concept, with no universally agreed upon legal or social definition. The modern understanding of caste is steeped in racialized theories about Indians and policies dating back to the colonial era. Moreover, recent data on the extent and prevalence to which caste identities and discrimination exists amongst the Indian (and wider subcontinental) diaspora in the U.S. demonstrates that the former is diminished significantly, and the latter is exceedingly rare.

At the same time, it is necessary to provide legal avenues and remedies to anyone that believes they have been discriminated against on the basis of their perceived caste. This need must be balanced against constitutional guarantees, however, in order to not target and discriminate against a micro-minority and deprive them of their rights to equal protection and due process, and unconstitutionally interfere in religion doctrine by inaccurately tying a “caste system” to Hinduism. Consequently, though imperfect, the most viable solution is to use existing, facially neutral, and more generally applicable state and federal civil rights categories of ancestry, national origin, and ethnicity to provide recourse. Just and viable solutions are only possible if the history and complexity of caste are understood when adjudicating legal claims or evaluating administrative or regulatory proposals to add caste as a specific category.