Court of Appeals No. 23-4363

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUNIL KUMAR, PH.D., PRAVEEN SINHA, PH.D.

Plaintiffs and Appellants,

v.

DR. JOLENE KOESTER, IN HER OFFICIAL CAPACITY AS CHANCELLOR OF CALIFORNIA STATE UNIVERSITY

Defendant and Appellee.

APPELLEE'S ANSWERING BRIEF

On Appeal From the United States District Court,
for the Central District of California
Hon. R. Gary Klausner
U.S.D.C. Case No. 2:22-CV-07550

Jeffrey P. Michalowski (SBN 248073)
jeff.michalowski@quarles.com
Matthew W. Burris (SBN 325569)
matt.burris@quarles.com
QUARLES & BRADY LLP
101 West Broadway, Ninth Floor
San Diego, California 92101-8285
Telephone: 619-237-5200
Facsimile: 619-615-0700

Attorneys for Dr. Jolene Koester

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

INTRODUCTION

CSU's prohibition against discrimination based on "Race or Ethnicity (including color, caste, or ancestry)" has never been enforced against the plaintiffs and there is no credible threat that it ever would be.

Plaintiffs insist they have never discriminated against anyone based on caste, and have no desire to do so. They do not contend that their religious faith or religious practice puts them at jeopardy of running afoul of the Nondiscrimination Policy. Rather, plaintiffs "*abhor* caste discrimination" (2-ER-306; 3-ER-387), and their Hindu faith requires them to treat everyone equally. Unsurprisingly, then, there have been no complaints against plaintiffs and no threats of enforcement. No one at CSU has even *mentioned* the possibility of enforcing the policy against them.

The District Court correctly dismissed some of plaintiffs' claims for lack of standing. But it could have gone further, and dismissed all of them, as there is no injury-in-fact here. At most, plaintiffs are alleging an abstract, stigmatic injury, but that is not enough. And in the absence of a credible threat of enforcement, the fact that plaintiffs have strong personal, moral, or political objections to CSU's Policy does not qualify as an injury sufficient for purposes of Article III. Under Supreme Court authority, all of plaintiffs' claims could and should have been dismissed.

Even assuming, *arguendo*, plaintiffs had somehow demonstrated standing and an injury-in-fact, their claims nonetheless failed on the merits. After considering the entire record after discovery and trial, the

District Court found no evidence that defendant held any hostility toward Hinduism, and found that the Policy instead addresses a social problem that transcends religion or geography. Those findings have abundant support in the record—based on plaintiffs' admissions, the testimony of CSU officials and students, expert testimony from a Harvard anthropologist, and over a dozen judicially recognizable reports from the State Department and the United Nations—and they are not clearly erroneous.

The record also supports judgment on the merits of plaintiffs' vagueness challenge under the Due Process clause. CSU presented unrebutted expert testimony regarding the sufficiency of the term "caste," and plaintiffs' own experiences show that they have an understanding of the term and use it freely. While plaintiffs and other detractors uniformly contend that the term "caste" offends them, they have never seriously claimed that they don't know what it means. Plaintiffs have a sufficient understanding of the term "caste"—just like they have a sufficient understanding of other contested terms, like "race" and "sex"—to know what injustices the Policy is designed to address. The term falls well within constitutional boundaries.

CSU respectfully asks this Court to affirm.

JURISDICTIONAL STATEMENT

Defendant agrees there is federal question jurisdiction over plaintiffs' claims under the United States Constitution (42 U.S.C. § 1983; 28 U.S.C. § 1331; 28 U.S.C. § 1343) and supplemental jurisdiction over the parallel state law claims (28 U.S.C. § 1367). As this appeal follows a final judgment after trial, this Court has authority to review

the judgment and the challenged order. 28 U.S.C. § 1291.

Plaintiffs lack standing, however, to pursue their claims. In their complaint, they did not allege an injury caused by the Policy, and at trial, they did not introduce any evidence of an injury caused by the Policy. *See* Section I(B), *infra*, pp. 24-31; Section II(A), *infra*, pp. 31-35; Section III(C), *infra*, pp. 53-55.

STATEMENT OF THE ISSUES

Free Exercise

1. Whether the District Court erred by entering judgment on the pleadings on the merits.

2. Whether plaintiffs satisfied their pleading burden of alleging an injury sufficient to confer standing.

Due Process

3. Whether the District Court clearly erred in dismissing plaintiffs' Due Process claim for lack of standing following trial.

4. Alternatively, whether the record supports judgment on the Due Process claim on the merits.

Establishment Clause

5. Whether the District Court clearly erred by finding, after a trial, no Establishment Clause violation.

6. Whether, at trial, plaintiffs satisfied their burden of proving, through admissible evidence, an injury sufficient to confer standing.

STANDARD OF REVIEW

Judgment on the pleadings. An order granting a motion for judgment on the pleadings is reviewed *de novo*. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1167 (9th Cir. 2002). This Court may affirm, however, on any ground supported by the record on appeal. *See M & T Bank v. SFR Invs. Pool 1, LLC*, 963 F.3d 854, 857 (9th Cir. 2020), cert. denied, 141 S. Ct. 2566 (2021). Even if the lower court's decision relied on the wrong grounds or wrong reasoning, "if the decision below is correct, it must be affirmed." *Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998).

Judgment following trial. In reviewing a judgment following trial, *de novo* review applies only to conclusions of law. Factual findings are reviewed for clear error. *See Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 612 (9th Cir. 2020).

"[B]ench trials evoke a deferential standard of review." *Calandro v. Sedgwick Claims Management Services, Inc.*, 919 F.3d 26, 30 (1st Cir. 2019). This is true of trials by live testimony as well as trials on the briefs. *Saab Cars USA, Inc. v. USA*, 434 F.3d 1359, 1372 (Fed. Cir. 2006) ("We review inferences [the District Court] drew from the stipulated facts, and its application of the law to those facts, for clear error."); *Arko v. Hartford Life & Accident Ins. Co.*, 672 F. App'x 693 (9th Cir. 2016).

A district court holding a trial on the briefs is entitled to resolve conflicting evidence presented on disputed factual issues, to weigh the evidence, and to take sides on the disputed issues of fact. *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999); *see also Bilyeu*

v. Morgan Stanley Long Term Disability Plan, 711 F. App'x 380, 382 (9th Cir. 2017). This Court will reverse after a bench trial "only if the district court's findings are . . . illogical, implausible, or without support in inferences from the record." *Chaudhry v. Aragon*, 68 F.4th 1161, 1171 (9th Cir. 2023), quoting *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 613 (9th Cir. 2020).[1]

While the question of standing is generally reviewed *de novo* (*Meland v. WEBER*, 2 F.4th 838, 843 (9th Cir. 2021), the "underlying factual findings" relied on to determine standing are reviewed for clear error. *Preminger v. Peake*, 552 F.3d 757, 762 n. 3 (9th Cir. 2008). This Court will thus affirm the District Court's factual findings regarding injury-in-fact, unless those findings are clearly erroneous. *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Caste is a Social Phenomenon and Is Not Coextensive with Religion.

The paradigmatic caste systems are those of India and South Asia, but caste systems exist throughout the world. Broadly speaking, caste systems are descent-based systems of social stratification that exist in many parts of the world, including South Asia, East Asia, Africa, and

[1] Plaintiffs suggest that an "extensive review" standard applies. AOB 34. Not so. In their case, *Easley v. Cromarties*, 532 U.S. 234, 243 (2001), extensive review was needed because the Supreme Court was reviewing the district court's decision without the benefit of an intermediate decision by the Circuit Court.

the Americas. 5-SER-1258-59. A resolution passed by a United Nations Subcommission declared that discrimination based on "descent," including "caste," has historically been a feature of societies in different regions of the world and has affected a significant proportion overall of the world's population. 7-SER-1832; *e.g.* 7-SER-1719-21, 1731-32, 1746, 1780-81, 1783-1804, 1806-30.

Caste systems organize every realm of social life by hierarchically ranked status differences. For example, in the South Asian caste system, Dalits, the group once known as "untouchables" who occupy the lowest level in the caste hierarchy, have less social and economic mobility than the intermediate and upper castes. They are often segregated into more polluted and poorly serviced neighborhoods, and they tend to be concentrated in less desirable jobs. Caste systems even limit whom one can or cannot marry. The norm in South Asia is still that a member of a caste must marry within that same caste. Inter-caste marriage, especially when it is between a Dalit man and a woman of a higher caste, can even provoke vigilante violence. 5-SER-1258-64.

Caste is not coextensive with Hinduism or any other religion. As a United Nations report puts it: "At present, the term "caste" has broadened in meaning, transcending religious affiliation. Caste and caste-like systems may be based on either a religious or a secular background and can be found within diverse religious and/or ethnic groups in all geographical regions, including within diaspora communities." 7-SER-1811.

In other words, caste is not a religious construct. Rather, it is an institution that undergirds social relations across many populations

and spheres of life. 5-SER-1264, 1276. Accordingly, its impacts are not limited to Hindus. Rather, as plaintiffs acknowledge, caste systems also impact Christians, Buddhists, Sikhs, and Muslims. Plaintiff Sunil Kumar acknowledged this in writings that he circulated, and at his deposition:

> Q. You go on to state 'caste is an unfortunate social practice among most communities and all the major religions (Hindus, Muslims, Sikhs and Christians) in South Asia.' Do you agree with your statement there? Is that accurate?
>
> A. It is a fact. So, I agree, yeah.

4-SER-910; 3-ER-386; 5-SER-1259.

Plaintiff Praveen Sinha, too, acknowledged that caste is an issue for some Christians and Sikhs, and that it "might be" an issue for some Muslims, too. 3-ER-329. *See also* 7-SER-1811; 6-SER-1571, 1612 ("Caste discrimination . . . is also found across communities of religious practice.").

