APPEAL NO. 23-4363

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUNIL KUMAR, Ph.D., PRAVEEN SINHA, Ph.D.,

Plaintiffs-Appellants,

v.

DR. JOLENE KOESTER, in her official capacity as Chancellor of California State University,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:22-CV-07550 / Hon. R. Gary Klausner

APPELLANTS' OPENING BRIEF

JOHN SHAEFFER
FOX ROTHSCHILD LLP
10250 Constellation Blvd, Suite 900
Los Angeles, CA 90067
(310) 598-4150
jshaeffer@foxrothschild.com

MICHAEL K. TWERSKY
ALBERTO M. LONGO
FOX ROTHSCHILD LLP
980 Jolly Rd, Suite 110
Blue Bell, PA 19422
(215) 299-2923
mtwersky@foxrothschild.com
alongo@foxrothschild.com

NATHAN WILSON
FOX ROTHSCHILD LLP
434 Fayetteville St, Suite 2800
Raleigh, NC 27601
(919) 719-1269
nwilson@foxrothschild.com

Attorneys for Plaintiffs Sunil Kumar, Ph.D and Praveen Sinha, Ph.D

CORPORATE DISCLOSURE STATEMENT

As natural persons, Sunil Kumar, Ph.D and Praveen Sinha, Ph.D have no parent corporation and no stockholders.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

In January 2022, California State University ("CSU") amended its non-discrimination policy ("Policy") to add the word "caste" to target practitioners of the Hindu religion and people from the Indian subcontinent. CSU may claim that "caste" is used solely in a secular sense to prohibit discrimination based on ethnicity, religion, socio-economic status, or some other label. But if that was true, it would have used those labels. CSU did not. Instead, it chose the word "caste" and elected not to define the term, yet acknowledged it has numerous meanings, including one which falsely ties caste to Hinduism. As the evidence makes clear, CSU purposefully did this to target Hindus and to improperly define their religion.

The reason CSU chose the word caste was because its students and faculty associations passed resolutions telling CSU that Hindu practitioners discriminate based on caste and needed to be stopped. There is no other evidence in the record as to why CSU added the word caste to the Policy except for those resolutions.

The amended Policy created a host of constitutional violations. Appellants (Plaintiffs below), Sunil Kumar, and Praveen Sinha

("Plaintiffs"), are professors at CSU and practitioners of Hinduism. CSU claims that the Policy does not conflict with Plaintiffs' religion, but the Policy contains no definition of caste and CSU has consistently waffled on the term's meaning. Thus, without a clear definition, Plaintiffs are left self-censoring their religious practices to avoid running afoul of the Policy's unconstitutionally vague scope. Consequently, the amended Policy violates Plaintiffs' Free Exercise, Establishment Clause and Due Process rights.

The First Amendment prohibits government entities from taking positions on religious doctrine. By adding the word caste to the Policy, CSU adopted its stakeholders' position that an oppressive and discriminatory caste system is a tenet of Hinduism. Regardless of whether that understanding of Hinduism is correct—it is not—and regardless of whether Plaintiffs support caste discrimination—they do not—the mere fact that CSU took a position on religious doctrine requires reversal.

The district court rejected Plaintiffs' attempt to remedy these constitutional violations at every step. Its decisions contradict controlling law, ignore record evidence, and require reversal. Holding

otherwise will enable universities to define religious doctrine unilaterally and silence religious beliefs.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiffs' federal claims pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331, and 28 U.S.C. § 1343, and over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367. The district court issued its decision, resolving all claims between the parties, on November 21, 2023. (ECF 125 p 10).[1] Final judgment was entered on November 30, 2023. (ECF 127 p 1).

Plaintiffs timely appealed on December 21, 2023. (ECF 129); *see also* Fed. R. App. P. 3(c), 4(a)(1)(A). Since Plaintiffs appeal from final judgment, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

---

[1] The Excerpts of Record produced pursuant to Circuit Rule 30-1 filed contemporaneously with Plaintiffs' brief contains Defendant's Answer to the Amended Complaint and Defendant's Motion for Judgment on the Pleadings. Both the Answer and the Motion for Judgment on the Pleadings contain voluminous exhibits, which if included would swell the Excerpts of Record to [Volumes]. To avoid unnecessarily burdening the Court with such a large Excerpts of Record, Plaintiffs have included only those exhibits to Defendant's Motion for Judgment on the Pleadings and Trial on the Briefs considered by the district court (the district court did not consider any exhibits that were attached to Defendant's Answer in deciding the Motion for Judgment on the Pleadings and the Trial on the Briefs). Counsel for Plaintiffs advised Defendant's Counsel of its decision to proceed in this manner. Defendant had no objection.

ISSUES PRESENTED

I. **WHETHER THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' DUE PROCESS CHALLENGE FOR LACK OF STANDING?**

II. **WHETHER THE POLICY VIOLATES THE ESTABLISHMENT CLAUSE OF THE CALIFORNIA AND U.S. CONSTITUTION?**

III. **WHETHER THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' FREE EXERCISE CLAIM?**

STATEMENT OF THE CASE

To placate concerns of supposed caste discrimination from its educational community, CSU added to its Policy the term caste—a term CSU admits has multiple definitions and is closely associated with Hinduism and people of Indian and South Asian origin. [ECF 114-2; 120-7]. Instead of defining the term (as it has for dozens of other terms in the Policy), CSU did the opposite, leaving faculty, staff, and students guessing as to what caste means and how it applies. [ECF 114-3]. Indeed, members of the CSU community have acknowledged that they are wholly unfamiliar with the term caste. [ECF 114-9].

CSU first became aware of supposed caste discrimination in 2021 after receiving a letter and resolutions from the CSU community advocating for adding caste to the Protected Statuses in the Policy. [ECF 120-8]. First, CSU received a resolution from the Cal Poly ASI Board of Directors (the "ASI Resolution") which accompanied a letter directed to then CSU Chancellor Castro (the "Letter") identifying caste as "a structure of oppression in ***Hindu*** society." [ECF 114-6, 120-8]. (emphasis added). Next, CSU received a resolution from the California State Student Association (the "CSSA Resolution") that identifies four

classes—Brahmins, Kshatriyas, Vaishyas, and Shudras—known as varna, which are classic ***Hindu*** terms found in ***Hindu*** scripture, and identifies caste as a structure of oppression based in birth and spiritual purity. [ECF 120-8; 114-5].

CSU then created a working group—which met privately—to make a recommendation to the Chancellor on whether to include caste in the Policy. [ECF 120-8]. Following the formation of the working group, CSU received a third resolution from the California Faculty Association (the "CFA Resolution") describing caste as "a structure of oppression" that is "present in the Hindu religion." [ECF 120-8; 114-4]. Together, the CFA, CSSA, and ASI Resolutions became the stakeholder feedback on which CSU's Chancellor relied in amending the Policy to include caste. [ECF 114-3; 120-8]

The CFA, CSSA, and ASI Resolutions each associate caste with Hinduism. [ECF 114-4; 114-5, 114-6]. The CFA Resolution expressly states: "Caste is present in the Hindu religion and common in communities in South Asia and in the South Asian Diaspora." [ECF 114-4]. It also identifies "four main caste groups: Brahmins, Kshatriyas, Vaishyas, and Shudras" and a group outside of the four

called Dalits. [ECF 114-4]. CSU acknowledges these are archetypal Hindu terms. [ECF 120-10; 120-7]. The CSSA Resolution identifies those same "four main caste groups" and notes that "[c]aste is a structure of oppression . . . based in birth that determines social status and assigns 'spiritual purity.'" [ECF 114-5]. The ASI Resolution contains essentially the same information and accompanies the Letter directed to (then) CSU Chancellor Castro identifying caste as "a structure of oppression in ***Hindu*** society." [ECF 114-6; 120-8] (emphasis added). The CFA, CSSA, and ASI Resolutions extensively cite to a survey by an entity called Equality Labs. [ECF 114-4; 114-5; 114-6; 114-9]. That survey defines "Caste Apartheid" as "the system of ***religiously codified*** exclusion that was established in Hindu scripture. [ECF 114-9] (emphasis added).

