S270535

In the

Supreme Court

of the

State of California

TAKING OFFENSE,
Plaintiff and Appellant,

v.

STATE OF CALIFORNIA,
Defendant and Respondent.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT CASE NO. C088485
SACRAMENTO SUPERIOR COURT CASE NO. 34-2017-80002749-CU-WM-GDS

**APPLICATION FOR LEAVE TO FILE BRIEF OF*AMICI CURIAE;*
BRIEF OF *AMICI CURIAE* CALIFORNIA PROFESSORS OF FREEDOM OF EXPRESSION AND EQUALITY LAW IN SUPPORT OF THE STATE OF CALIFORNIA**

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Professor of Law Emeritus Alan E. Brownstein of UC Davis School of Law, Dean and Jesse H. Choper Distinguished Professor of Law Erwin Chemerinsky of UC Berkeley School of Law, Newton Professor of Constitutional Law David B. Cruz of USC Gould School of Law, Dorothy W. Nelson Professor of Law and Sociology Camille Gear Rich of USC Gould School of Law, and Professor of Law and Chancellor's Fellow Brian Soucek of UC Davis School of Law (collectively, the "amici")[1] respectfully request permission to file the amici curiae brief in support of Defendant-Petitioner which is combined with this application.

As profesors at California law schools who teach and write about freedom of expression and equality law, amici have a professional interest in ensuring that this Court correct the decision of the Court of Appeal, which threatens both the lived equality of some of California's most vulnerable residents and the coherence of of the state's free speech doctrine.

The proposed amici curiae brief will assist the Court in deciding this matter by explaining (1) why the challenged provision of SB 219 regulates

[1] Titles and institutional affiliations are provided for identification purposes only; the opinions and arguments here are amici's, not necessarily those of their respective schools.

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verbal conduct rather than public discourse, (2) why LGBT seniors in residential facilities constitute a uniquely captive audience under the First Amendment, and (3) why facial challenges to SB 219's pronouns provision are doomed under the overbreadth doctrine.

No party or counsel for any party authored this brief, participated in its drafting, or made monetary contributions intended to fund the drafting or submission of the applicants' proposed brief. The applicants certify that no other person or entity, other than the applicants and their counsel, authored or made any monetary contribution intended to fund the drafting or submission of this brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

This application is timely. It is being submitted within 30 days of the filing of Petitioners' reply brief on June 24, 2022. (See id., rule 8.520(f)(2).)

For these reasons, the applicants request that this Court accept and file the attached amici curiae brief.

Dated: July 25, 2022

Respectfully submitted,

KEKER, VAN NEST & PETERS LLP

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case threatens both the lived equality of some of our state's most vulnerable residents and the coherence of our state's free speech doctrine. Taking Offense, an "unincorporated association" consisting of at least one California taxpayer, asks this Court to facially invalidate a provision of the LGBT Long-Term Care Facility Residents' Bill of Rights,[2] which protects LGBT[3] seniors in long-term care facilities from being willfully and repeatedly misgendered in the place where they live and receive medical care.[4] To side with Taking Offense would require this Court to ignore the difference between public speech and verbal conduct in

[2] Senate Bill 219 (SB 219), The LGBT Long-Term Care Facility Residents' Bill of Rights, added a new provision ("the pronouns provision") to the Health and Safety Code penalizing long-term care facilities and their employees who "wholly or partially on the basis of a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status . . . [w]illfully and repeatedly fail to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns." (Health & Saf. Code, § 1439.51(a).)

[3] Throughout this brief, the term LGBT refers to lesbian, gay, bisexual, and transgender individuals.

[4] LGBT seniors in long-term care facilities experience rampant harassment and mistreatment. (See National Senior Citizens Law Center, *Stories from the Field: LGBT Older Adults in Long-Term Care Facilities* < https://www.lgbtagingcenter.org/resources/pdfs/NSCLC_LGBT_report.pdf > [as of July 20, 2022].) One widespread form of harassment is intentional misgendering, or the use of the wrong name and pronouns to refer to an individual. Misgendering is a deliberate invalidation of an LGBT person's identity that can cause "distress and despair," and lead to suicidal ideation, psychological distress, and substance abuse. (E.g., Bennett, *Pioneering Care for Transgender People* (2018) 49 American Psychological Assn. Monitor on Psychology 84 < https://www.apa.org/monitor/2018/11/care-transgender> [as of July 20, 2022].)