The existence of caste discrimination has received legal recognition, both abroad and in the United States. The Indian Constitution has barred caste discrimination since 1959, and the Indian Prevention of Atrocities Act of 1989 targeted ongoing mistreatment of Dalits. 7-SER-1839-40; 7-SER-1843. However, as the Third Circuit has recognized, caste discrimination is a persistent problem. "Dalits face discrimination and violence in India, especially in rural areas, despite legal protection and affirmative action programs." *See D.W. v. Raufer*, 839 F. App'x 723, 724 (3d Cir. 2020).

B. Caste is an Increasingly Significant Issue in the United States and at CSU.

Caste has shaped patterns of migration to the United States. The current social makeup of the South Asian American population, which is highly educated and affluent, is made up disproportionately of historically privileged castes. Members of historically disadvantaged castes in the United States are a "minority within a minority," and are uniquely vulnerable to discrimination. 5-SER-1869. Recent lawsuits in Silicon Valley, New Jersey, and New York have alleged caste discrimination against Dalits, and public accounts of caste discrimination have grown increasingly common. 5-SER-1872-73. *See also* 7-SER-1815.

CSU, the largest university system in the country, draws students from around the world, including from countries where caste systems are prominent. As of Fall 2022, there were 7,199 students from India including 5,942 students on an academic student F-1 Visa. CSU likewise enrolled students from Nigeria and Senegal. 5-SER-1329. Both have recognized caste systems. 5-SER-1257. CSU also employs hundreds of faculty and staff members from South Asia, and likewise employs workers from Nigeria. 5-SER-1335.

Members of the CSU community have voiced concerns about caste discrimination – not just abroad, but also in their experiences in California and at CSU. 5-SER-1336; 4-SER-957-59. Additionally, one CSU student has reported that he was the victim of caste-based violence. Specifically, a CSU student reported that his roommate repeatedly called him a "Madhiga Lanja" (a "sub-caste prostitute"); hit

him with a water bottle 10–15 times, knocking his glasses to the floor; and pepper sprayed the back of his neck, causing him the greatest pain he'd ever experienced. 2-ER-233-235.

C. After Extensive Study and Engagement with the CSU Community, Chancellor Koester Adopted a Policy Clarifying that CSU's Nondiscrimination Policy Prohibits Discrimination Based on Caste.

1. In response to growing concerns about caste discrimination, a Working Group of CSU thought leaders began to study the issue.

In 2021, students at CSU became increasingly vocal about concerns with caste discrimination. Following extensive public testimonials by students, the California State Students Association ("CSSA"), the student body organization representing CSU students systemwide, passed a resolution calling for a policy barring caste discrimination. *See* 5-SER-1331-32; 5-SER-1336; 3-ER-553 ("CSSA Resolution").

In response to these growing concerns, the Title IX and DHR Policy Revision Workgroup (the "Title IX Working Group"), which had been convened by the Chancellor to recommend systemwide policy revisions, began studying the issue. 2-ER-237-238 ¶¶ 3-5.

The Working Group included a broad cross-section of University thought leaders, representing Human Resources, Title IX Compliance, Student Affairs, and the Office of General Counsel. 2-ER-237 ¶ 4. It met on at least seven occasions in 2021. 2-ER-237-38 ¶ 5. The group focused on range of policy-related issues, including renaming and

simplifying the Policy, revising the appeal process, and adding Sexual Exploitation as a defined form of prohibited conduct. Caste discrimination was among the topics discussed at each meeting. 2-ER-237 ¶ 5.

2. The Working Group added the word "caste" to its proposed Policy.

The Working Group, as part of its broader proposed revision to CSU's Nondiscrimination Policy, added the word "caste" in two places. First, the draft clarified that the existing prohibition on race and ethnicity discrimination includes caste, as well as color and ancestry. Their draft policy thus added "caste" in a parenthetical:

> The CSU prohibits the following conduct, as defined in Article VII. Discrimination based on any Protected Status: i.e., Age, Disability (physical and mental), Gender (or sex, including sex stereotyping), Gender Identity (including transgender), Gender Expression, Genetic Information, Marital Status, Medical Condition, Nationality, Race or Ethnicity **(including color, caste, or ancestry)**, Religion (or religious creed), Sexual Orientation, and Veteran or Military Status.

2-ER-238; 4-ER-749; 3-SER-708 (emphasis supplied). The Policy further explains, in its definitions section: "Race or Ethnicity includes ancestry, color, caste, ethnic group identification, and ethnic background." 2-ER-238.

The Working Group considered including a definition of caste in the Policy, but opted against it, as the term was used only as an illustration of a type of "Race or Ethnicity" discrimination that was barred by the Policy. 2-ER-238 ¶ 7. Moreover, the Working Group was

not aware of any members of the CSU community expressing concerns that the term was insufficiently clear. 2-ER-238.

3. The Working Group sought feedback from stakeholders across campus, including CSSA and CFA.

The Working Group circulated its proposed language to a broad cross-section of CSU stakeholder groups, which in turn represented all students, faculty, and employees. Specifically, the group circulated its draft to Campus Title IX Coordinators, Campus DHR Administrators, Campus Police Chiefs, Campus Clery Coordinators,[2] Campus Student Conduct Administrators, Campus Confidential Sexual Assault Victim Advocates, Campus Diversity Officers, Campus AVPs-Human Resources, Campus AVPs-Faculty Affairs, Campus Vice Presidents for Student Affairs, Campus Vice Presidents for Administration and Finance, Campus Provosts, the CSU Academic Senate, the Cal State Student Association ("CSSA"), and all CSU labor unions, including the California Faculty Association ("CFA"). 2-ER-238-239 ¶ 9. Notably, the CFA represents all faculty members at CSU, including both plaintiffs. None of these stakeholder groups objected to the addition of the term "caste." None of them complained of vagueness. And none of them asked that the term "caste" be separately defined. 2-ER-252.

Although the Working Group was generally aware that CSSA had passed a resolution (3-ER-553), and that the CFA had passed one, too

[2] Clery Coordinators oversee compliance with the Clery Act, which requires disclosure of campus crime statistics. *See* 20 U.S.C. § 1092(f).

(3-ER-548), the Chancellor's designee did not recall that the resolutions were reviewed or even discussed by the Working Group. 2-ER-251.

4. CSU's Chancellor accepted the Working Group's recommendation, and the word "caste" was added to CSU's Nondiscrimination Policy.

The Working Group emailed the Proposed Policy to the Chancellor and members of his Senior Leadership Council. 2-ER-239 ¶ 12. The Chancellor accepted the Working Group's recommendation without modification, and the new Policy became effective. 2-ER-239 ¶ 13.

II. PROCEDURAL BACKGROUND

A. Plaintiffs' Complaint.

Plaintiffs filed a civil complaint in the Central District of California challenging CSU's inclusion of the word "caste" in its Nondiscrimination Policy. 4-ER-694, 721. They alleged causes of action under the Exercise Clause; the Establishment Clause; the Equal Protection Clause; the Due Process Clause; and parallel California laws. 4-ER-694, 721. Additionally, they alleged a cause of action for Declaratory relief. 4-ER-708.

B. The District Court Granted Judgment on the Pleadings to CSU as to the Free Exercise Claims.

CSU filed a motion for judgment on the pleadings, arguing that plaintiffs lacked standing and that they failed to state a claim. 4-ER-628. The District Court granted the motion in part, and denied it in part. 1-ER-21.

Specifically, the Court granted judgment in favor of CSU on the Free Exercise claims. It did not directly address standing, and instead

entered judgment on the merits: "Plaintiffs emphatically denounce the caste system and reject the notion that it is part of their religion. Thus, the Policy does not threaten any of Plaintiffs' rights to practice their religion." 1-ER-18 (internal citations omitted).[3]

The District Court denied CSU's motion for judgment on the pleadings with respect to the Establishment Clause and Due Process claims. 1-ER-19, 20.

C. The Parties Tried the Establishment Clause and Due Process Claims, and the District Court Made Factual Findings and Entered Judgment for CSU.

Following trial, the District Court entered judgment for CSU on the Establishment Clause claim, and dismissed the Due Process claim for lack of standing. Critically, the District Court made a factual finding that the Policy did not disfavor Hinduism. 1-ER-11. The Court explained: "The fact that 'caste' is readily defined [in dictionaries] without reference to Hinduism demonstrates that the use of the word, by itself, does not evince any impermissible hostility toward religion." 1-ER-11. As for plaintiffs' theory that stakeholders at CSU were hostile to Hinduism, and that this hostility could be attributed to CSU itself and its decisionmakers, the Court found that the theory failed on the facts. 1-ER-11-12. All told, the District Court concluded: "Plaintiffs fail to demonstrate that the Policy conveys disapproval of Hinduism . . . ." 1-ER-12.

[3] The District Court dismissed plaintiffs' Equal Protection claim for lack of standing. 1-ER-17. That claim is not at issue in this appeal.

The District Court also made factual findings regarding plaintiffs' standing. It found that the Policy does not proscribe religious conduct; it only barred discrimination. 1-ER-9. Nor was there a credible threat of enforcement against the plaintiffs. 1-ER-8. Based on these findings, the District Court dismissed the Due Process claim for lack of standing. 1-ER-9.

On the Establishment Clause claim, the District Court reiterated its factual finding that there was no evidence of hostility toward religion. 1-ER-11. And it further found there was no evidence that CSU was taking positions on Hindu doctrine. 1-ER-13. It entered judgment for CSU on the merits.