Instead of disavowing the view that Hinduism contains an oppressive and discriminatory caste system, CSU adopted it and amended the Policy accordingly. [ECF 114-2]. There is nothing in the record other than the Resolutions and Letter to show why CSU's Chancellor adopted the Policy. [ECF 114-4; 114-5; 114-6; ECF 120-8; 114-3]. Consequently, the ***only*** information of record on which the

Chancellor based his decision were the Resolutions and Letter—which the Chancellor received long before CSU amended the Policy—that falsely attribute to the Hindu religion an oppressive caste system. [ECF 114-4; 114-5-; 114-6; 120-8].

On January 1, 2022, CSU implemented the amended Policy, which added "caste" as a Protected Status to its anti-discrimination prohibitions. [ECF 114-2]. The Policy prohibits: "[d]iscrimination 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." [ECF 114-2 (emphasis added)].

Plaintiffs—professors at CSU and adherents to the Hindu faith—filed this action against CSU's Chancellor in her official capacity asserting a facial challenge to the constitutionality of the Policy.[2] [ECF 80 Am. Compl]. Plaintiffs asserted claims for Declaratory Judgment (Claim One); violation of the First Amendment Free Exercise and

[2] Defendant is referred to herein as "Defendant," "Chancellor," and "CSU."

California Constitution's No Preference Clauses (Claims Two and Four); violation of the First Amendment and California Constitution Establishment Clause (Claims Three and Four); violations of the Equal Protection Clause of the Fourteenth Amendment and California Constitution (Claims Five and Six); and violation of the Fourteenth Amendment Due Process Clause (Claims Seven and Eight). [ECF 80 Am. Compl.]

Appellee-Defendant CSU filed an Answer and Motion for Judgment on the Pleadings (the "Motion") denying that the Policy violates either the United States or California Constitutions. [ECF 84; ECF 90]. CSU maintained that "caste" as used in the Policy is based on race or ethnicity," regardless of national origin, ancestry, religion, geographical location, or social status. [ECF 90; ECF 94]. CSU also denied that caste is "co-extensive with Hinduism or any other religion, [ECF 90]" notwithstanding the CFA, CSSA, and ASI Resolutions on which it relied (and the Letter imputing caste as a Hindu construct), ***and*** the dictionary definition tying caste to Hinduism. [ECF 114-4; 114-5; 114-6; 114-11].

Plaintiffs opposed CSU's Motion, which the district court denied in part and granted in part on July 25, 2023. [ECF 91; ECF 102]. The district court dismissed Plaintiffs' federal and state Equal Protection (Claims Five and Six) and Free Exercise claims (Claims Two and Four), but left intact Plaintiffs' Establishment Clause and Due Process claims, finding that Plaintiffs possessed standing to assert those claims. [ECF 102].

Following the district court's decision, the parties next engaged in discovery, including the deposition of Defendant's designee, Laura Anson. [ECF 114-3]. Ms. Anson explained that the working group formed as part of the process to revise the Policy [ECF 114-3]. The ultimate authority to revise the Policy, however, was with the Chancellor. [ECF 120-8 (explaining the working group was formed to make a recommendation to the Chancellor for consideration); *see also* [ECF 114-6 (directing the ASI Resolution *to the Chancellor* for consideration)]. She also confirmed that CSU relied on the feedback from its stakeholders—including the CFA, CSA, and ASI—in determining that "caste discrimination was a real thing." [ECF 114-3].

She admitted that the working group "reached out to th[e CSSA] . . . before putting the Policy in effect." [ECF 114-3].

Ms. Anson, as the Defendant Chancellor's designee, also provided—for the first time—her definition of caste. [ECF 114-3]. She defined caste as "a system of social stratification or ranking based on inherited status and linked to race or ethnicity." [ECF 114-3]. That definition—which does little to clarify the meaning of caste under the Policy—is found nowhere in the Policy or in CSU's system. [ECF 114-3; 114-2] It is not a dictionary definition of caste. [ECF 114-3; ECF 120-11; 120-12]. Nor is it the definition CSU proffered in its Motion (a definition from an academic journal Ms. Anson had never heard of). [ECF 114-3; ECF 90]. And despite attempting to define the term, Ms. Anson admitted that "there is no one universally accepted definition of caste" and at least one definition that expressly ties caste to Hinduism. [ECF 114-3]

Ms. Anson also confirmed that CSU did nothing to learn whether its community understood the term caste, and acknowledged that the students and faculty who raised concerns about caste "may have had different understandings of what it meant under the Policy." [ECF

114-3] She also admitted that CSU considered—and rejected—several definitions of caste and, for reasons that remain unclear (and which Ms. Anson would not explain), decided ultimately "not to include a definition in the [P]olicy. [ECF 114-3; ECF 114-11].

Ironically one of the definitions considered (and rejected) is the first (and primary) definition of caste contained in the *Merriam-Webster Dictionary*, which defines caste as "[o]ne of the hereditary social classes in Hinduism that restricted the occupation of their members and their association with members of other castes." [ECF 114-3; ECF 114-11].

Instead of defining a term that CSU admits is subject to numerous definitions, CSU elected not to tell ***anyone*** in its community what it means. [ECF 114-3; 114-11]. Even when CSU attempted to educate its community on the definition of caste, it was unable to do so. [ECF 114-8]. For example, CSU produced a "Q&A" for the inclusion of caste in the Policy, which strikingly demonstrates that CSU cannot define the term:

> **Q1: What does "caste" mean or how is it defined in the CSU's discrimination policy?**
>
> A1: While caste protections were inherently included in previous CSU non-discrimination policies, the decision to specifically name caste in the [Policy] reflects the

> university's commitment to inclusivity and respect, making certain each and everyone one of our 23 CSU campuses today . . . and always . . . is a place of access, opportunity and equity for all.

[ECF 114] (omissions in original and alteration added).

It is difficult to imagine a more evasive response to a simple question (drafted by CSU) asking for a definition. Even CSU admits that the Q&A "doesn't directly answer" the question of "what does caste mean." [ECF 114-3]. Thus, the CSU community is left with no idea what caste means under the Policy or how to ensure they do not run afoul of the Policy. [ECF 114-3; 120-4].

CSU's own experts, ostensibly retained to help clarify the amended Policy, further confuse it and do little to explain "caste." One expert was asked a simple question during her deposition: "what is caste?" In response, she rambled: "What is caste, you leave me a little bit short of rudderless because those terms always get defined in a functional sense in relation to what it is that particular legal provision is attempting to do . . . when you ask me more generally what is caste, I say, you know, what is caste, how is caste operating within a particular regime, and is there enough there to help us define what is meant by that?" [ECF 120-5].

