

April 24, 2023

Honorable Thomas J. Umberg
Chair, Senate Judiciary Committee
1021 O Street, Room 3240,
Sacramento, CA 95814

Re: [SB-403 – SUPPORT] Caste Equity Legal Task Force Supports SB403: A Bill to End Caste Discrimination

Dear Chairman Umberg, Vice-Chair Wilk and distinguished members of the committee,

We, the undersigned, are part of a growing coalition of litigators, law professors, legal advocates and law school students across the country, committed to ending caste-based discrimination. Many of us have clients with caste-based discrimination claims and/or have performed in-depth legal analyses about the impact of caste on U.S. institutions. You may learn more about our task force at www.casteequity.org.

While many of our respective firms, organizations and law schools have submitted letters of endorsement for SB403: A Bill to End Caste Discrimination, we felt compelled to submit this letter independently after having reviewed the material from opponents of SB403. Not only did we find a concerning amount of disinformation in opponents' material, but we also realized that the committee may have some open questions which require precise legal answers to make SB403 a 'workable' bill. Our task force addresses the eight open questions or 'arguments' below.

1 - What are the jury instructions in a caste-discrimination case after this bill is passed?

Presuming both parties have met their burdens of proof and production, the case would move to trial and a jury would receive instructions using existing CACI templates of instructions¹:

PLAINTIFF claims that DEFENDANT denied PLAINTIFF full and equal accommodations/advantages/ facilities/privileges/services because of PLAINTIFF'S CASTE. To establish this claim, PLAINTIFF must prove all of the following:

1. That DEFENDANT denied/aided or incited a denial of/discriminated or made a distinction that denied full and equal accommodations/advantages/facilities/privileges/services to PLAINTIFF;
2. That a substantial motivating reason for DEFENDANT'S conduct was DEFENDANT'S PERCEPTION OF PLAINTIFF'S CASTE
3. That PLAINTIFF was harmed; and
That DEFENDANT'S conduct was a substantial factor in causing PLAINTIFF'S harm.

The language on defendant's perception of plaintiff's protected status² in the above jury instructions is reproduced directly from the Judicial Council of California Civil Jury Instructions 3060 on the Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52). As the above instructions indicate, there is well developed case law finding discrimination based on a defendant's perception of a plaintiff.

2 - Can someone be born without a caste?

As in America, where you will be ascribed a race whether you identify with it or not, if you are born into a caste-based society, a level of caste will always be attributed to you, regardless of whether you identify

¹ https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf

² <https://www.senate.ca.gov/content/protected-classes>

with it or not. Just as with race, there are individuals who are not aware of or refuse to acknowledge their caste identity, or do not believe they have one. Nevertheless, one's individual position does little to prevent race- or caste-based harms. Moreover, one need not be born with a caste to perpetuate caste-based discrimination, just as one need not be born with a caste to be harmed by caste-based prejudice. Ultimately, we find this question to be irrelevant to the task of ending caste discrimination. The legal question is not about whether someone belongs to a particular level in the caste system, but whether that person is *perceived* as belonging to a particular level in the caste system - and treated differently for it. This bill does not force a person to self-identify as part of a caste system or perpetuate a system which they wish to leave behind. Rather, it affords protection to those who do face caste-based discrimination by other people who *perceive* that person to belong to a certain level of the caste system. When someone says "I don't see caste", we find this as problematic as saying "I don't see skin color." Such a statement results in suppressing and ignoring harms based on inescapable social prejudice and stereotypes.

3 - Can a second generation South Asian be born in this country and not know her caste?

The answer to this depends on the level of exposure to either past privilege or trauma, but is also irrelevant in proving matters of discrimination. The legal question is not about whether someone belongs to a particular level in the caste system, but whether that person is *perceived* as belonging to a particular level in the caste system - and treated differently for it.

4 - What is the latest with the Cisco case?

The California Civil Rights Department has voluntarily dismissed its case alleging caste discrimination against two Cisco engineers, while still keeping alive its litigation against Cisco (will go to mediation).³ Meanwhile, Cisco added caste as a protected category to its anti-discrimination policy in 2022.⁴ Dalit civil rights organizations have also referred additional new complaints to law firms of members of our task force, which are now under investigation.

5 - What companies have caste listed as a protected category in both their workplace discrimination policies & product policies?