D. This Appeal Addresses Only Three Causes of Action.

With their appeal, plaintiffs challenge the dismissal of their Due Process claim; the judgment on their Free Exercise claim, and the judgment on their Establishment Clause claim. They do not challenge the dismissal of the Equal Protection claim, nor their claim for Declaratory Relief. These are not among the issues presented (AOB 4 4); they are not briefed; and they are not identified in plaintiffs' request for relief (AOB 56).

Nor does plaintiffs' brief challenge the District Court's dismissal of plaintiffs' state causes of action. Plaintiffs do not cite any California cases; they do not brief the California claims; and they do not mention the California Constitution in their argument. *See* AOB 17–55 and Table of Authorities, pp. 5–9.

SUMMARY OF THE ARGUMENT

The District Court did not err in entering judgment in favor of

CSU on plaintiffs' Free Exercise claims. Plaintiffs' religious exercise was not burdened by CSU's Policy barring discrimination because plaintiffs have no desire to violate the policy. Rather, they abhor caste discrimination, and wish to treat everyone equally without regarding to caste. Additionally, the Policy does not implicate the Free Exercise Clause, because it is neutral toward religion – it bars discrimination by anyone at CSU (regardless of religion) against anyone else at CSU (regardless of religion). Although the District Court assumed, without analysis, that plaintiffs had standing, dismissal for lack of standing would have been appropriate, because the Policy does not restrict plaintiffs' religious conduct, and they have no credible basis to fear enforcement.

For similar reasons, the District Court did not clearly err in dismissing plaintiffs' due process claims for lack of standing. Plaintiffs' claimed self-censorship is not sufficient – they must also show that their conduct is proscribed by the Policy, and that they credibly fear enforcement. They can do neither. Additionally, the record supports judgment in favor of CSU on the merits of the Due Process claim. Plaintiffs presented no evidence that anyone at CSU, not even plaintiffs, were confused by the term "caste." Rather, the Policy provides fair notice of the conduct proscribed – members of the CSU community may not discriminate or harass based on race or ethnicity (including caste).

The District Court did not clearly err in entering judgment in favor of CSU on the Establishment Clause claims. Its factual finding that the Policy was not hostile to religion had ample support in the

record, and there is no evidence that CSU was taking sides on matters of religious doctrine. Moreover, the District Court's finding of lack of hostility should have carried with it a finding that plaintiffs lacked standing.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ENTERING JUDGMENT FOR CSU ON THE FREE EXERCISE CLAIM

A. The District Court Correctly Found that Plaintiffs Failed to State a Claim.

1. Plaintiffs' theory that the Policy burdens religion is not viable."

a. Plaintiffs did not allege that the Policy burdened their exercise of religion.

"[It] is necessary in a free exercise case for one to show the coercive effect of [an] enactment as it operates against him in the practice of his religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963). "To state a claim under the Free Exercise Clause," then, "a plaintiff must show that a government practice substantially burdens a religious practice . . . ." *Sabra v. Maricopa Cnty. Community College Dist.*, 44 F.4th 867 (9th Cir. 2022). Plaintiffs' cases are in accord. *See* AOB 53, citing *Jones v. Williams*, 791 F.3d 1023, 1031–32 (9th Cir. 2015) ("A substantial burden . . . place[s] more than an inconvenience on religious exercise; it must have a tendency to coerce individuals into acting contrary to their religious beliefs or exert substantial pressure on an adherent to modify his behavior and to violate his beliefs."); *Ohno v. Yasuma*, 723 F.3d 984, 1011 (9th Cir.

2013) (same).

This Court, in a recent and closely analogous case, reaffirmed that a plaintiff must prove an actual *burden*. Mere offense is not enough. In *Calif. Parents for the Equalization of Educational Materials v. Torlakson*, 973 F.3d 1010 (9th Cir. 2020), a Hindu advocacy organization challenged state curricular guidance that, among other things, described the caste system as a "social and cultural structure as well as a religious belief." *Id.* at 1014 (emphasis supplied). This Court held that the fact that plaintiffs were offended by this characterization did not result in a Free Exercise violation. Rather, plaintiffs needed to show a tangible burden on their exercise of religion: "Appellants' allegations suggest at most that portions of the Standards and Framework contain material Appellants find offensive to their religious beliefs. . . . Offensive content that does not penalize, interfere with, or otherwise burden religious exercise does not violate Free Exercise Rights." *Id.* at 1020; *see also Grove v. Mead Sch. Dist. No.* 354, 753 F.2d 1528, 1533 (9th Cir. 1985) (plaintiffs must identify "coercive effect that operates against the litigant's practice of his or her religion.").

At the pleading stage, a plaintiff must allege that the government has burdened one of his religious practices or operates against the practice of his religion. *Torlakson*, 973 F.3d at 1019. When a plaintiff's complaint fails to identify specific religious conduct that was impaired, dismissal is "required." *Id.*, citing *American Family Ass'n Inc. v. City & Cnty.* of S.F., 277 F.3d 1114, 1123–24 (9th Cir. 2002) and *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1393 (9th Cir. 1994).

Here, the District Court properly adjudicated the Free Exercise

claim on the pleadings, because plaintiffs' complaint did not allege that the Policy burdens their ability to practice their religion, and they certainly did not identify any "specific religious conduct" that was impaired or that will be impaired. In fact, the allegations of the Complaint affirmatively demonstrate that the Policy will not burden their religious exercise. *See* 4-ER-699 ¶ 18 ("Hindu religion's core principles [include] equal regard for all humans . . . which is directly contrary to a discriminatory caste system."); 4-SER-705 ¶ 51 ("Plaintiffs here do not believe in nor engage in caste discrimination at all. Rather, they abhor it . . . .").

As the District Court put it, plaintiffs "emphatically denounce the caste system and reject the notion that it is part of their religion." 1-ER-18. There is no conflict, then, between CSU's prohibition on caste discrimination and plaintiffs' abhorrence of all forms of discrimination. Indeed the Policy and plaintiffs' views are complementary.

Plaintiffs raise two arguments in response. *First*, they argue that the District Court was obligated to credit their allegations that the Policy "was targeted at, and hostile to, Hinduism," because plaintiffs "affirmatively pled that it was." AOB 52, citing 4-ER-696-97, 714 ¶¶ 3, 9, 110, 114. But a plaintiffs' burden at the pleading stage is to plead *facts* sufficient to support their claim, not mere conclusions of law. And the cited paragraphs of the Complaint are just that – conclusory allegations that CSU was targeting Hinduism. *See* 4-ER-696 ¶ 3; 4-ER-694 ¶ 9; 4-ER-714 ¶¶ 110, 114. On what *factual* basis did plaintiffs base their conclusion that the Policy was targeting Hindus? None.

Moreover, none of the cited allegations are responsive to the

plaintiffs' pleading burden in a Free Exercise case – *i.e.*, identifying a religious practice that is substantially burdened. Accordingly, even taking the cited allegations as true, plaintiffs did not meet their burden under *Torlakson*.

Second, plaintiffs argue that the "Plaintiffs have shown more than a mere tendency of coercion," because "[t]he Policy forced Plaintiffs to self-censor their behavior." AOB 53. As explained in detail below, the self-censorship arguments rests on a skewed and incomplete reading of the record, as Sinha acknowledged that the Policy had *no impact* on his religious practice (3-ER-342), and Kumar acknowledged that the Policy was consistent with this religious beliefs (4-SER-917). *See* Section I(A)(1), *infra*, pp. 26–27; *compare Jones*, 791 F.3d at 1031–32 (free exercise claim may lie where government action "pressure[s] an adherent to modify his behavior and to violate his beliefs.").

Plaintiffs' argument also ignores the procedural posture in which the District Court found that plaintiffs failed to state a Free Exercise claim. Specifically, the District Court below made that determination based on the allegations of plaintiffs' Complaint, which is all that is relevant on a motion for judgment on the pleadings. *Seattle Pac. Univ. v. Ferguson*, No. 22-35986, 2024 WL 2873376, at *4–5 (9th Cir. June 7, 2024) ("[W]e rest our analysis on the Complaint's allegations, which we accept as true at the pleading stage). The fact that plaintiffs later testified that they had engaged in self-censorship does not render erroneous the District Court's earlier assessment of the complaint.

Notably, plaintiffs did not raise their "self-censorship" argument in Opposition to the motion for judgment on the pleadings. Nor did they

seek leave to amend in order to add new factual allegations to their complaint; and nor did they move for reconsideration. Instead, they ask this Court to reverse an adjudication on the pleadings based on evidence extraneous to the pleadings. This Court should decline that request.

b. There is an alternate reason to affirm on the merits – plaintiffs failed to plausibly allege that the Policy targets religion.

The Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), quoting *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). Here, even setting aside the expert testimony and plaintiffs' admissions regarding the neutrality of the Policy (*see* Section I(A), *supra*, pp. 6-7, and instead focusing solely on the Complaint, the neutrality of the Policy is plain. Its text is neutral and makes no mention of any particular religion. Indeed, its only mention of religion is because religion is *protected* under the Policy. *See* 3-SER-708; *compare Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."). Nor do plaintiffs plausibly allege that the object of the Policy is to restrict practices because of their religious motivation. Rather, the object of the Policy is to prevent discrimination – by anyone, against anyone, and regardless of the motivation. *Compare id.* (law is not neutral "if the object of a law is to infringe upon or restrict practices

because of religious motivation.").

With nothing to grab onto from the language of the Policy, plaintiffs instead attempt to attribute to CSU statements and positions of others. Specifically, they cite statements connecting caste with Hinduism and South Asia by student organizations (CSSA and ASI at Cal State Polytechnic) and a faculty union (CFA), and claim these statements can be attributed to and bind CSU. 3-ER-553, 548; AOB 7, 30.