Another of Defendant's experts—Dr. Ajantha Subramanian—admitted in her deposition that caste "is not derived from Hinduism, but yes, it is often associated with Hinduism." [ECF 120-7]. She also noted that while "caste" has a Western European origin, it is synonymous with the Hindu term "jati" which means birth in Hindi and refers to an expansive hierarchical classification in South Asia based on descent. [ECF 120-7]. Finally, CSU's Establishment Clause expert, Professor Frank Ravitch, testified during his deposition that the *Merriam-Webster* dictionary definition of caste is simply wrong. [ECF 120-6].

Following the close of discovery, Plaintiffs' Establishment Clause and Due Process claims proceeded to a trial held on the briefs on October 24, 2023. [ECF 105; ECF 106]. On November 6, 2023, the district court issued an Order to Show Cause Re: Standing to Assert Due Process Clause Claim requiring Plaintiffs to show cause in writing why their Due Process claim should not be dismissed for lack of subject matter jurisdiction. [ECF 123]. Plaintiffs timely responded. [ECF 124] On November 21, 2023, the district court entered an order dismissing Plaintiffs' Due Process Claims for lack of subject matter jurisdiction and

entering judgment for Defendant on Plaintiffs' Establishment Clause claims. [ECF 125]. This appeal followed.

SUMMARY OF THE ARGUMENT

The district court committed several errors warranting reversal.

First, the district court improperly dismissed Plaintiffs' Due Process Claims for lack of standing, finding that Plaintiffs did not have a "well-founded fear that the Policy would be enforced against them." [ECF 125]. The evidence, however, showed that Plaintiffs suffered (and continue to suffer) the constitutionally sufficient harm of self-censorship due to CSU's refusal to define caste, and the district court's legal analysis on this issue is contrary to well-established case law.

Second, the district court erred in dismissing Plaintiff's Establishment Clause claims by ignoring critical facts and misapplying the law to hold that "[n]o reasonable reader would conclude that the Policy defines Hinduism to include a caste system." [ECF 125]. That is not the standard for evaluating whether an Establishment Clause violation exists; in fact, that standard was disavowed by the Supreme Court in *Kennedy v. Bremerton*, 597 U.S. 507 (2022). Instead, courts must consider the motivation underlying a policy's adoption, not how it

would be interpreted. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). The district court failed to do so here, ignoring the only evidence of record as to what CSU considered when it adopted the Policy targeting and defining the Hindu religion.

Third, in granting Defendant's Motion for Judgment on the Pleadings, the district court improperly dismissed Plaintiffs' Free Exercise claims following CSU's Motion for Judgment on the Pleadings. Plaintiffs alleged in their Amended Complaint that the Policy interferes with Plaintiffs' participation in their religion and impermissibly defines religious doctrine. Accepting those allegations as true, as the law requires, the district court's dismissal cannot be sustained. Indeed, had the district court allowed the claims to proceed (as it should have), the testimony of Plaintiffs demonstrates that they have self-censored their Free Exercise rights as a direct result of the unconstitutionally vague Policy.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' DUE PROCESS CLAIM FOR LACK OF STANDING.

Plaintiffs assert that inclusion of the term "caste" in the Policy renders the Policy unconstitutionally vague under the Due Process

Clause of the Fourteenth Amendment. The district court dismissed Plaintiffs' claims for lack of subject matter jurisdiction after finding Plaintiffs lacked standing. This Court should reverse because Plaintiffs suffered—and continue to suffer—the constitutionally recognized harm of self-censorship to avoid violating the Policy.

Dismissal for lack of subject matter jurisdiction is reviewed *de novo*. *Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186 (9th Cir. 2001). The district court's underlying factual findings regarding subject matter jurisdiction are reviewed for clear error. *Rattlesnake Coalition v. U.S. Env't Prot. Agency*, 509 F.3d 1095, 1100 (9th Cir. 2007). This Court also reviews "de novo a district court's determination of a party's standing to bring suit." *Id.* Applying those standards here, the district court erred in dismissing Plaintiffs' Due Process claims as a matter of law.

a. Plaintiffs have suffered the constitutionally recognized harm of self-censorship.

An Article III case or controversy includes "(1) an injury-in-fact; (2) causation, and (3) a likelihood that a favorable decision will redress plaintiff's injury." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 (9th Cir. 2003). To show that injury in fact, "[c]ourts have long recognized that '[o]ne does not have to await the consummation of

threatened injury to obtain preventive relief.'" *Id.* at 1094 (second alteration in original) (quoting *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)). "First Amendment challenges" like those asserted by Plaintiffs here, "present unique standing considerations such that the inquiry tilts dramatically toward finding of standing." *Libertarian Party of Los Angeles County, v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013) (quoting *Bayless*, 320 F.3d at 1006). This is so because, as the Supreme Court has recognized, a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury." *Id.*

This Court accepts "the constitutionally recognized injury of self-censorship" as a sufficient basis for standing in cases involving First Amendment rights. *Getman*, 328 F.3d at 1095; *see also Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (recognizing that self-censorship is "a harm that can be realized even without an actual prosecution"). In *Getman*, the Ninth Circuit held that a nonprofit had standing to assert a pre-enforcement facial challenge to a law on the grounds that the law's definition of "independent expenditure" was unconstitutionally vague. *Getman*, 328 F.3d at 1095. This Court

determined the nonprofit group "suffered the constitutionally sufficient injury of self-censorship" because it decided against making expenditures, fearing that it might fall within the regulatory ambit of the law, even though (like Plaintiffs here) the nonprofit did not understand what conduct was prohibited by the law given its vagueness and undefined terms. *Id.* at 1093.

Ten years after deciding *Getman*, this Court reiterated in *Bowen* that when a law "risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements and recognized 'self-censorship' as a harm that can be realized even without an actual prosecution." *Bowen*, 709 F.3d at 870 (quoting *Hum. Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010)). This Court explained that where, as here, a "plaintiff has refrained from engaging in expressive activity for fear of prosecution under the challenged statute, such self-censorship is a constitutionally sufficient injury as long as it is based on an actual and well-founded fear that the challenged statute will be enforced." *Id.*; *see also Index Newspapers LLC v. U.S. Marshals Service*, 977 F.3d 817, 826 (9th Cir. 2020) (explaining that a "chilling of First Amendment rights can constitute

cognizable injury, so long as the chilling effect is not 'based on a fear of future injury that itself [is] too speculative to confer standing.'" (quoting *Munns v. Kerry*, 782 F.3d 402, 410 (9th Cir. 2015))).

Plaintiffs presented to the district court significant evidence that they intended, but declined, to engage in constitutionally protected conduct due to the Policy. Professor Kumar testified that he serves as an advisor to a CSU Indian Hindu club that celebrates certain festivals—which he once celebrated, but now is reluctant to celebrate—due to some of them being erroneously labeled as casteist. [ECF 124-2]. Professor Kumar declines to participate in those festivals because he is concerned that celebrating those festivals will be considered casteist activity leading to "a big problem" and a complaint under the Policy. [ECF 124-2]. Professor Kumar also testified that he needs "to be very careful" practicing his religion and *no longer* discusses his religious beliefs in public because of the Policy. He specifically declines to discuss the Bhagavad Gita—a Hindu text—at CSU because of the Policy, and even fears he needs to change his beliefs. [ECF 124-2]. He chooses "not to talk about [his] religious beliefs and keep[s] them very private"—when he has ***every*** right to speak openly under the

First Amendment, as he did before the Policy was amended to add caste. [ECF 124-2]. This is the type of self-censorship recognized as constitutionally sufficient in *Getman*.