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the workplace, in places of public accommodation, and in the provision of medical care and housing; to abandon decades of case law protecting captive audiences; to deepen existing confusion on the difference between strict scrutiny and overbreadth analysis under the First Amendment; and to sidestep this Court's authority to construe statutes constitutionally to effectuate the will of the Legislature.

Thankfully, this Court has an almost embarrassing number of ways to uphold the Legislature's judgment, correct the opinion below, and further clarify longstanding free speech doctrine.[5] The challenged provision of Senate Bill 219 is constitutional because it regulates verbal conduct outside the marketplace of ideas, in a place—at once a workplace, a public accommodation, a medical care facility, and a place of residence—where LGBT seniors are a uniquely captive audience. The pronouns provision should be safe from facial challenge under overbreadth analysis, even if this Court were to conclude that it regulates a mix of protected speech and unprotected conduct or expression. And this Court could also

[5] Throughout this brief, the terms "protected speech" and "free speech" refer to speech that is protected under the First Amendment of the U.S. Constitution, (U.S. Const. amend. I, *as applied to the states by* U.S. Const. amend. XIV), and Article I of the California Constitution, (Cal. Const., art. I, § 2). Because amici see no differences between the U.S. Constitution's Free Speech Clause and the Liberty of Speech Clause of the California Constitution as they apply to any of the issues discussed in this brief, all references to the "First Amendment" should be read to apply to both federal and state protections of speech.

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simply construe the pronouns provision in a way that eliminates any of the the purely hypothetical unconstitutional applications Taking Offense has conjured up. For any of these reasons—and, this brief argues, for *all* of them—plaintiff's facial challenge to SB 219's pronoun provision must fail.

By upholding SB 219, this Court will not only honor the Legislature's desire to protect LGBT seniors from harassment and discriminatory treatment in an environment where they are dependent on others and have limited ability to protect themselves; it will also helpfully clarify the legal standards under the First Amendment that will apply to other challenged antidiscrimination measures going forward.

II. ARGUMENT

A. SB 219's pronouns provision does not regulate public discourse.

SB 219's pronouns provision is not a regulation of public discourse in the marketplace of ideas. In fact, the challenged provision regulates conduct that is neither public nor a form of discourse. Like the other provisions of SB 219, the pronouns provision regulates verbal conduct in long-term care facilities—unique spaces which are at once places of employment, housing, and the provision of medical care.

Taking Offense would have this Court view staff treating patients in a long-term care facility as if they were no different than speakers on a public street corner. But First Amendment law is not so undifferentiated. If it were, judges would be unable to regulate speech in a courtroom by

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enforcing hearsay rules or requiring lawyers to address them as "your Honor." Individuals would have a constitutionally protected right to place harassing phone calls into people's homes (but see *United States v. Waggy* (9th Cir. 2019) 936 F.3d 1014, 1019), discriminate against others based on a protected characteristic in the workplace (but see *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 141-42), or disclose others' private medical information without authorization (but see *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 414). As courts have long recognized, regulation in contexts like these does not defeat the First Amendment's purpose of preserving "an uninhibited marketplace of ideas in which truth will ultimately prevail." (*Red Lion Broadcasting Co. v. F.C.C.* (1969) 395 U.S. 367, 390.)

Ignoring these distinctions, Taking Offense argues that SB 219's pronouns provision should be subject to strict scrutiny because it distinguishes what speech is and is not permissible based on content. But in making this argument, Taking Offense relies on *Reed v. Town of Gilbert* (2015) 576 U.S. 155, 159, a case about content-based regulations of street signs, placed on public land and directed at the general public. In other words, the speech at issue in *Reed* took place squarely within the marketplace of ideas, in a traditional public forum where protection for speech is at its zenith. *Reed*'s holding does not extend to all contexts in which words are voiced —to courts and care facilities no less than streets

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and sidewalks. Were *Reed*'s analysis to apply to all words that are spoken in the workplace (or in housing and healthcare contexts), then laws like Title VII and FEHA that are violated "when spoken words, either alone or in conjunction with conduct, amount to employment discrimination" (*Aguilar*, *supra*, 21 Cal.4th at p. 134), would be endangered. And yet this Court has left no doubt as to their validity. (See *id.* at 141-42 [plurality opinion]; *id.* at 147–48 [Werdegar, J., concurring].)