Plaintiffs' reliance on these statements is misplaced. The CFA (a faculty group) and CSSA (a student group) do not speak for the Chancellor. Their Complaint did not allege otherwise. And in their brief, plaintiffs rely on rhetoric rather than the record. They ask: "If the CFA—the California ***Faculty*** Association—and the CSSA—the Cal State ***Student*** Association—do not represent the views of the CSU community, then who does?" AOB 39 (emphasis in original). That, of course, is the wrong question. The question here is whether the defendant—Chancellor Koester—held animus toward Hinduism, and there are no allegations (nor any evidence) of that.

While CSU took the views of its students and faculty seriously, and was rightfully concerned about the issues they raised, the Policy must be interpreted based on what it actually says, not on the basis of statements and viewpoints expressed by other interested entities. *Compare Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (finding hostility to religion by Commission based on anti-religious remarks *by commissioner*). And the Policy, as noted above, is neutral to religion. It prohibits discrimination by anyone and

against anyone, nothing less and nothing more.

2. Plaintiffs' new argument that CSU defined the contours of Hinduism is meritless and waived.

Plaintiffs further alleged in their Complaint that the Policy impermissibly "define[d] the contours and practices of the Hindu religion." 4-ER-709 ¶ 75. As plaintiffs would have it, this violates the Free Exercise clause, because religious institutions have the right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 4-ER-709 ¶ 74, quoting *Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 591 U.S. 732, 746 (2020).

On appeal, plaintiffs argue that the District Court erred in entering judgment on the Free Exercise claim because it "never addressed Plaintiffs' allegations that the Policy impermissibly defined religious doctrine." AOB 51. The argument fails for several reasons. *First*, the District Court did not address this argument below because plaintiffs did not raise it below. In their Opposition below, they did not make the argument with respect to their Free Exercise claim (*see* 4-ER-620-626); they did not cite paragraphs 74 or 75 of their Complaint, and they did not cite *Our Lady of Guadalupe*. *Compare Yamada v. Novel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016) ("[T]he argument must be raised sufficiently for the trial court to rule on it."). The argument is forfeited, and this Court should not entertain it for the first time on appeal. *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014) ("Generally, arguments not raised in the district court will not be considered for the first time on appeal.");

Second, plaintiffs are wrong on the facts. The Policy does not define Hinduism, and does not even mention it. Plaintiffs claim CSSA and CFA mischaracterized Hinduism, but they did not allege that CSSA or CFA spoke for the Chancellor. 4-ER-729, 733; *see also* Section III(A)(1), *infra*, pp. 42-46.

Third, even if the Policy had opined that Hinduism and caste are inextricably connected (it did not), plaintiffs fail to allege that the Policy interfered with the autonomy of any Hindu institution. Indeed, the Complaint expressly alleges that caste discrimination is not recognized, condoned or practiced as part of Hinduism. Logically, therefore, the inclusion of caste would not affect or impact Hinduism in any way.

Plaintiffs' only cited case, *Our Lady of Guadalupe*, thus has no bearing. There, the Court interpreted the "ministerial exception" to the employment discrimination laws, under which "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* at 2061. It held that the exception applied to teachers at a private religious school, because such teachers were "entrusted most directly with the responsibility of educating their students in the faith." *Id.* at 2066. The Supreme Court further explained: "This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy ***with respect to internal management decisions*** that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles." *Id.* at 2060 (emphasis supplied). The Policy at issue here does not infringe on the autonomy or internal decision-making of

Hindu institutions. Rather, it bars discrimination, nothing more.

The District Court did not err by entering judgment for CSU on the Free Exercise causes of action.

B. The District Court Did Not Address Standing, But Plaintiffs' Allegations Were Insufficient.

The Supreme Court, in a recent decision unanimously reversing a Fifth Circuit decision that would have ordered mifepristone (an abortion drug) off the market, confirmed that the requirement of Article III standing is alive and well. Stated at its most basic level:

> To establish standing, as this Court has often stated, a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief.

Food & Drug Admin. v. All. for Hippocratic Med., 144 S. Ct. 1540, 1554 (2024) (hereinafter, *Food & Drug Admin.*), citing *Summers v. Earth Island Institute*, 555 U.S. 488, 394 (2009) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs' Complaint failed to plausibly allege facts sufficient to meet any of the three elements.

1. Plaintiffs failed to allege an injury-in-fact.

Under the first prong, injury-in-fact, a plaintiff must prove a concrete injury, "meaning that it must be real and not abstract." *Food & Drug Admin.*, 144 S. Ct. at 1556. In other words, the injury must be "concrete and particularized" and "actual or imminent." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). A fear of future harm will not suffice unless plaintiffs demonstrate a sufficient likelihood that the harm will

materialize. Speculation about future harm is not enough. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211-12 (2021). This requirement "screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action." *Food & Drug Admin.*, 144 S. Ct. at 1556.

In the context of pre-enforcement facial challenges, special rules apply. An actual enforcement action is not a prerequisite for standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *see* 1-ER-7-8. Instead, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* at 159, quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979). *See also Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50 (9th Cir. June 7, 2024) (applying *Driehaus* test in case alleging, among other things, Free Exercise violations).

Here, plaintiffs do not allege in their Complaint that they "intend to engage in a course of conduct arguably affected within a constitutional interest." They say only that the Policy will lead them "to live with the fear of being disciplined for committing discrimination they did not commit . . . ." 4-ER-710 (First Amended Complaint ("FAC") ¶ 79). But they did not identify any *conduct* that they wished to engage in that would lead them to hold such a fear – not in their Complaint, nor in their FAC, nor in their Opposition to the Motion for Judgment on the Pleadings. *See* 4-ER-602, 695, 721. Indeed, their own allegations indicate that they should *not* have such a fear, as plaintiffs

abhor caste discrimination and have no desire to engage in it. 4-ER-699, 705 (FAC ¶¶ 18, 51).

In a similar case involving a Seattle Ordinance barring discrimination based on caste, the court found that the plaintiff had not alleged that the policy would burden him, and dismissed the Free Exercise claim for lack of standing. *Bagal v. Sawant*, No. C23-0721, 2024 WL 1012908, at *3 (W.D. Wash., Mar. 8, 2024). This case presents even stronger reasons for dismissal. Plaintiff Sinha expressly admitted that the Policy does not impact his religious beliefs or practices:

> Q. Did you [do] anything to change your religious beliefs because of CSU's passage its non-discrimination policy?
>
> A. No – no I have not.
>
> Q. Did you do anything to change your religious practices because of CSU's implementation of its non-discrimination policy?
>
> A. No, I have not.
>
> Q. And just to be clear, there's nothing in your religious beliefs that would require you to treat people of different castes differently?
>
> A. That's correct.
>
> Q. And, in fact, your religious beliefs would require you to treat everyone with compassion and respect; is that right?
>
> A. Exactly. That's correct.
>
> Q. And part of that would be treating people of different castes or varnas equally and fairly; is that correct?
>
> A. Exactly.

3-ER-342.

Plaintiff Kumar was asked several times during his deposition

about the impact of the Policy (4-SER-916-17). After initially resisting the questioning, he ultimately acknowledged that a ban on caste discrimination does not conflict with his beliefs. *See* 4-SER-917 ("Q. To be clear, your religious beliefs don't require you to treat people of different castes differently; right? A. Right. Q. In fact, it's quite the opposite, your religious beliefs require you to treat people equally; right? A. Correct.")

To be sure, Kumar now argues that he engaged in self-censorship: (i) he was "very worried" that celebrating at a religious festival could "become a problem" and "there can be [a] complaint against me";[4] and (ii) he does "not talk about" religious texts, such as the Bhagavad Gita. *See* AOB 20–21. But that post-complaint testimony does not qualify as an allegation of injury sufficient to withstand a motion for judgment on the pleadings. A motion for judgment on the pleadings is to be decided on the pleadings, not matters extraneous to the pleadings. *Seattle Pac. Univ.*, 2024 WL 2873376, at *4–5.

In any case, even if plaintiffs' extrinsic testimony regarding self-

[4] Plaintiffs' description of this testimony in their brief overreaches. While plaintiffs argue that Kumar "declines to participate in festivals" (AOB 20) and that both plaintiffs "self-censored their religious exercise by not attending religious events" (AOB 54), Sinha said nothing about festivals, and acknowledged that he has not done "anything to change [his] religious practices." 3-ER-388. And Kumar did not testify that he actually declined to attend religious events. 4-SER-916. Rather, he testified only that "now I am very worried" that attending a festival could lead to a complaint or ridicule. 4-SER-916. Had Kumar actually restricted his attendance, it would have been easy enough to (i) allege that in his Complaint; and/or (ii) submit a declaration saying he did so with his Trial Brief. He did neither.

censorship could be considered, plaintiffs still could not satisfy the second and third *Driehaus* requirements – showing that the conduct they wish to engage in is proscribed by statute; and that there exists a credible threat of prosecution.

The Policy does not proscribe any of the conduct in which plaintiffs wish to engage. It does not bar plaintiffs from participating in religious festivals. It does not bar plaintiffs from reading sacred texts or from talking about their faith. Rather, it bars plaintiffs from engaging in *discrimination* or *harassment* based on caste. Specifically, plaintiffs may not take "adverse action" against someone based on their caste, which means they may not take actions that have "a substantial and material adverse effect on the Complainant's ability to participate in a university program, activity or employment." 3-SER-810. Nor may plaintiffs engage in "unwelcome verbal, nonverbal or physical conduct because of an individual's caste" that is so "severe or pervasive" that it creates "an intimidating, hostile or offensive work or educational environment." 3-ER-714. Attending a festival or discussing a sacred text is simply not "proscribed" by the Policy. And the conduct that *is* proscribed—discrimination—is something that plaintiffs concededly have no desire to do. 4-SER-862, 874.