Plaintiffs should not have to bear the Hobson's choice of refraining from core protected speech and religious activities or "risking costly [administrative] proceedings." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 151 (2014); *Kennedy*, 597 U.S. at 523 ("Where the Free Exercise clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."). That is true regardless of whether, as Defendant's expert opined, universities like CSU "typically do not respond to alleged violations in a 'draconian or punitive manner.'" [ECF 125]. Indeed, *Bowen* makes clear that a well-founded fear the Policy will be enforced ***in any manner*** is sufficient to confer standing. *Bowen*, 709 F.3d at 870.

Here, CSU has not, in any way, advised that the Policy will not be enforced, and whether that enforcement is "draconian or punitive" is irrelevant; any enforcement threat is enough. The "Constitution and the best of our traditions counsel mutual respect and tolerance, ***not***

censorship and suppression, for religious and nonreligious views alike." *Kennedy*, 597 U.S. at 514 (emphasis added). By dismissing Plaintiffs' Due Process Claim, the district court forced Plaintiffs' First Amendment rights to yield to the Policy simply because CSU has chosen ***not*** to define "caste." This tension between Plaintiffs' Due Process rights, on one hand, and their First Amendment rights, on the other, is a stark departure from the spirit of the First Amendment. *See id.* at 517, 523 (discussing perceived tension between the Free Exercise and Establishment Clauses).

The Supreme Court further recognized this constitutionally prohibitive self-censorship in *Driehaus*, where the Court held that advocacy organizations possessed standing to assert a pre-enforcement facial challenge to a statute criminalizing false statements made about candidates during political campaigns. *Driehaus*, 573 U.S. at 167-68. The Court explained that because the organizations intended to engage in future conduct concerning "political speech, it [wa]s certainly 'affected with a constitutional interest.'" *Id.* at 162 (quoting *Babbit v. Farm Workers*, 442 U.S. 289, 298 (2014)).

This case is no different. Professor Kumar wants to exercise his constitutional rights to celebrate Hindu festivals and discuss issues related to his faith (as he did before caste was added to the Policy) but declines to do so because it is unclear whether his actions will be considered casteist and in violation of the Policy. Those self-imposed limitations create the same constitutional harms identified in *Getman, Bowen*, and *Driehaus*—where this Court and the Supreme Court found standing to exist—and yet, the district court here concluded otherwise.

b. Plaintiffs demonstrated a well-founded fear that the Policy will be enforced against them.

For self-censorship to qualify as a constitutionally sufficient harm for standing, plaintiffs "must have 'an actual and well-founded fear that the law will be enforced against [them]." *Getman*, 328 F.3d at 1095 (quoting *Booksellers*, 484 U.S. at 393); *see also Bowen*, 709 F.3d at 870. This Court recognized that, "in the context of pre-enforcement challenges to laws on First Amendment grounds, a Plaintiff 'need only demonstrate that a threat of potential enforcement will cause him to self-censor." *Tingley v. Ferguson*. 47 F.4th 1055, 1066-67 (9th Cir. 2022) (quoting *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th

Cir. 2014)). This Court also held that a state's "failure to *disavow* enforcement" weighs in favor of standing. *Id.* (emphasis in original).

In *Bayless*, this Court held that a political action committee faced a credible threat following enactment of a statute requiring notice to candidates before distributing political literature. *Bayless*, 320 F.3d at 1006. The committee wanted to disseminate literature without noticing political candidates but instead delayed to avoid the possible penalty. *Id.* This Court found those actions to be "self-censorship" and determined it was reasonable for the committee to delay its actions given that Arizona never suggested that the legislation would not be enforced. *Id.*

Plaintiffs face the same risks as in *Bayless*. CSU has never suggested that it will not enforce the Policy, nor is there reason to think otherwise. [ECF 124]. *See also Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021) (recognizing the state's refusal to disavow enforcement of a challenged law during litigation "is strong evidence" that plaintiffs face "a credible threat" of enforcement). To the contrary, CSU's expert testified about CSU's efforts to enforce the Policy. [ECF 124-2]. Defendant's designee also testified that "[c]aste systems treat

people unequally, so we're trying to do something about it." [ECF 124-2].

Despite that evidence, the district court held that Plaintiffs failed to demonstrate a well-founded fear of enforcement, citing several reasons for its decision—none of which are relevant and all of which ignore critical facts ***and*** the law. Specifically, the district court explained that (1) Plaintiffs' religious freedom is protected by the Policy; (2) Plaintiffs have presumably practiced Hinduism during the entirety of their tenure at CSU and never faced allegations of discrimination; and (3) universities "typically do not respond to alleged violations in a 'draconian or punitive' manner." [ECF 125]. These findings ignore the applicable law and facts of this case.

If anything, that the Policy claims to protect Plaintiffs' religious freedom—but now includes a term at odds with that freedom—renders the Policy contradictory and therefore vague. Similarly, Plaintiffs have practiced Hinduism during their time at CSU, but the Policy has not included caste during that time. Thus, the lack of previous discrimination allegations is irrelevant. *Tingley*, 147 F.4th at 1069 ("The history of enforcement carries little weight' when the challenged

law is 'relatively new' . . . ." (citations omitted). Finally, it is immaterial whether CSU enforces the Policy in a "draconian or punitive manner"; any constitutional violation, no matter how minor, warrants scrutiny.

In short, given (1) CSU's refusal to excise the term "caste" from the Policy; (2) its position that it "is not willing to change its policy absent a Court Order" (*see* ECF No. 107, p. 3); (3) the CSSA, CFA, and ASI Resolutions linking caste to Plaintiffs' religion; and (4) the Letter addressed directly to the Chancellor expressly calling for action in response to an oppressive Hindu caste system, Plaintiffs have a more than reasonable fear of CSU enforcing the Policy. [ECF 114; ECF 116; ECF 121; ECF 124]. Indeed, it is an active Policy of CSU with enforcement provisions contained therein [ECF 114-2]. Accordingly, Plaintiffs had standing to assert a pre-enforcement challenge to the Policy on the grounds that it causes them to self-censor and that they fear enforcement; they should ***not*** be forced to wait until the Policy is enforced to mount an as applied challenge when the requirements of a facial challenge are satisfied.

As this Court recently recognized, "facial vagueness challenges are appropriate if the statute clearly implicates free speech rights." *Tuscon*

v. City of Seattle, 91 F.4th 1318, 1329 (9th Cir. 2024) (quoting *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 (9th Cir. 2001). The same applies to religious freedom rights found in the First Amendment. *See Kennedy*, 597 U.S. at 523 ("[T]he Free Speech Clause provides overlapping protection for expressive religious activities . . . . That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent.") (citations omitted).

Where, as here, "First Amendment freedoms are at stake, courts apply the vagueness analysis more strictly, requiring statutes [here, the Policy] to provide a greater degree of specificity and clarity than would be necessary under ordinary due process principles." *Tuscon*, 91 F.4th at 1329 (quoting *Cal. Teachers Ass'n*, 271 F.3d at 1150). In *Tuscon*, this Court reversed the dismissal of a facial challenge because the district court failed to employ the requisite analysis required by the facial vagueness doctrine. *Id.* at 1330. The Court explained that instead of focusing on whether the ordinance is not vague, the district court

speculated about possible vagueness in hypothetical situations that were not before it. *Id*.