SB 219's pronouns provision does nothing to prevent staff members from engaging in public dialogue, even from voicing controversial opinions about sexual orientation or gender identity. The provision only prohibits one form of verbal conduct: the willful and repeated misnaming or misgendering of long-term care facility residents by their caretakers. (See *id.* at 141 [plurality opinion] [a statute "does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity".])

In proscribing this particular conduct in this particular context, the state is advancing legitimate and well-established interests in protecting against (1) the harassment of LGBT seniors; (2) discriminatory treatment of LGBT seniors in the provision of medical care based on their sexual orientation or gender identity; and (3) the unauthorized disclosure of private medical information. SB 219's pronoun provision should be held constitutional on all of these bases.

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1. SB 219's pronouns provision prohibits harassment of LGBT seniors

California state courts and the Ninth Circuit have repeatedly recognized that verbal harassment is not entitled to free-speech protection. In *People v. Borelli*, for example, a California Court of Appeal held that a provision of a state anti-stalking statute penalizing threats that generate reasonable fear did not target protected speech. ((2000) 77 Cal.App.4th 703, 716.) The court reasoned: "While the right to free speech guarantees a powerful right to express oneself, it does not include the right to repeatedly invade another person's constitutional rights of privacy and the pursuit of happiness through the use of acts and threats that evidence a pattern of harassment designed to inflict substantial emotional distress." (*Ibid*.)

The Ninth Circuit reached a similar conclusion in *Waggy*, holding that a Washington state statute penalizing telephone harassment did not regulate protected speech because it targeted calls made with the specific intent to harass. (*supra*, 936 F.3d at p. 1019.) Similarly, in *United States v. Osinger*, the Ninth Circuit rejected a First Amendment challenge to a federal anti-stalking law prohibiting the use of mail or electronic communication to harass or intimidate. ((9th Cir. 2014) 753 F.3d 939, 944.)

Like the regulations in *Waggy*, *Osinger*, and *Borelli*, the pronouns provision regulates harassment, not protected discourse. Indeed, the

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legislative record underscores that the Legislature passed SB 219 precisely to curtail this type of harassment perpetrated against LGBT seniors in the intimate spaces where they live, spend most of their time, and receive medical care. (See SB 219 § 1(c), 2017 [citing a national study finding that 43 percent of respondents experienced or witnessed mistreatment of LGBT seniors in long-term care facilities, including verbal harassment and misgendering].) Repeated misgendering, like stalking (*Osinger*, *Borelli*), is a form of harassment that can cause substantial emotional distress, including "suicidal ideation, psychological distress, and substance abuse." (Letter of Amici Scholars in Social Work, Gerontology, and Social Science (Sept. 1, 2021), pp. 8-9, https://www.lieffcabraser.com/pdf/TGAmicus.pdf [as of July 20, 2022].)

Moreover, under SB 219, residential care facility employees remain free to express their opinions on sex and gender to the general public in the free marketplace of ideas. This is consistent with the Ninth Circuit's decision in *Rodriguez v. Maricopa County Community College District*, which held that the First Amendment protected emails sent by a college professor to the general public expressing racist ideas. ((9th Cir. 2010) 605 F.3d 703, 705-06.) The *Rodriguez* court distinguished between the professor's abstract expression in the free marketplace of ideas and the conduct of "racial insults or sexual advances directed at particular individuals in the workplace," which could be properly prohibited. (*Id*. at

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p. 710.) Likewise here, sexist, transphobic, and homophobic remarks made elsewhere by employees of long-term care facilities may be protected speech, but the repeated and willful misgendering of LGBT seniors is not. SB 219 can permissibly regulate the latter.

2. SB 219's pronouns provision protects LGBT seniors from disparate treatment based on their sex and gender identity

Another legitimate state interest served by SB 219's pronouns provision is protecting LGBT seniors from disparate treatment in medical care, housing, and public accommodations based on their sex and gender identity. Courts, including the United States Supreme Court, have long held that disparate treatment of protected classes is not "within the area of constitutionally protected speech." (*R.A.V. v. City of St. Paul, Minn.* (1992) 505 U.S. 377, 383.) For example, the Supreme Court recognized that Title VII's general prohibition against discrimination based on sex in employment practices can cover verbal conduct such as the use of sexually derogatory language. (*Id*. at p. 389.) Additionally, the California Legislature has recognized sexual orientation, gender identity, and gender expression as protected characteristics under state antidiscrimination law. (Gov. Code, § 12940(a).) Disparate treatment of LGBT seniors because of their sex or gender identity is therefore not protected, even when the disparate treatment involves "the use of spoken words or other expressive activity." (*Aguilar*, *supra*, at p. 141 [plurality opinion] [noting that "[m]any

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crimes can consist solely of spoken words" and that "[c]ivil wrongs may also consist solely of spoken words" and yet "such practices are entitled to no constitutional protection"]).