Relatedly, there is no "credible threat" that plaintiffs would be prosecuted for attending a religious festival or discussing a sacred text. Such a prosecution is hardly thinkable, and there is no allegation (nor a shred of evidence) suggesting that they or anyone else would be subject to such a prosecution. Indeed, prosecuting a member of the CSU community for attending a religious festival or discussing a sacred text

would be a flagrant violation of CSU's Nondiscrimination Policy, which bars differential treatment based on Religion (including religious creed). 3-SER-708.

2. Plaintiffs failed to allege causation.

Injury-in-fact is only the first step in the analysis. Assuming an injury, "[t]he plaintiff must also establish that the plaintiff's injury likely was caused or likely will be caused by the defendant's conduct." *Food & Drug Admin.*, 144 S. Ct. at 1556. The Court further explained: "Without the causation requirement, courts would be 'virtually continuing monitors of the wisdom and soundness' of government action." *Id.* at 1557.

For purposes of standing, the linkage between the challenged policy and the injury "must not be too speculative or too attenuated." *Food & Drug Admin.*, 144 S. Ct. at 1557. Rather, "the plaintiff must show a predictable chain of events leading from the government action to the asserted injury." *Id.* at 1558.

Here, it is far from predictable that a policy barring caste discrimination and caste harassment would lead anyone to forego a religious festival or refrain from discussing a sacred text. These purported injuries are not the consequence of CSU's policy. At best, they are the consequence of an unreasonable misinterpretation of the Policy.

3. Plaintiffs' allegations show that their claimed injury is not redressable.

Plaintiffs must show that the Court is capable of redressing the claimed injury. *Steel Co. v. Citizens for a Better Environment*, 523 U.S.

83, 107 (1998) (relief that does not redress injury "cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."); *see also Juliana v. U.S.*, 947 F.3d 1159, 1170 (9th Cir. 2020) (injury not redressable if it "is not substantially likely to mitigate the plaintiffs' asserted concrete injuries.").

Here, the term "caste" is not a new standalone protected category. Rather, it is a clarifying illustration of existing protecting categories (race and ethnicity). Excising the word "caste" from the Policy, then, would be an idle act – members of the CSU community could still raise complaints about the same conduct by bringing claims of race or ethnicity discrimination. *Compare* 1-SER-19 (Veto Letter from Gov. Newsom, stating "[b]ecause discrimination based on caste is already prohibited under [] existing categories, this bill is unnecessary.").

Moreover, plaintiffs' brief and their testimony make it clear that their claims of self-censorship are not based on the Policy, which is neutral toward religion. Their real concern is broader criticism of caste practice and caste oppression, including the resolutions by CFA and CSSA. *See* AOB 30 ("Plaintiffs' fear is more than well-founded given the plain language of the CFA, CSSA, and ASI Resolutions"). Excising the word "caste" from CSU's policy will not erase the widespread concerns about caste discrimination expressed by members of the CSU community, and will not redress plaintiffs' claimed injury.

II. THE DISTRICT COURT DID NOT CLEARLY ERR IN DISMISSING THE DUE PROCESS CLAIM

A. The District Court Did Not Clearly Err in Finding that Plaintiffs Lacked Standing to Bring a Pre-Enforcement Due Process Challenge.

1. Self-censorship alone does not confer standing.

Plaintiffs lead with an argument that they have self-censored by declining to attend religious festivals and declining to talk about sacred texts, and say this is "a sufficient basis for standing in cases involving First Amendment rights." AOB 19. Even under their own cases, that misstates the law of standing. In their first case, *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (*see* AOB 18-19) this Court did not find that self-censorship provides an automatic pathway to federal jurisdiction. Rather, much like in *Driehaus*, this Court required a plaintiff to demonstrate that their self-censorship was based on a credible fear of enforcement. *Getman*, 328 F.3d at 1095 ("The self-censorship door to standing does not open for every plaintiff. The potential plaintiff must have 'an actual and well-founded fear that the law will be enforced against [him or her].')

Plaintiff's second case, *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867 (9th Cir. 2013) is in accord. Self-censorship alone is not enough. Rather, courts must evaluate "the genuineness of a claimed threat of prosecution" (*id.* at 870), including by assessing "whether the plaintiffs have articulated a concrete plan to violate the law in question" and "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings" (*id.*, quoting *McCormack v.*

Hiedeman, 694 F.3d 1004, 1021 (9th Cir. 2012)). These are precisely the same factors that this Court recently used to guide the "threat of enforcement" inquiry under *Driehaus*. *See Tingley v. Ferguson*, 47 F.4th 1055, 1067 (9th Cir. 2022).

Plaintiffs' third case, *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020), too, recognizes that self-censorship does not alone confer standing. Rather, such self-censorship must be based on a reasonable fear of enforcement. If the "fear of future injury [] itself is too speculative to confer standing," then a plaintiffs' unreasonable decision to forego constitutionally protected activity likewise does not confer standing.

Fourth, plaintiffs claim this case is factually analogous to *Driehaus*. It isn't. *Driehaus* involved a challenge to a law prohibiting "false statements" during the course of a political campaign. *Driehaus*, 573 U.S. at 151. There, the petitioners intended to make political statements about "taxpayer-funded abortion," and sued. The Court found standing because (i) the false statement law "swe[pt] broadly . . . and covers the subject matter of petitioners' intended speech; and (ii) "a Commission panel . . . already found probable cause to believe that SBA violated the statute" by using similar language. *Id.* at 162. Here, the conduct that plaintiffs wish to engage in—participation in religious festivals and speaking about sacred texts—is not covered by the Policy's non-discrimination prohibition, and there has been no past finding of a violation.

Plaintiffs' fifth case, *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002 (9th Cir. 2003) likewise misses the

mark. There, the plaintiffs wanted to disseminate political advertising without providing 24-hour notice to candidates, but feared enforcement of a law that prohibited that exact conduct – political advertising without notice. Here, the Policy does not proscribe any conduct in which plaintiffs wish to engage. It simply bars discrimination, something that plaintiffs have testified they have never done and never wish to do.

2. The District Court did not clearly err in finding that plaintiffs' intended conduct—practicing their religion—was not "arguably proscribed" by the Policy.

The District Court made a factual finding that "Plaintiff's intended conduct—practicing their religion—is protected, rather than proscribed by the Policy . . . ." 1-ER-7. That finding was not clearly erroneous, and had ample support in the record. As noted above, Sinha expressly acknowledged that he did not have any fear that the Policy would be enforced against him. And both plaintiffs insist that their religious practice does not include caste discrimination. 2-ER-38; 3-ER-387, 389. Indeed, their religious practice is *inconsistent* with discrimination. Nothing in the Policy proscribes them from practicing their faith.

3. The District Court did not clearly err in finding no "credible threat" of enforcement.

The District Court also made factual findings that plaintiffs "have articulated a desire to comply with the Policy's prohibition," and that a threat of enforcement is "not reasonable or imminent at this time." 1-

ER-8. Those findings are entitled to deference, were not clearly erroneous, and alone supports affirmance.

Plaintiffs do not address them, and instead pivot to three secondary factual findings. AOB 25, citing 1-ER-8-9. *First*, plaintiffs argue that "the mere fact that Plaintiffs' religious practices *were* protected by the Policy before caste was added does not mean that their Hindu practices are not now curtailed by the Policy's inclusion of the undefined term caste." AOB 30 (emphasis in original). The argument mischaracterizes the Policy, which still bars discrimination and harassment based on religion, just as did prior to the addition of the word "caste." And it is hollow on the facts. Which "Hindu practices are . . . curtailed" by the prohibition on caste discrimination? Plaintiffs do not identify any. *See* AOB 30–31.

Second, plaintiffs argue that the lack of prior enforcement is irrelevant, because "caste" was only recently added to the Policy. The argument has some superficial appeal, at least until it is compared to the record. "Caste," in the Policy is not a new standalone category. It is a parenthetical illustration of protected categories ("Race and Ethnicity") that have been part of the Policy all along. Members of the CSU community who were concerned about caste discrimination could've raised complaints against plaintiffs under the former Policy. The fact that there was no enforcement, and there were not even any complaints, show that plaintiffs' purported fears of future enforcement are not credible. 4-ER-398 ¶ 11.

Third, plaintiffs argue that the District Court erred by relying on CSU's expert testimony that universities, in implementing new policies,

do not resort to "draconian or punitive" enforcement. Plaintiffs argue that this means that some lesser form of enforcement must be expected. AOB 18-23. In reality, the expert testified that in the university context, when new policies are implemented, "there's an education process where you talk to parties who have run afoul of the guidelines and attempt to, you know, find a resolution that's more about conciliation." 1-SER-68. This evidence, too, undermines plaintiffs' claim that they credibly feared that the University, in response to their attending a religious festival or discussing a sacred text, would respond by taking disciplinary action.

All told, the District Court's dismissal decision was well-reasoned and correct. At a minimum, its decision was not so "illogical, implausible, or without support in inferences from the record" that reversal is warranted following trial. *Chaudhry*, 68 F.4th at 1171.

B. The Record Supports Affirmance on the Merits.

The District Court dismissed the Due Process claim not at the pleading stage, but instead, following a full trial on the merits. Accordingly, the parties took discovery on the claim, briefed the issues, and had a full opportunity to present their evidence. In other words, the Due Process record was fully developed and ripe for adjudication on the merits, even though the claim was ultimately dismissed. That record provides three reasons to affirm on the merits.