Although *Tuscon* involved review of the district court's analysis of a vagueness claim on the merits, the same improper analysis exists here with respect to Plaintiffs' standing. Instead of focusing on the harm of self-censorship that Plaintiffs ***did*** suffer (and are suffering), the district court focused on CSU's Policy of preventing racial and ethnic discrimination, whether Plaintiffs faced discrimination in the past, and whether alleged violations are enforced in a draconian manner. [ECF 125]. That was wrong. The district court's analysis ignores Plaintiffs' harm of self-censorship and warrants reversal.

c. The district court misapplied the factors set forth in *Driehaus*.

Under *Driehaus*, a plaintiff asserting a pre-enforcement facial challenge must show that: (1) he intends to engage in conduct that implicates his constitutional rights; (2) his intended future conduct is arguably proscribed by the challenged provision; and (3) he faces a credible threat of prosecution. *Arizona v. Yellen*, 34 F.4th 841, 849 (9th

Cir. 2022) (citing *Driehaus*, 573 U.S. at 159). Here, the district court found that Plaintiffs had not satisfied the second and third factors.

Under the second factor the district court determined that "Plaintiffs' intended conduct—practicing their religion—is protected rather than proscribed by the Policy" because it bars discrimination based on religion. [ECF 125]. But the district court's conclusion only underscores Plaintiffs' vagueness claim. The mere fact that Plaintiffs' religious practice *should be* protected by the Policy does not mean that it is not curtailed by the Policy's inclusion of the term caste.[3] After all, CSU did not define caste in the Policy and admitted to relying on Resolutions that target Hinduism. There is no way to determine under the Policy whether Plaintiffs religious practices would be considered casteist by CSU or the CSU community (*i.e.*, the CSSA, CFA, and ASI). Consequently, there is no way the district court could have found that Plaintiffs' religion is protected by the Policy now that it includes caste.

[3] Because the Policy doesn't define caste, Plaintiffs cannot determine what is a casteist versus a religious practice under the Policy. *See Tuscon*, 91 F.4th at 1329 ("The terms of a law cannot require 'wholly speculative judgments without statutory definitions, narrowing context, or settled legal meanings.'"). Here, there are several definitions of caste (including *Merriam-Webster's*), which combined with the "narrowing context" of the Resolutions, emphasize the clash between Plaintiffs' religion and allegations of caste discrimination.

Hence, Plaintiffs must engage in self-censorship until the Policy's boundaries have been determined. That is all Plaintiffs must show under *Driehaus*'s second factor, yet the district court concluded otherwise.

As to the third factor, the district court held that Plaintiffs failed to demonstrate a well-founded fear of enforcement for several reasons: (1) Plaintiffs' religious freedom is protected by the Policy; (2) CSU has maintained a Policy against discrimination based on race or ethnicity; (3) Plaintiffs have not yet faced any allegation of discrimination; and (4) Defendant's expert testified that universities implementing new policies "typically" do not respond to alleged violations in a "draconian or punitive" manner. [ECF 125]. The district court's conclusions are erroneous for several reasons.

First, as mentioned above, 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. In fact, Plaintiffs' fear is more than well-founded given the plain language of the CFA, CSSA, and ASI Resolutions, coupled with the Letter addressed to the Chancellor, which

describe caste as a "structure of oppression in Hindu society." [ECF 114-4; 114-5; 114-6; ECF-120-8]. The Resolutions confirm that certain CSU faculty, staff, and students believe Hinduism contains an oppressive and discriminatory caste system. Because the Resolutions and Letter are the ***only*** record evidence of what the Chancellor considered before adding caste to the Policy, that is the ***only*** evidence the district court should have considered. Instead, the district court flipped the burden on Plaintiffs to adduce ***more*** information the Chancellor considered. [ECF 125]. This too was in error.

Second, the district court determined that CSU has long had a Policy against discrimination based on race or ethnicity, and that Plaintiffs have "presumably . . . been practitioners of Hinduism for the duration of their time at CSU" and yet, Plaintiffs have never faced any allegations of discrimination. [ECF 125]. But the fact that there is no history of enforcement "carries little weight when the challenged law is relatively new." *Tingley*, 47 F.4th at 1069 (cleaned up). The Policy also never included caste. So unless the district court itself is assuming caste is part of Hinduism or Plaintiffs' race or ethnicity (which presents its own constitutional concerns), it is entirely irrelevant whether

Plaintiffs have faced any discrimination in the past. Moreover, the mere fact that CSU prohibits discrimination based on race or ethnicity has little to do with whether the term "caste" is unconstitutionally vague. Nor does it make it any less likely that Plaintiffs will be perceived as engaging in caste discrimination by CSU's faculty and staff for participating in Hindu practices.

Finally, the district court credited Defendant's expert testimony that universities implementing new policies "typically do not respond to alleged violations in a draconian or punitive manner." [ECF 125]. But that is not enough under this Court's precedent. In *Isaacson v. Mayes*, 84 F.4th 1089, 1101 (9th Cir. 2023), "the Arizona Attorney General . . . expressly disavowed enforcement of the [challenged r]egulations." Yet this Court held that a single public official's statement was not enough to eliminate the plaintiffs' credible fear of enforcement when other facts pointed toward the possibility of liability. *Id.* So too here: CSU has an active Policy, with consequences for violation, that CSU has ***never*** disavowed. Further, the mere fact that a university "typically" does not respond in a "draconian or punitive manner" does not justify the Policy's chilling effect on protected speech and expression in this specific case.

See Cramp v. Bd. of Pub. Instruction of Orange Cnty., 368 U.S. 278, 287 (1961) ("The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question . . . inhibit[s] the exercise of individual freedoms affirmatively protected by the Constitution"); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1119 (9th Cir. 2005) ("A greater degree of specificity and clarity is required when First Amendment rights are at stake"). ***Any*** enforcement of the Policy that impacts Plaintiffs' constitutional rights—whether draconian or otherwise—is sufficient to meet the test for standing. *See, e.g.*, *Bowen*, 709 F.3d at 870.

The law does not require Plaintiffs to wait until an allegation of caste discrimination occurs and hope that Defendant does not enforce its Policy at the expense of their First Amendment rights. Therefore, the district court's judgment should be reversed and Plaintiffs permitted to litigate their Due Process claims.

II. INCLUDING "CASTE" IN CSU'S POLICY VIOLATES THE ESTABLISHMENT CLAUSE.

Plaintiffs assert that the Policy violates the Establishment Clause by adopting an official position that caste is part Hinduism. Indeed, the ***only*** evidence in the record as to why CSU included the term "caste" in

its Policy was as a response to the CSSA, CFA, and ASI Resolutions (and the Letter attached to the ASI Resolution) that targeted caste as a Hindu practice. By adopting that position under the guise of facial neutrality, CSU violated the Establishment Clause.

This Court reviews a district court's factual findings on documentary evidence under the clearly erroneous standard. *Mondaca-Vega v. Lynch*, 808 F.3d 413, 425 (9th Cir. 2015) (*en banc*). When the key evidence presented at trial consists primarily of documents and testimony, the appellate court's review of the district court's findings for clear error may be particularly "extensive." *Easley v. Cromartie*, 532 US 234, 243 (2001); *Miller v. Thane Int'l Inc.*, 519 F.3d 879, 888 (9th Cir. 2008). As part of that extensive review, this Court will reverse factual findings when it has "definite and firm conviction that a mistake has been committed." *Lentini v. California Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004). The district court's legal conclusions are reviewed de novo. *Bertelsen v. Harris*, 537 F.3d 1047, 1056 (9th Cir. 2008).