California courts—including this Court—have adhered to this principle when analyzing regulations addressing both race and sex discrimination in certain spaces, like the workplace or the home, even when that discrimination involves verbal conduct. In *Aguilar v. Avis Rent A Car System, Inc.*, this Court held that a lower court's injunction prohibiting the continued use of racial epithets in the workplace did not target protected speech. (*supra*, 21 Cal.4th at p. 141-42.) Because the pervasive use of racial epithets created a hostile and abusive work environment in violation of the state Fair Employment and Housing Act (FEHA), it was not protected by the federal or state constitutions. (*Ibid.*) Similarly, a California Court of Appeal concluded that a landlord who used explicit sexual language with a tenant—including sexualized descriptions of her body, his attraction to her, and his desire to have sex with her—was sex discrimination in violation of FEHA. (See *Brown v. Smith* (1997) 55 Cal.App.4th 767, 782.) Although the *Brown* court did not explicitly hold that the landlord's conduct was not protected speech, that was implicit in

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the Court's unwavering conclusion that it constituted an actionable violation of FEHA, which is a constitutionally valid statute.[6] (*Ibid*.)

In light of these precedents, the lower court erred in suggesting that the pronouns provision is not a valid antidiscrimination regulation because willful and repeated misgendering is only "*potentially* offensive or harassing" and "does not *necessarily* create a hostile environment." (See *Taking Offense v. State* (2021), 66 Cal.App.5th 696, 708.) The lower court failed to recognize that speech does not have to create a hostile environment in order to constitute proscribable discrimination. Even non-harassing speech can unlawfully treat people differently based on their identity, as here. (See *Aguilar*, *supra*, 21 Cal.4th at p. 137 n.6 [offering the example of a "Whites Only" sign placed outside a workplace].) Refusing to call transgender patients by their proper names and pronouns due to their gender identity is a form of disparate treatment not unlike using racial epithets at work (*Aguilar*) or making demeaning sexual comments in housing (*Brown*). The fact that *words* are used to treat people differently

[6] Here, the conduct regulated by SB 219's pronouns provisions was arguably already covered by FEHA because of California's recognition of gender identity and expression as protected characteristics. But the California Legislature passed SB 219 specifically to "fully actualize" FEHA's prohibition of discrimination on the basis of sex, gender, gender identity, gender expression, or sexual orientation. (SB 219 § 1(e), 2017.) In other words, SB 219 simply made FEHA's protections explicit in the context of LGBT seniors living in long-term care facilities. The constitutional validity of FEHA implies that of SB 219 as well.

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because of their race, gender, or gender identity in contexts such as these does not turn a conduct regulation into a free speech issue.

Indeed, this Court has explicitly recognized that there is no free speech exception to regulations targeting disparate treatment based on sexual orientation in medical care spaces. In *North Coast Women's Care Medical Group, Inc. v. Superior Court*, this Court held that doctors who refused to perform artificial insemination on a lesbian patient due to religious objections were not exempt from the Unruh Civil Rights Act's prohibition on sexual orientation discrimination. ((2008) 44 Cal.4th 1145, 1155.) Requiring doctors to comply with antidiscrimination obligations did not infringe upon their constitutional free speech and free exercise of religion rights because they were still free to voice their ideological objections elsewhere in the free marketplace of ideas. (*Id*. at p. 1157.)

As in *North Coast*, this case involves parties seeking a free speech exception from a neutral and generally applicable law targeting disparate treatment based on sex and gender identity in a space where individuals receive medical care. (See *North Coast*, *supra*, 44 Cal.4th at p. 1155.) Requiring a caregiver to use a senior's preferred name and pronouns regardless of their gender identity is no different than requiring an infertility doctor to perform artificial insemination on a patient regardless of whether she's a lesbian. In both situations, the medical provider is

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prohibited from providing care in different ways based on the patient's protected identity characteristics.