1. Plaintiffs present no evidence of confusion.

Plaintiffs had the burden of proving their Due Process claim of unconstitutional vagueness. To do so, they were required to present affirmative evidence that "people of ordinary intelligence" did not

understand the Policy. *United States v. Doremus*, 888 F.2d 630, 634 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991). Plaintiffs defaulted on their burden. They did not present any surveys or academic studies. They did not offer any expert testimony. They did not present a declaration from a single one of CSU's 560,000 students or 29,000 faculty and staff. And perhaps most tellingly – *Plaintiffs themselves* did not submit declarations attesting that they do not understand the term.

Moreover, all affirmative evidence in the record shows that the term "caste" is understandable. Of the 206 speakers who participated in public comment, only *one* individual claimed he didn't understand the term. The other 205 used the term caste freely, without definition. 5-SER-1341; 5-SER-1337-56. Plaintiffs, too, used the term freely, without defining it. In a letter co-signed by the plaintiffs to the CSSA Student Association Board of Directors, they wrote about caste discrimination, without defining the term. 4-SER-961-62.

Plaintiffs' only efforts to characterize the term as vague is based on two statements by the Chancellor's designee, Laura Anson. Specifically, Ms. Anson testified that there is no universally accepted definition of caste (*see* AOB 20), and that "caste" has multiple definitions (AOB 14). But this evidence falls short of proving unconstitutional vagueness. If the rule were otherwise, "race"—which has no universally accepted definitions and is defined in *myriad* ways[5]—would also be unconstitutionally vague. So too would ethnicity. *Consider In re Joshua H.*, 13 Cal.App.4th 1734 (1993) (declining to

[5] CSU's linguist identified ten definitions of race. 5-SER-1318.

strike down as unconstitutionally vague California's hate crime statute, which states that "race or ethnicity" includes "ancestry, color, and ethnic background"); *Vill. of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016) (analyzing whether "Hispanic" qualifies as a "race," and noting inconsistent descriptions by different federal agencies, as well as changes over time); *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987) (analyzing whether "Arab" qualifies as race, noting differing dictionary and encyclopedia definitions).

Consider, too, the term "sex" in Title VII, a statute passed in 1964. The term has undergone a 60-year process of orderly interpretation, and legitimate questions regarding its scope continue to arise through this day. *See General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) ("sex" does not include pregnancy); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) ("sex" includes sex stereotyping); *Oncale v. Sundowner*, 118 S. Ct. 998, 1103 (1998) ("sex" includes same-sex harassment); *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) ("sex" includes gender identity and sexual orientation). Despite these persistent questions of interpretation, the term "sex" in Title VII has never been deemed unconstitutionally vague. *See also Colgan v. Leatherman Tool Grop., Inc.*, 135 Cal.App.4th 663, 692 (2006) ("A statute is not unconstitutionally vague merely because its meaning must be refined through application.").

A recent Ninth Circuit case confirms that statutes may rely on terms that are open to varying definitions. In *Tingley v. Ferguson*, 47 F.4th 1055, 1063 (9th Cir. 2022), the Ninth Circuit considered a challenge to a statute barring health care providers from practicing

conversion therapy on children. The statute defined conversion therapy as "a regime that seeks to change an individual's sexual orientation or gender identity . . . ." The plaintiff challenged the terms "sexual orientation" and "gender identity" as "vague terms without consistent definitions." *Id.* at 1065, 1089. The Ninth Circuit disagreed, finding that their common meanings were clear enough to defeat a vagueness challenge. *Id.* at 1089–90*; see also Reynolds v. Talberg*, 2020 WL 6375396 at *9 (W.D. Mich. Oct. 30, 2020) (terms "transgender" and "gender expression" are not overly vague).[6]

2. The meaning of "caste" is even clearer in context.

Words must be read in the context in which they are used. *King v. Burwell*, 576 U.S. 473, 486 (2015) ("[W]e must read the words 'in their context and with a view of their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions."). This case cannot be framed as a vocabulary quiz, in which the question is whether CSU members have a ready definition of "caste" at their fingertips. Rather, the relevant question for purposes of a vagueness challenge is whether members of the CSU community are on fair notice of what *conduct* is proscribed by the Policy. *Doremus*, 888 F.2d at 634.

Here, context matters in two ways. *First*, the only conduct

[6] In contrast, terms that have been found to be unconstitutionally vague are those that genuinely leave the reader scratching their head. *See Coates v. City of Cincinnati*, 402 U.S. 611, 612–14 (1971) (ordinance prohibiting "conduct . . . annoying to persons passing by" found vague); *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 786 (4th Cir. 2023) ("act[ing] in an obnoxious manner"); *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996) ("offensive personality").

prohibited by the Policy is discrimination and harassment. 3-SER-714. Even if a member of the CSU community had questions about the precise meaning of "caste," to comply with the Policy, all they would need to understand is that they are barred from *discrimination* against others or *harassment* of others based on their "race or ethnicity (including color, caste, or ancestry)." The Policy provides further detail, too. To be actionable as discrimination, conduct must rise to the level of an "adverse action," *i.e.*, conduct that "has a substantial and material adverse effect on the Complainant's ability to participate in a university program, activity or employment." 3-SER-810. The Policy further clarifies that "[m]inor or trivial actions or conduct not reasonably likely to do more than anger or upset a Complainant does not constitute an Adverse Action." *Id.* Likewise, harassment is only barred if it is "sufficiently severe or pervasive" that it "creat[es] an intimidating, hostile or offensive work or educational environment." *Id.*

Accordingly, even if a CSU community member was unclear on the precise definitional contours of the term "caste," they could readily avoid a finding of caste discrimination by refraining from discriminatory or harassing conduct.

Tellingly, Plaintiffs admittedly understand how to comply with the Policy. Kumar testified that there is a discreet universe of decisions that he makes regarding students' academic progress (*e.g.*, grading, letters of recommendation, etc.), and that he is 100% confident that he does not take into account their caste. *See generally* 4-SER-926. The same is true of his decisions with respect to his academic peers and to staff members. 4-SER-926.

Sinha, too, is confident that he has always followed the Policy, and that the university would never find he had violated it. 3-ER-327 ("[I]f a student were to raise a complaint of caste discrimination by you, they would be wrong, is that correct? A. Yes, they would be wrong. Q. Are you afraid that CSU would find that they – that you actually discriminated against somebody based on caste? A. No.") (objections and colloquy omitted). Plaintiffs are not left guessing about what the Policy means. They admit they understand how to comply.

Second, the term "caste" is not listed as a standalone protected category. Rather, it is used as an illustration. In other words, "caste" clarifies how existing terms ("Race or Ethnicity") operate in the context of the Policy. In this respect, "caste" is similar to the clarifying term "color." Including the term "color" makes it clear that the Policy prohibits individuals of one race from discriminating against individuals of the same race, as they may do if they discriminate based on color. *Cf. Jordan v. Whelan Security of Illinois, Inc.*, 30 F. Supp. 3d 746, 752 (N.D. Ill. 2014) (African-American stated viable claim against African-American manager who alleged disfavored light-skinned African-Americans).

Likewise, addition of the term "caste" helps clarify that an individual of one race and ethnicity may discriminate against another individual from the same race and ethnicity, as they may do if they discriminate based on caste. *Cf.* 4-SER-957 (CSU professor declines Kumar's invitation to protest caste policy because he had been victim of discrimination "by Indians toward Indians" at CSU). In other words, the addition of the term "caste" to the policy, as a parenthetical

clarification, would not be confusing to ordinary members of the CSU community. Rather, as CSU's expert linguist testified, addition of the term "caste" helps eliminate ambiguity. 5-SER-1317–1324.

3. The term "caste" is especially understandable to those for whom caste matters personally.

What matters under a vagueness challenge is whether the term caste is understandable to those for whom caste is a meaningful concept. "If the statutory prohibition involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, the standard is lowered and a court may uphold a statute which uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them." *Pickup v. Brown*, 740 F.3d 1208, 1234 (9th Cir. 2014), quoting *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1994).

Here, "caste" is readily understandable to those for whom caste personally matters. Individuals who are connected to caste systems know all too well what caste means. *See* 3-SER-688 (CSU student called another CSU student a "sub-caste prostitute," pepper-sprayed him, and knocked his glasses to the floor). Courts should not strike down provisions that are both understandable and consequential for many, based on the theoretical possibility—unsupported by any evidence—that the term is not understandable (and not consequential) to some.

"Caste" is well within the understanding of persons of ordinary intelligence. This is not the type of case appropriate for the "strong

medicine of striking down [a policy] as facially vague." *Schwartzmiller v. Gardner,* 752 F.2d 1341, 1346 (1984).

III. THE DISTRICT COURT DID NOT CLEARLY ERR BY ENTERING JUDGMENT FOR CSU ON THE ESTABLISHMENT CLAUSE CLAIM

A. The District Court Did Not Clearly Err by Rejecting Plaintiffs' Religious Hostility Theory.

1. The District Court found, as a matter of fact, that there was no hostility toward Hinduism.

Government conduct violates the Establishment Clause when it favors one religion over another, involves coercion, or expresses hostility towards any religion. *Lee v. Weisman*, 505 U.S. 577, 591–92 (1992); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (the Constitution "forbids hostility towards any religions"). Unconstitutional hostility is apparent when government conduct "passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (internal citation omitted).

Here, the District Court made a factual finding that the Policy was not hostile to religion. 1-ER-11-13. That finding had ample support in the record. *First*, the Policy's language was neutral toward religion. *Second*, both CSU's experts and plaintiffs testified that caste is not coextensive with religion. *Third*, the Chancellor's designee testified that the intent of the Policy was neutral toward religion: "[O]ur policy is religion neutral. It's not – we don't associate caste with any specific religion." 2-ER-255; *see also* 2-ER-238 ¶ 8. The District Court's

conclusion—that there was no hostility toward Hinduism—was certainly not "illogical, implausible, or without support in inferences from the record." *Chaudhry*, 68 F.4th at 1171.