The First Amendment *requires* that government "proceed in a manner neutral toward and tolerant" of citizens' "religious beliefs."

Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 638 (2018). The Establishment Clause requires "neutrality between religion and religion, and between religion and nonreligion.'" *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 971 (9th Cir. 2011) (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)).

The Supreme Court clarified in *Kennedy* that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy,* 597 U.S. at 536 (quoting *Town of Greece v. Galloway*, 572 U.S. 565 (2014)). Specifically, "the line that courts and governments must draw between permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers." *Id.* (cleaned up).

The history of the Establishment Clause confirms that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State Power is no more to be used so as to handicap religions, than it is to favor them." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 218 (1963) (quoting *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947)); *see also Everson*, 330 U.S. at

15-16 (recognizing a law may not, among other things, permit the government from "openly or secretly[] participat[ing] in the affairs of any religious organizations or groups and vice versa"). Nor may the government become "embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." *Schempp*, 374 U.S. at 219 (quoting *McCollum v. Bd. of Ed. of Sch. Dist. No. 71*, 333 U.S. 203, 229 (1948) (Frankfurter, J., concurring)).

In particular, "courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Anytime the government starts "[d]eciding" doctrinal questions, it "risk[s] judicial entanglement in religious issues." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020). As James Madison concluded, the idea that a government official "is a competent Judge of Religious truth" is "an arrogant pretension" that has been "falsified." Memorial and Remonstrance Against Religious Assessments, in *Selected Writings of James Madison* 21, 24 (R. Ketcham ed. 2006); *see also Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*,

393 U.S. 440, 449 (1969) (prohibiting the government from weighing in on "underlying controversies over religious doctrine").

These principles are especially profound in the education setting, where the Supreme Court "has given the [First] Amendment a 'broad interpretation in light of its history and the evils it was designed forever to suppress.'" *See Schempp*, 347 U.S. at 252 (Brennan, J., concurring); *see also id.* at 220 (majority opinion) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

It is also well settled under the First Amendment that government may not take an official position on religious doctrine (*i.e.*, by asserting either directly or indirectly that Hinduism contains an oppressive caste system) without running afoul of the Establishment Clause. In *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 295 F.3d 415, 425 (2d Cir. 2002), the Second Circuit considered whether defining the term "kosher" to mean "prepared in accordance with orthodox religious requirements" violated the Establishment Clause in the context of New York statutes addressing fraud in the kosher food industry. *Id.* at 418.

The Second Circuit determined that the challenged laws violated the Establishment Clause because they required the state to adopt an official position on a key point of religious doctrine – that is, what it means to be kosher. *Id.* at 427. The court explained that "to assert that a food article does not confirm to kosher requirements, New York must take an official position as to what are the kosher requirements," which "impermissibly 'weigh[s] the significance and the meaning of disputed religious doctrine.'" *Id.* (alteration in original) (quoting *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Bull Mem'l Presbyterian Church*, 393 U.S. 440, 452 (1969) (Harlan, J., concurring)). The court held the challenged laws departed from the "core rationale underlying the Establishment Clause[, which] is preventing a fusion of governmental and religious functions." *Id.* at 428 (alteration in original) (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982)).

Here, CSU took an official position as to what being Hindu means by including caste in the Policy based on its stakeholders' views that Hinduism contains an oppressive caste system. Thus, in attempting to remediate concerns of its stakeholders, CSU takes the position that an

oppressive caste system is a Hindu belief and practice. *Commack* affirms this is expressly prohibited by the Establishment Clause. *See also Kelly v. Warden, Calipatria State Prison*, 2018 WL 3805929, at *3 (S.D. Cal. Aug. 10, 2018) (recognizing that the court may not determine what is or is not part of religion (citing *Commack*, 294 F.3d at 426-28)).

The district court disagreed, and in doing so, committed several errors by entering judgment for Defendant. First, the district court erroneously concluded that the CFA and CSSA do not speak for Defendant. 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? Indeed, the ***only*** record evidence as to what CSU's Chancellor considered in adding caste to the Policy is the CFA, CSSA, and ASI Resolutions and Letter. [ECF 114-4; 114-5; 114-6; ECF 120;8].

Second, the district court erred in determining that the Resolutions do not express anti-Hindu sentiments. [ECF 125]. The CSA, CFA, and ASI Resolutions pronounce that caste—a system of systemic oppression and discrimination—is part of Hinduism. [ECF 114-4; 114-5; 114-6]. They all contain citations that claim caste

discrimination is codified in Hindu scripture. It is immaterial that the Resolutions also associate caste with South Asia; the constitutional sting is no less simply because the Resolutions state that caste discrimination exists elsewhere. The fact that the Resolutions specifically mention caste as a Hindu construct—and then list no other religion that allegedly engages in caste discrimination—only emphasizes the anti-Hindu sentiment of the Resolutions.

Third, the district court misapplied this Court's holding in *California Parents for the Equalization of Educational Materials v. Torlakson*, 973 F.3d 1010, 1014 (9th Cir. 2020). *Torlakson* is easily distinguishable from this case. In *Torlakson*, the plaintiffs challenged California's history and science curriculum, arguing that wholly secular descriptions of Hinduism are disparaging when read alongside the descriptions of other religions covered in the educational materials. *Id.* The plaintiffs also challenged the description of caste as a "social and cultural structure as well as a religious belief." *Id.* In concluding that the plaintiffs' Establishment Clause claim failed, this Court explained that the teaching standards did not call for teaching of "biblical events or figures as historical fact," which would endorse religion. *Id.* at 1021.

The challenged materials did "not take a position on the historical accuracy of the stories or figures" at issue. *Id.* Accordingly, this Court held that no Establishment Clause violation existed. *Id.*

Unlike in *Torlakson*, here, CSU amended its Policy relying on materials that contained specific assertions of ***fact*** regarding Hinduism. The CFA Resolution ***expressly*** describes caste as "a structure of oppression . . . present in the ***Hindu religion***." [ECF 114-4 (emphasis added)]. Both the CSSA and CFA Resolutions connect the caste system with the four "varna," which are expressly ***Hindu*** terms found in ***Hindu*** scripture. [ECF 114-4; 114-5]. The ASI Resolution likewise mirrors the CSSA Resolution. [ECF 114-6].

Moreover, the Letter to former CSU Chancellor Castro (which the district court ignored *in toto*) asserts that "[c]aste is a structure of oppression in Hindu society" and urges CSU to include caste in its Policy so that "hundreds of students across the CSU" can feel "seen and protected by [CSU's] public education system." [ECF 114-6]. The Letter confirms that the CSU community called upon CSU to respond to perceived discrimination—"a structure of oppression"—"present in the Hindu religion." [ECF 114-6] And CSU responded by adding caste to

the Policy. The Letter—ignored by the district court—could not be *any* clearer.

Unlike *Torlakson*, this is not a case where CSU aimed to educate its community on caste-based discrimination, the divine origins of Hinduism, or how those sacred beliefs were transcribed in texts like the Bhagavad Gita. *See Torlakson*, 973 F.3d at 1021-22 (recognizing that the challenged materials took no position on the factual accuracy of Hinduism's origins). This is a case where the CSU community demanded Defendant target "a structure of oppression" that it considers "present [in] the Hindu religion," and Defendant obliged. Thus, the Policy impermissibly defines Hinduism as including an oppressive caste system. *See Guadalupe*, 140 S. Ct. at, 2069 (prohibiting government entities from "defin[ing]" religious doctrine). If anything, *Torlakson*, substantiates Plaintiffs' Establishment Clause claims because it clarifies that CSU may not adopt its community's assertion that Hinduism contains an oppressive caste system.