Apple, IBM⁵ and Cisco (after being sued by the California Civil Rights Department) have publicly confirmed they have added caste as a protected category to their workplace anti-discrimination policies. Several academic institutions have also added caste as a protected category to their student and faculty anti-discrimination policies, including but not limited to the California State University system (23 schools)⁶, Brandeis⁷, Brown⁸, Harvard⁹, and more. Companies such as Twitter¹⁰, Google¹¹ and YouTube¹² also list caste as a protected category in their product policies about hate speech.

6 - Is there a universally agreed upon definition of 'caste'? If not, how to legislate matters of caste discrimination?

³ <https://apnews.com/article/cisco-caste-discrimination-lawsuit-california-a82cf1b775217bd3cabca24be89c3bf8>

⁴ https://www.cisco.com/c/dam/en_us/about/cobc/2021/fy22-code-of-business-conduct-english.pdf (pg9)

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<https://www.reuters.com/business/sustainable-business/caste-california-tech-giants-confront-ancient-indian-hierarchy-2022-08-15/>

⁶ <https://www.nbcnews.com/news/asian-america/cal-state-schools-add-caste-anti-discrimination-policy-rena12602>

⁷ <https://www.brandeis.edu/president/letters/2019-12-17-adding-caste-to-our-nondiscrimination-harassment-policy.html>

⁸ <https://www.brown.edu/news/2022-12-01/caste>

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<https://www.freepressjournal.in/education/harvard-officially-adds-caste-to-its-new-anti-discrimination-policy-rules-to-be-effective-from-september-1>

¹⁰ <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>

¹¹

https://support.google.com/contributionpolicy/answer/11412392?hl=en&ref_topic=11410564&sjid=11430843247515119445-NA

¹² <https://www.youtube.com/howyoutubeworks/our-commitments/standing-up-to-hate/>

The law does not require a universally-agreed upon or scientifically-accepted definition of a protected category to prohibit discrimination against people in that category. Congress enacted the Civil Rights Act to protect the rights of African-Americans and people of color, even though cases since then have further clarified the scope of the term race as it is used in civil rights statutes. Similarly, less than three years ago, in *Bostock v. Clayton County* (U.S. Supreme Court, 2020), the Court clarified that the definition of ‘sex’ covers claims of discrimination based on sexual orientation or gender identity.¹³ Thus, a lack of a universally-agreed upon definition of a protected category does not mean we can’t create laws to prohibit discrimination against people belonging to those categories.

While there is no universally-agreed upon definition of caste, SB403 provides a workable definition based on several inputs from legal experts¹⁴ and the United Nations, Committee on the Elimination of Racial Discrimination (CERD), the latter reaffirming that discrimination based on ‘descent’ includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights.¹⁵

SB403 defines caste as an individual’s perceived position in a system of social stratification on the basis of inherited status, which may be characterized by factors that may include, *but are not limited to*, inability or restricted ability to alter inherited status; socially enforced restrictions on marriage, private and public segregation, and discrimination; and social exclusion on the basis of perceived status. Since the characteristics that place someone on a particular level of a caste system’s hierarchy vary from culture to culture, SB403 does not limit the definition of caste to a particular set of characteristics. This ensures that people from all caste systems are protected under the bill.

One opponent to SB403 alleged that by referencing marriage restrictions, the bill would give the government the right to interfere with whom someone could marry. This is not true. Rather, the relevant inquiry is, for example, if a person asks who you are married *to*, and uses the answer to treat you differently - *then* you may have a claim of caste-based discrimination which should be investigated. SB403 does not include any marriage prohibitions.

Last, some opponents forewarn of a slippery slope of caste-based policies based on India’s definition of caste (ex: affirmative action quotas¹⁶, etc). The bill does not contain any such policy and thus, is not true.

7 - Isn’t caste already covered by ancestry¹⁷ or race?