Plaintiffs also argued that the Policy is hostile toward Hinduism because the CSSA and CFA Resolutions connect caste discrimination with Hinduism. AOB 41. But even after full discovery, and even though they had the burden of proof at trial, they did not cite any depositions, declarations, or writings to show that the resolutions were passed out of hatred for Hindus. And even though the CSSA resolution was preceded by three hours of public comment (5-SER-1331-32; 5-SER-1147-89), plaintiffs do not identify a single commenter that showed any hostility to Hinduism or to Hindus. In reality, the commenters objected to discrimination. They did not object to Hindus or their faith. 5-SER-1337-56. It was not clearly erroneous, illogical, or improbable, then, for the District Court to find that the Resolutions did not carry any animosity toward Hinduism. 1-ER-12.

Moreover, even if CFA and CSSA *had* been hostile to Hinduism, that would not be enough. The relevant question is whether the defendant—Chancellor Koester—held such hostility. It was not clearly erroneous for the Court to make factual findings that neither CSSA (a student organization) nor CFA (the faculty union) speak for the Chancellor. These are distinct legal entities that speak on behalf of their respective constituents, not CSU. The CFA is a union of 29,000 professors, lecturers, librarians, counselors, and coaches at CSU. 2-SER-275-76. The CFA and CSU are often at odds, and CFA certainly does not speak for CSU, as one of the plaintiffs acknowledges. 3-ER-

355 ("Q. [I]t's not uncommon for CFA and the administration to be in disagreement; is that correct? A. Not uncommon. That's possible, yeah. . . . Q. CFA does not speak for the chancellor; right? A. CFA will make recommendations. Chancellor may or may not accept it. Sometimes they don't accept it. Sometimes they accept it.").

The CSSA is a "student-led organization" that engages and advocates for CSU students, but "shall maintain autonomy from the CSU Office of the Chancellor in the stances it takes [and] the work it carries out." 3-SER-548. Likewise, Cal Poly ASI is a "student body organization" that serves as "the official voice of Cal Poly Students." 3-SER-589. None of these organizations speak for the Chancellor.

Moreover, plaintiffs presented no evidence that the Chancellor adopted CSSA or CFA's views, and CSU prevented affirmative evidence that the Chancellor did not. As the Chancellor's designee explained:

> The Title IX Working Group was not affiliated with the California State Students Association ("CSSA") or the California Faculty Association ("CFA"), and no CSSA or CFA representatives were included in the Title IX Working Group. While the Title IX Working Group solicited and considered feedback from stakeholders and took all feedback seriously, the charter of the Title IX Working Group was to make independent recommendations to the Chancellor after vetting and considering various inputs. The Title IX Working Group did not simply adopt the views or positions of any stakeholder group.

2-ER-239 ¶ 10.

Plaintiffs note that a letter was sent to the Office of the Chancellor from ASI at California Polytechnic State University, describing caste as a "structure of oppression in Hindu society." AOB

30-32, citing 3-ER-558.[7] But plaintiffs did not introduce evidence that this view was adopted by the Chancellor, or even that she reviewed or considered it. To the contrary, the evidence shows that the Chancellor relied on independent recommendations from the systemwide Working Group, and that the Working Group made its recommendation only following a thoughtful and deliberate process that spanned seven months. 1-ER-5-6. Moreover, there is affirmative evidence that the Working Group did *not* associate caste with any religion (2-ER-255; 2-ER-238 ¶ 8; 3-ER-536), and that they did not adopt the views of any stakeholder group (ER-239 ¶ 10). Plaintiffs' suggestion that the Chancellor was unduly influenced by a letter from a student group at one campus is not plausible. The District Court was well within its discretion in finding that plaintiffs did not "meaningfully call the Workgroup's independence" into question, and that there was no evidence that the Policy was hostile to Hinduism. 1-ER-12.

Plaintiffs' theory, then, collapses into a request that this Court assume without any evidence that the CSSA and CFA acted out of religious hostility, and that the Chancellor endorsed that animus and imported it into her decision to accept the Working Group's recommendation. But it is well-settled that the Establishment Clause turns on the objective evidence, not on such assumptions. "Establishment Clause analysis does not look to the veiled psyche of

[7] Plaintiffs are incorrect that the District Court ignored the letter "in toto." AOB 41. The District Court acknowledged the letter and the ASI Resolution. 1-ER-6, n. 1. It simply wasn't persuaded that these groups speak for CSU. 1-ER-12.

government officers" because "an understanding of official objectives emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 861-62 (2005).

Plaintiffs counter with *Church of Lukumi*, 508 U.S. 520, but *Lukumi* is irrelevant here for three reasons. *First*, *Lukumi* is a Free Exercise case, not an Establishment Clause case. *Second*, the City Ordinance at issue in *Lukumi* specifically targeted ritual animal sacrifice by adherents of the Santeria faith. *Id.* at 524-26. Here, Plaintiffs do not contend that the Policy targeted their religious practices. To the contrary, their religious beliefs *bar* them from discriminating based on caste. 4-ER-699, 705 (FAC ¶ 18, 51); 3-ER-341-42; 4-SER-917. *Third*, the petitioners in *Lukumi* presented actual and direct evidence of religious animus – including a comment by one of the decisionmakers that Santeria was "in violation of everything this country stands for." *Id.* at 526, 541-42. Here, Plaintiffs presented no evidence of animus whatsoever.

2. Even if a ban on caste discrimination had some overlap with Hindu religious practices, that would not amount to an Establishment Clause violation.

In evaluating a claim under the Establishment Clause, courts must determine "whether the challenged practice is religious in nature." *Ervins v. Sun Prairie Area Sch. Dist.*, 609 F. Supp. 3d 709, 725 (W.D. Wis. July 1, 2022). If a practice is not religious, then the Establishment Clause does not apply. *Id.* Moreover, the fact that a practice has some

level of overlap with a religious practice does not mean that it is immune from regulation. "[T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). *See also Bagal v. Sawant*, No. C23-0721, 2024 WL 1012908, at *3 (W.D. Wash., Mar. 8, 2024) ("It is not enough, in other words, that the anti-caste legislation strikes members of a religion as reflecting poorly on their religious beliefs."); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980).

A case from this Court is particularly instructive. At issue in *Catholic League for Religious & Civ. Rights v. City & Cnty. of San Francisco*, 567 F.3d 595 (9th Cir. 2009) was a resolution by the County urging a Catholic Cardinal to "withdraw his discriminatory and defamatory directive that Catholic Charities . . . stop placing children in need of adoption with homosexual households." The Catholic League argued that the County's resolution had attacked "Catholic religious beliefs" but the County countered by arguing that its purposes was to "champion needy children, gays, lesbians, and same-sex couples within its jurisdiction." *Id.* at 600, 602. This Court held that the overlap between the conduct criticized and Catholic doctrine did not result in an Establishment Clause violation:

> [G]overnment speech or action with respect to a secular issue is not considered endorsement of religion simply because the government's views are consistent with religious tenets. That is, the same belief can have both religious and secular dimensions; the government is not stripped of its secular purpose simply because the same concept can be construed as religious.

Id. at 603. *Consider also Bagal*, 2024 WL 1012908 *3 ("[B]irth control is a topic that involves both religious beliefs and general welfare concerns. And yet, no court has ever held that government approval of birth control violates the Establishment Clause.")

As another example, every state in the country has laws barring polygamy. Even though polygamy is associated with the Church of Latter-Day Saints in the public consciousness, these laws have never been struck down as violations of the Establishment Clause. 5-SER-1292. *See also Reynolds v. U.S.*, 98 U.S. 145 (1878) (upholding anti-polygamy laws over religious challenge); and *Davis v. Beason*, 133 U.S. 333 (1890) (same).

This same principle applies in the discrimination context. *In Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), the Supreme Court assessed whether the Internal Revenue Service could revoke the tax-exempt status of a university and a primary school based on discriminatory admissions and discipline policies. At the university, "[t]he sponsors . . . genuinely believe[d] that the Bible forbids interracial dating and marriage." *Id.* at 580. The school generally admitted only Caucasians, based on sincerely held religious beliefs that mixing of races violated "God's command." *Id.* at 583, n. 6. The Court held that revocation of the schools' tax-exempt status did not violate the First Amendment: "[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . That governmental interest substantially outweighs whatever burden denial of tax benefits placed on petitioners' exercise of their religious beliefs." *Id.* at 604.

Here, the Policy barring caste discrimination serves a legitimate

purpose that is independent of religion. It prohibits acts of discrimination and harassment in order to protect and ensure equal access to educational and employment opportunities at CSU regardless of race or ethnicity, including caste. Even assuming the Policy had incidental effects on those who practice Hinduism (and there is no evidence that it does), such incidental effects would not be actionable under the Establishment Clause.

3. There is an alternate basis for affirming – appellants defaulted on their burden of finding support in history and tradition.

In *Kennedy v. Bremerton School District*, the Supreme Court mandated an additional consideration, that Establishment Clause claims "must be interpreted by reference to historical practices and understanding." *Kennedy*, 142 S. Ct. 2407, 2428 (2022). "The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers." *Id.*; *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 888 (9th Cir. 2022).