Fourth, while the district court recognized that the government cannot take official positions on religious doctrines, it erred in finding that the Policy does not take a position that caste is part of Hinduism.

As discussed above, the decision to include caste in the Policy was prompted by the assertion that caste is a structure of oppression in Hinduism. It is wholly immaterial under the Establishment Clause whether the Policy mentions Hinduism. The United States Supreme Court established that the "question of government neutrality is not concluded by the observation that [a policy] on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutral . . . as well as obvious abuses." *Gillette v. United States*, 401 U.S. 437, 451 (1971) (citing *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., Concurring)). Nearly twenty years later, in *Lukumi*, the Supreme Court cautioned that a law does not *per se* comply with the Establishment Clause merely because it appears facially neutral, explaining that "the Establishment Clause[] extends beyond facial discrimination." *Id.* *Lukumi* is particularly instructive here.

In *Lukumi* a Santeria church brought a First Amendment action after the City of Hialeah banned ritual animal slaughter through a series of enactments. *Id.* at 526. For example, Resolution 87-66 "noted the 'concern' expressed by residents of the city 'that certain religions

may propose to engage in practices which are inconsistent with public morals, peace or safety,' and declared that '[t]he City reiterates its commitment to a prohibition against any and all acts and any and all religious groups which are inconsistent with public morals, peace or safety.'" *Id.* at 526 (alteration in original).

The city also approved an emergency ordinance that incorporated Florida's animal cruelty laws. *Id.* After the attorney general determined that Florida law did not prohibit animal sacrifice, the city enacted a new resolution, which "noted its residents' 'great concern regarding the possibility of public ritualistic animal sacrifices' and the state-law prohibition." *Id.* at 527. The resolution further declared a city policy "to oppose the ritual sacrifices of animals" in the city and indicated that "any person or organization practicing animal sacrifice 'will be prosecuted.'" *Id.* The city thereafter adopted three additional ordinances specifically addressing religious animal sacrifice. *Id.* at 527-28. None mentioned Santeria. *Id.*

In evaluating whether the city's actions violated the First Amendment, the Supreme Court (unlike the district court here) focused on the underlying purpose of the city's actions and examined the record

to conclude that the ordinances targeted the Santeria religion. *Id.* at 534. The Court reached its decision ***even though the ordinances did not mention Santeria***, explaining that while "use of the words 'sacrifice' and 'ritual' does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion." *Id.* The Supreme Court also noted that Resolution 87-66 recited the concerns of city residents over certain religious practices. *Id.* Accordingly, the Court concluded that "[n]o one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria." *Id.*

The same is true here. Given the Resolutions' references to Hinduism—including the CFA's Resolution explicit connection between caste and Hinduism—and the Letter's clear claim that "[c]aste is a structure of oppression in Hindu society" in need of remediation, (ECF 114-6), CSU cannot suggest, "and on this record it cannot be maintained," that CSU officials had in mind a religion (or anything else) other than Hinduism. *Lukumi*, 508 U.S. at 535. And just like the city's choice to use "sacrifice" and "ritual" in *Lukumi* suggested the city's

intent to target Santeria, Defendant's choice to use the term "caste" also suggests its intent to target Hinduism. [ECF 114-11].

The district court ignored the only evidence of record showing that the Policy was focused on the Hindu religion. That is the only evidence in this case of what the CSU chancellor considered when approving the addition of caste to the Policy. There is no other religion mentioned in the Resolutions or the Letter as employing castiest practices. [ECF 114-4; 114-5; 114-6]. *Merriam-Webster* does not mention any religions other than Hinduism either in its definition of caste. [ECF 114-11]. There is no other evidence that CSU considered anything other than the Resolutions or Letter. If CSU truly believed that caste discrimination was previously covered by the Policy's prohibition on ethnic, racial, or ancestral discrimination, then it did not need to use the word caste. The only reason to add caste was to target and define the contours of the Hindu religion.

The Resolutions and the Letter expressly connect Hinduism and caste, just as the resolutions in *Lukumi* targeted Santeria. In fact, the resolutions in *Lukumi* were far less obvious about targeting Santeria than the Resolutions here are about targeting Hinduism. *See Lukumi*,

508 U.S. at 526, 550. But despite the arguably neutral language in the *Lukumi* resolutions, the Supreme Court held that the city targeted the Santeria religion. *Id.* at 535. Here, the district court erred by reaching the opposite result despite far more overt evidence.

Finally, the district court applied the same faulty Establishment Clause standard that the Supreme Court reversed in *Kennedy*. In *Kennedy*, the district court "began with the premise that the Establishment Clause is offended whenever a 'reasonable observer' could conclude that the government has 'endorse[d]' religion." *Kennedy*, 597 U.S. at 533 (alteration in original). Applying that premise, the district court granted summary judgment to the defendant school district in a First Amendment action brought by a high school coach after he was suspended for kneeling in prayer after football games. *Id.* at 519-21. The district court reasoned that the coach's suspension was essential to avoid an Establishment Clause violation because reasonable viewers could view the coach's action as an endorsement of religion. *Id.*

The district court here applied the same now-overturned endorsement test by concluding that "[n]o reasonable reader would

conclude that the Policy defines Hinduism to include a caste system." [ECF 125]. *Kennedy* makes clear that the endorsement approach "invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators." 597 U.S. at 534. But despite that warning, the district court applied the endorsement approach to hold that the Policy does not take the position that caste is a Hindu construct despite ***significant*** evidence to the contrary. Such a misapplication of the law warrants reversal under *Kennedy* and underscores the Supreme Court's concerns about "differing results" in Establishment Clause cases. *See id.*

More problematic is the district court's factual findings that CSU received "opinions of about twenty stakeholder groups" in amending the Policy. But CSU did not present ***any*** of that evidence to the district court. In fact, the only evidence of stakeholder input litigated before the district court was the CFA, CSSA, and ASI Resolutions. Nevertheless, the district court concluded that ***Plaintiffs*** did not "offer any evidence that the Workgroup inappropriately considered the two Resolutions amongst the large amount of feedback it received from a wide array of CSU stakeholders." [ECF 125]. That conclusion is

problematic for two reasons. First, Plaintiffs introduced ***three*** Resolutions to the district court [ECF 114-4; 114-5; 114-6], not two. The district court's analysis wholly ignored the ASI Resolution ***and*** the accompanying Letter to Chancellor Castro. Second, the district court credited feedback from the "wide array of CSU stakeholders" but no evidence of that feedback was ever presented or is in the record. The only evidence of feedback was the Resolutions and the Letter. That was what the record evidence shows the Chancellor relied on when adding caste to the Policy. Significantly, that decision was the Chancellor's, not the working group. [ECF 120-8]. Defendant may claim that it considered other, non-Hinduism-targeting feedback, but it never provided a scrap of that feedback to the district court to justify its claims.