Until caste is explicitly enumerated by statute, its protected status will face legal challenges by defendants seeking to evade liability. This will lead to raised litigation costs for complainants and inconsistent protections. In fact, this is the argument that Cisco has made in *California Department of Fair Employment and Housing v. Cisco Systems, Inc. et al.* (20CV372366). Until civil rights statutes expressly protect against caste discrimination, employers will always try to evade liability by convincing courts to adopt the erroneous view that the law doesn’t prohibit caste discrimination. Clear and explicit laws will protect both complainants and defendants alike by allowing for greater predictability and consistency with

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<https://www.aclu.org/cases/lgbtq-discrimination-cases-supreme-court?document=bostock-v-clayton-county-supreme-court-opinion>

¹⁴ <https://harvardlawreview.org/forum/vol-134/title-vii-and-caste-discrimination/#footnote-15>,
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3816265

¹⁵ <http://hrlibrary.umn.edu/cerd/genrec29.html>.

¹⁶ <https://www.ohchr.org/en/stories/2016/04/shadow-caste-and-its-stigma-continue-violate-all-aspects-human-rights>

¹⁶

<https://www.msuir.org/new-blog/2021/3/22/a-comparison-of-the-reservation-system-in-india-to-affirmative-action-policies-in-the-united-states>

¹⁷ <https://www.census.gov/topics/population/ancestry/about.html#:~:text=Ancestry>

respect to claims of discrimination on the basis of caste.

Notably, the law already recognizes the importance of explicitly protecting certain groups even if other classifications may already protect them. An analogy can be made to the relationship between LGBTQ discrimination and sex discrimination. In *Bostock*, the Supreme Court made clear that prohibitions on sex discrimination also ban discrimination based on sexual orientation and gender identity. That, however, does not obviate the need for express protection in California state law against sexual orientation and gender identity discrimination. The LGBTQ community faces specific challenges that, while overlapping in some respects with other forms of sex discrimination, are different and therefore deserve statutory recognition and protection. The same can be said of caste and ancestry. The specific challenges of caste discrimination necessitate an express statutory prohibition.

Last, if caste is not expressly protected, then companies will not ensure leadership and human resources staff can effectively identify and address caste discrimination; they will not conduct workplace trainings about caste discrimination, nor will they keep records concerning caste discrimination. Such education, trainings and records are necessary steps to prevent caste discrimination in the workplace consistent with Gov. Code section 12940(k) and indeed, such records (e.g. of past complaints of discrimination) are often crucial evidence for establishing both individual claims and class wide patterns of discrimination (Gov. Code section 12946; 2 CCR 11013). If caste is not expressly banned, plaintiffs will confront substantial challenges obtaining discovery relevant to their claims of caste discrimination. This is a tremendous enforcement challenge under existing law.

Thus, we find it critical that the statute expressly recognizes caste as a protected classification.

8 - Will this unintentionally profile/target South Asians, perhaps actually making things worse rather than letting this ancient practice fade into history?

SB403 does not contend that South Asians are more likely to discriminate against other South Asians compared to any other group. SB403 explicitly states that caste-based discrimination is *not* limited to one group of people and can be found on multiple continents. A person does not need to be a member of a caste to engage in caste-based discrimination. We have received reports of people being discriminated against by individuals who are presumably outside the caste system.

By contrast, unlike perpetrators, victims of caste discrimination are likely to largely be from minority communities. Thus, laws that seek to protect against discrimination based on caste are designed to protect a minority, albeit a minority within a minority. Current lawsuits, testimony from South Asian Americans, and a host of press reports make clear that caste is not fading into history. Caste-based discrimination is alive; it is well; and it is a part of the fabric of American society. The argument that laws prohibiting discrimination based on caste will target, for example, South Asians implicitly suggest that those who claim to have been harmed by caste discrimination in the United States are either lying (along with government officials) or that such people are not a part of the South Asian diaspora (or not worth counting as a part of the diaspora).

Just as the Civil Rights Act stemmed from centuries of oppression of Black people in America, but extended protection to people of *all* races, SB403 stems from a growing South Asian community in America shining a light on caste discrimination, but extends protection to people in *all* caste systems. California has the benefit of an increasingly diverse community, and with that comes a recognition of the needs of its different members. The bill does not force self-identification by caste, but affords protections to those who seek remedy against caste-based discrimination. History has shown us that the past does not become obsolete simply by changing the subject. We must confront the realities of caste-based discrimination, and legislation like SB403 provide much needed vehicles that will empower caste-based minorities to step forward to seek protection.

We, the undersigned members of the Caste Equity Legal Task Force, fully support SB 403 and urge this esteemed Senate Judiciary Committee to do the same.

Sincerely,

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