The burden of producing historical support under *Kennedy* rests squarely on the plaintiff. *Firewalker-Fields v. Lee*, 58 F.4th 104, 122 & n. 7 (4th Cir. 2023). To meet their burden, plaintiffs must do more than cite general principles of First Amendment law, which is all plaintiffs have done here. *See* AOB 35-37. Rather, they must direct the Court to specific historic precedents. *Compare Freedom from Religion Foundation, Inc. v. Mack*, 49 F.4th 941, 942 (5th Cir. 2022) (to assess whether courtroom prayers violated the Establishment Clause, Court

cited fourteen historical precedents on point from 1700-1800); *Kane v. De Blasio*, 623 F. Supp. 3d 399, 359 (2nd Cir. 2022) (to assess whether vaccination requirements violated the Establishment Clause, Court cited "a long history requirements in this County and this Circuit"). Here, plaintiffs did not meet their burden. They did not produce any historical evidence, nor did they cite to any historical analogue.

Even if the burden fell on CSU, CSU would readily satisfy it. It is well-established that neutral anti-discrimination laws are constitutionally sound, especially in the context of education. "An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." *See Bob Jones Univ. v. United States*, 461 U.S. 574, 592–95 (1983); *see also Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("The right of a student not to be segregated on racial grounds in school . . . is indeed so fundamental and pervasive that it is embraced in the concept of due process of law."). There simply is no history or tradition of striking down neutral policies that bar discrimination in education. To the contrary, such policies have been a defining feature of American education since the Civil Rights era, and have received the unqualified endorsement of the Supreme Court.

As CSU's expert historian explained, CSU's policy is consistent with the eighteenth- and nineteenth-history and traditions relating to religion in the antidiscrimination context. 5-SER-1288. Neither the framers of the Constitution nor of the Fourteenth Amendment would have found anti-discrimination laws to constitute an establishment of

religion. 5-SER-1286-91.

Nor is there any indication that the framers would have found the word "caste" to have religious connotations. Indeed, there is a long judicial history of using the term "caste" to signify social stratification, not to signify any particular religion. Specifically, Justice Harlan's dissent in *Plessy v. Ferguson*, 16 S. Ct. 1138 (1896) understood "caste" as a social concept, not a religious one. And of the fifteen times "caste" was mentioned in the Supreme Court's recent affirmative action decision, ***none*** of them had anything to do with religion. *Students for Fair Admissions v. Harvard College*, 143 S. Ct. 2141, 2175, 2181, 2187, 2191-2192, 2203-2204, 2230-31, n. 3 (2023). *See also* 5-SER-1289-92.

Further, settled precedent demonstrates that limitations on discrimination do not offend the Constitution if they incidentally infringe upon the beliefs or preferences of some religious actors. In *Loving v. Virginia*, 388 U.S. 1 (1967), the groundbreaking decision striking down anti-miscegenation statutes, the trial court had defended the anti-miscegenation laws on purportedly religious grounds: "God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix." *Id.* at 3. This perspective, of course, was not a sufficient justification to uphold discriminatory marriage laws. Instead, the Supreme Court unanimously held that Virginia's anti-miscegenation law violated both the equal protection clause and due process clause of the Fourteenth Amendment. *Id.* at 12.

B. The District Court Did Not Clearly Err by Rejecting Plaintiffs' Claim that CSU Took an Official Position on Hindu Doctrine.

Plaintiffs also argue that CSU "took an official position as to what being Hindu means," by adopting "its stakeholders' views that Hinduism contains an oppressive caste system." For the reasons explained above (*see* Section III(A), *infra*, pp. 42-51), the District Court did not clearly err in rejecting this theory on the facts. As a factual matter, CSU did not define Hinduism, and did not adopt anyone else's views regarding Hinduism. It barred caste discrimination, nothing more.

Plaintiffs' authority, *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.2d 415 (2d Cir. 2002), has no bearing here. In *Commack*, as part of an effort to protect consumers from fraud in the kosher food market, New York state developed a statutory framework defining and policing kosher food labelling. Under the statute, "kosher" meant that food was "prepared in accordance with Orthodox Hebrew religious requirements." *Id*. at 425-27. By defining "kosher," the government took sides in an intra-religious debate between Orthodox rabbis and Conservative rabbis, who held different views on kosher practices.

That is not at all analogous to the Policy at issue here. The Policy bars discrimination and harassment, regardless of the religion of the accuser, and regardless of the religion of the accused. The Policy makes no mention of Hinduism, and certainly does not weigh in on any intra-religious debates over religious doctrine.

Moreover, even if the Policy had expressly or implicitly drawn a

connection between caste and Hinduism (it did not), that still would not violate the Establishment Clause. In *Torlakson*, 973 F.3d 1010, the plaintiffs claimed that California's curricular guidance materials described the caste system as a "social and cultural structure as well as a religious belief." *Id.* at 1014. But this Court found no violation: "As the district court noted, an 'objective, reasonable observer would find much of the challenged material entirely unobjectionable.' But even if isolated passages could be read as implying some hostility toward religion—which they do not—they would not violate the Establishment clause unless that were the 'principal or primary effect.'" *Id.* at 1022. All told, then, even if the Policy had specifically tied caste discrimination to Hinduism (it did not), that still would not be sufficient. The overarching purpose of the Policy is to eliminate discrimination, not to vilify Hinduism.

Finally, plaintiffs fault the District Court for making a factual finding that "no reasonable reader would conclude that the Policy defines Hinduism to include a caste system." 1-ER-13. In plaintiffs' telling, the "reasonable observer" test has been overruled by *Kennedy*. AOB 47. But that argument stretches *Kennedy* far beyond its intended scope. *Kennedy* disavowed use of the *Lemon* test for determining whether government has *endorsed* religion. It did not address how to analyze claims that government has improperly taken an official position on matters of religious doctrine.

In any event, the District Court's determination did not rely exclusively on what a "reasonable reader" of the Policy would believe. Rather, the District Court's finding that CSU did not wade into

religious doctrine was also based on (i) plaintiffs' "fail[ure] to demonstrate that the Policy defines Hindu doctrines"; and (ii) plaintiffs' failure to "demonstrate[] that the Resolutions and their reasoning are attributable to Defendant." Accordingly, even if it were erroneous to consider the perspective of a reasonable reader (it isn't), that error would be harmless, as the decision is supported on alternate grounds.

C. The District Court's Finding that There Was No Hostility Toward Hinduism Also Means that Plaintiffs Lacked Standing.

To prove standing for purposes of the Establishment Clause, a plaintiff must, at a minimum, prove that they personally suffered stigma, and that the challenged government action was the cause. *Catholic League*, 624 F.3d at 1049. In its decision on CSU's motion for judgment on the pleadings, the District Court found that based on the Complaint's allegations, Plaintiffs had sufficiently alleged both stigma and causation. 1-ER-18.

Following trial, the District Court declined to revisit the issue based on the evidence. Specifically, it held: "The procedural posture of this case does not affect Plaintiffs' standing because '[s]tanding is not about who wins the lawsuit; it is about who is allowed to have their case heard in court." 1-ER-9, quoting *Catholic League*, 624 F.3d at 1049 (9th Cir. 2010).

That analysis was incorrect. The procedural posture of the case has a significant and potentially outcome-determinative impact on standing. At the pleading stage, plaintiffs had to allege facts, which ***if*** true, establish standing. However, at trial, plaintiffs had to prove that

the alleged facts were actually true. *Catholic League*, 624 F.3d at 1049 (9th Cir. 2010).

Here, plaintiffs did not submit declarations attesting to stigma, nor did they present expert declarations or reports. Indeed, in their trial brief below, there was no discussion of plaintiffs' experiences at all. *See* 3-ER-397-420. It was erroneous to rely, at the trial stage, on plaintiffs' mere *allegations* of injury. While allegations may suffice at the pleading stage, they are not enough at summary judgment or trial. *See Wright v. Farouk Systems, Inc.*, 701 F.3d 907, 911, n. 8 (11th Cir. 2012); *Peralta v. Dillard*, 744 F.3d 1076, 1088 (9th Cir. 2014).

Moreover, the Court's factual finding that the Policy was not hostile to Hinduism should have foreclosed a finding of standing. Even if plaintiffs had introduced evidence of stigma, they could not prove causation or redressability. The Policy does not stigmatize anyone, so it cannot be the cause of plaintiffs' injury. To the extent that plaintiffs felt stigmatized by others (such as CFA or CSSA), that is a harm that this action cannot redress.

CONCLUSION

CSU asks this Court to affirm.

Dated: July 1, 2024 QUARLES & BRADY LLP

By: /s/ Jeffrey P. Michalowski
JEFFREY P. MICHALOWSKI
MATTHEW W. BURRIS
Attorneys for Dr. Jolene Koester

STATEMENT OF RELATED CASES

Bagal v. Sawant, Ninth Circuit Case No. 24-1488 addresses the constitutionality of a Seattle Ordinance that barred discrimination based on an individual's caste. *Bagal* likewise addresses the plaintiff's burden of demonstrating standing under the First Amendment and Fourteenth Amendment.

Dated: July 1, 2024

QUARLES & BRADY LLP

By: /s/ Jeffrey P. Michalowski
JEFFREY P. MICHALOWSKI
MATTHEW W. BURRIS
Attorneys for Dr. Jolene Koester

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 13,928 words.

Dated: July 1, 2024 QUARLES & BRADY LLP

By: /s/ Jeffrey P. Michalowski
JEFFREY P. MICHALOWSKI
MATTHEW W. BURRIS
Attorneys for Dr. Jolene Koester

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 1, 2024.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 1, 2024

By: /s/ Whitney W. Farrell
WHITNEY W. FARRELL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-4363

I am the attorney or self-represented party.

This brief contains 13,928 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[x] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties.
- [ ] a party or parties are filing a single brief in response to multiple briefs.
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Jeffrey P. Michalowski **Date** July 1, 2024
*(use "*s/[typed name]*" to sign electronically-filed documents)*