Plaintiffs, on the other hand, introduced significant evidence to the district court that was provided to CSU by its stakeholders and community that specifically describes caste as an oppressive structure of Hinduism. [ECF 114-4; 114-5; 114-6]. Plaintiffs also introduced the *Merriam-Webster Dictionary* definition of caste, which reinforces the conclusion that CSU intended to target Hinduism. [ECF 114-20]. CSU

admitted that it consulted *Merriam-Webster's Dictionary*, and even admitted that the dictionary is its "primary source" of learning the definition of a word. [ECF 114-3; 120-4]. In the context of the evidence in this case—and in the absence of any explanation by CSU—it is abundantly clear that CSU intended to target Hinduism based on (1) caste being "closely associated with Hindu and South Asian Societies" [ECF 120-7]; (2) the Resolutions [ECF 114-4; 114-5; 114-6]; and (3) the Letter attached to the ASI Resolution [ECF 114-6]. But despite all of that, the district court held that Plaintiffs offered no evidence that Defendant "inappropriately considered the two Resolutions amongst the large feedback it received" and that Plaintiffs failed to "meaningfully call the Workgroup's independence from the CFA or CSSA into question." [ECF 125].[4]

The district court ignored both the law and the facts in entering judgment for the Defendant. The record contains significant evidence that CSU targeted Hinduism because that is where CSU perceives the problem of caste discrimination to exist. The CFA, CSSA, and ASI Resolutions (coupled with the Letter) show that is the case. Because

[4] Even the district court recognized that "caste" is "arguably most closely associated with Hindu and South Asian Societies." [ECF 125].

that evidence (the ***only*** record evidence on this issue) makes clear that CSU targeted Hinduism—just like the local government targeted Santeria in *Lukumi*—the district court's judgment should be reversed.

III. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' FREE EXERCISE CLAIM.

After CSU enacted the Policy, Plaintiffs stopped discussing their religion at CSU (as explained above). Yet the district court dismissed Plaintiffs' Free Exercise claims on Defendant's Motion for Judgment on the Pleadings. That was wrong in two respects. First, the district court failed to recognize that the Policy stopped Plaintiffs' from openly practicing their religion, including observing religious festivals—a prototypical Free Exercise violation. Second, the district court never addressed Plaintiffs' allegations that the Policy impermissibly defined religious doctrine. Accepting those allegations as true—as the Court must on a motion for judgment on the pleadings—Plaintiffs stated a viable claim.

This Court reviews "de novo a district court's grant of a Rule 12(c) motion for judgment on the pleadings." *Harris v. County of Orange*, 682 F.3d 1126, 1131 (9th Cir. 2012). In doing so it "accept[s] all material allegations in the complaint as true and construe[s] them in the light

most favorable to [the non-moving party]." *Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 n.1, 589 (9th Cir. 2008) (quoting *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir. 2004)).

1. Plaintiffs alleged that CSU adopted the Policy to target their religion, in violation of the Free Exercise Clause.

"[A] law targeting religious beliefs" is "never permissible." *Lukumi*, 508 U.S. at 533. Nor can the law's "object" be "to infringe upon or restrict practices because of their religious motivation." *Id.* In short, "the government may not act in a manner 'hostile to . . . religious beliefs.'" *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 686 (9th Cir. 2023) (alteration in original) (quoting *Masterpiece Cakeshop*, 584 U.S. at 639). "[E]ven 'subtle departures from neutrality'" are unconstitutional. *Id.*

At judgment on the pleadings below, there should not have been a question that the Policy was targeted at, and hostile to, Hinduism. Under the applicable standard of review, Plaintiffs had affirmatively pled that it was. (Am. Compl., ECF 80 p 2-3, 20 ¶¶ 3, 9, 110, 114). Those averments had to be treated as true. *Fairbanks*, 543 F.3d at 589. Under the correct standard, Plaintiffs asserted a cognizable Free Exercise violation due to religious hostility.

The district court attempted to side-step those averments by holding that Plaintiffs had not suffered harm because the Policy did not prevent them from practicing their religion. (*See* ECF No. 102, p, 5). But all Plaintiffs had to allege was that the Policy had "a tendency to coerce [them] into acting contrary to their religious beliefs or exert[ed] substantial pressure" on them to "modify [their] behavior." *See Jones v. Williams*, 791 F.3d 1023, 1031-32 (9th Cir. 2015) (quoting *Ohno v. Yasuma*, 723 F.3d 984, 1011 (9th Cir. 2013)).

As detailed above, Plaintiffs have shown more than a mere tendency of coercion. The Policy forced Plaintiffs to self-censor their behavior. *See* Argument, *supra*, § I. Specifically, Plaintiffs alleged that the Policy's vagueness forced them "to guess—at their peril—what constitutes reportable conduct." (Am. Compl., ECF 80 p 8 ¶ 36). They also alleged the Policy neither describes what repercussions exist for alleged caste discrimination nor explains "what 'caste' discrimination is." (*id.* p 18 ¶ 93). Because Plaintiffs feared "losing privileges at the university, their tenures, or even their professorship positions, if they [w]ere even ***accused of*** caste discrimination," (*id.* p 16 ¶ 80) (emphasis

in original), they self-censored their religious exercise by not attending religious events and declining to discuss their beliefs.

Not attending religious events is a "substantial[] burden[]" on religious exercise. *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008). Only by ignoring Plaintiffs' allegations concerning the Policy's vagueness could the district court find that Plaintiffs were not at risk of harm. Plaintiffs have outlined above how they pled that the Policy's vagueness caused them to refrain from exercising their religion. That necessarily satisfies the standard of a motion for judgment on the pleadings. Consequently, the district court erred in dismissing the Free Exercise claim on the pleadings.

2. Plaintiffs Alleged that the Policy Attempted to Define Religious Doctrine, which Comprised Another, Separate Free Exercise Clause Violation.

The Supreme Court has recognized that defining religious doctrine not only violates the Establishment Clause, it violates the Free Exercise clause as well. Specifically, *Guadalupe* held that anytime the government starts "[d]eciding" doctrinal questions, it "risk[s] judicial entanglement in religious issues." *Guadalupe*, 140 S. Ct. at 2069. Such

"interference . . . *obviously* violate[s] the free exercise of religion." *Id.* (emphasis added).

As Plaintiffs explained above, CSU relied on Resolutions asserting that caste discrimination was part of Hinduism. That was an impermissible attempt to define Hindu doctrine by a government entity. In their complaint, Plaintiffs identified this Free Exercise violation. (Am. Compl., ECF 80 p 15-16 ¶ 74-75). But the district court's Free Exercise analysis never addressed this aspect of Plaintiffs' claim. That too was error requiring reversal.

CONCLUSION

This Court should reverse the district court's dismissal of Plaintiffs' due process and free exercise claims for lack of standing and remand for further proceedings on those claims, as well as for the district court to conduct a correct Establishment Clause analysis.

Dated: March 12, 2024 Respectfully submitted,

/s/ Michael K. Twersky
FOX ROTHSCHILD LLP

JOHN SHAEFFER
FOX ROTHSCHILD LLP
10250 Constellation Blvd, Suite 900,
Los Angeles, CA 90067
(310) 598-4150
jshaeffer@foxrothschild.com

MICHAEL K. TWERSKY
ALBERTO M. LONGO
FOX ROTHSCHILD LLP
980 Jolly Rd, Suite 110
Blue Bell, PA 19422
(215) 299-2923
mtwersky@foxrothschild.com
alongo@foxrothschild.com

NATHAN WILSON
FOX ROTHSCHILD LLP
434 Fayetteville St, Suite 2800
Raleigh, NC 27601
(919) 719-1269
nwilson@foxrothschild.com