3. SB 219's pronouns provision protects the privacy of LGBT seniors

The pronouns provision of SB 219 advances an additional legitimate state interest: it protects against the unauthorized disclosure of LGBT seniors' private medical information. Maintaining patient privacy is an ethical obligation recognized by the American Medical Association. (Am. Med. Assn., Code of Med. Ethics Opinion 3.1.1.) Scholars have recognized the crucial role medical privacy plays in advancing values including personal autonomy, individuality, respect, dignity, and quality of care. (Sharyl J. Nass, Laura A. Levit & Lawrence O. Gostin, *The Value and Importance of Health Information Privacy,* in *Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research* (2009).) Moreover, California law contains both a statutory and a constitutional right to medical privacy.[7] The willful and repeated misgendering of a person often violates these privacy protections because it can disclose to others that the person is transgender, which means disclosing the person's sex as identified at birth and potentially a whole host of other private

[7] The California Constitution defines privacy as an inalienable right. (Cal. Const., art. I, § 1.) The Confidentiality of Medical Information Act (CMIA) likewise provides that health care providers must not disclose patients' medical information without authorization, with limited statutory exceptions. (Civ. Code, § 56.10(a).)

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medical information, including the use of sex hormones during transition or gender affirming surgery, to name just a few examples.[8]

In *Pettus*, a California Court of Appeal held that certain doctors who provided a patient's employer with the patient's psychiatric examination report without specific written authorization from the patient violated both the CMIA and the state constitutional privacy right. (See *Pettus*, *supra*, 49 Cal.App.4th at p. 414.) The court relied on the statutory definitions of "patient" ("any natural person, whether or not still living, who received health care services from a provider of health care and to whom medical

[8] Other provisions of SB 219 also underscore that the Legislature was deeply concerned about the privacy of LGBT seniors when receiving medical care when it passed the law. For example, section 1439.53(b) of the Health and Safety Code requires visual privacy when an LGBT resident of a long-term care facility is receiving care and is partially unclothed:

> Long-term care facility staff not directly involved in providing direct care to a resident, including, but not limited to, a transgender or gender-nonconforming resident, shall not be present during physical examination or the provision of personal care to that resident if the resident is partially or fully unclothed without the express permission of that resident, or his or her legally authorized representative or responsible party. A facility shall use doors, curtains, screens, or other effective visual barriers to provide bodily privacy for all residents, including, but not limited to, transgender or gender-nonconforming residents, whenever they are partially or fully unclothed. In addition, all residents, including, but not limited to, LGBT residents, shall be informed of and have the right to refuse to be examined, observed, or treated by any facility staff when the primary purpose is educational or informational rather than therapeutic, or for resident appraisal or reappraisal, and that refusal shall not diminish the resident's access to care for the primary purpose of diagnosis or treatment.

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information pertains") and "medical information" ("any individually identifiable information in possession of or derived from a provider of health care regarding a patient's medical history, mental or physical condition, or treatment") to conclude that a CMIA violation had occurred. (*Id*. at p. 429 (quoting Civ. Code, § 56.05).)

Under the reasoning in *Pettus*, willful and repeated misgendering of an LGBT senior could constitute a CMIA violation. Long-term care facility residents, as persons receiving health care services from a provider, are "patients" within the meaning of the CMIA. (See Civ. Code, § 56.05.) And a resident's birth sex, use of sex hormones associated with gender transition, and history of gender reaffirming surgeries, for example, would all be individually identifiable information about medical history in a provider's possession under the CMIA. (See *ibid.*) Moreover, long-term care facility employees have unique access to medical records reflecting this information, which may not be readily apparent to others, including the patient's roommates, friends, or even some family. (Dolan et. al., *Misgendering and experiences of stigma in health care settings for transgender people*, 212(4) Medical J. of Australia 150, 151 (2020) < https://www.mja.com.au/system/files/issues/212_04/mja250497.pdf> [as of July 20, 2022].) That is why courts around the country have recognized transgender status as medical information entitled to confidentiality. In *Grimes v. County of Cook*, for example, a federal district court concluded

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that a supervisor violated the plaintiff's federal constitutional right to medical privacy by disclosing his transgender status to coworkers. ((N.D. Ill. 2020) 455 F.Supp.3d 630, 637-38; see also *Powell v. Schriver* (2d Cir. 1999) 175 F.3d 107, 111 [holding that transgender status is private medical information entitled to confidentiality].) Both courts and public health scholars have recognized that unauthorized disclosure of transgender identity can lead to hostility and violence, warranting heightened privacy. (*Grimes*, *supra*, 455 F.Supp.3d at p. 638; *Powell*, *supra*, 175 F.3d at p. 111; Dolan, *supra*, at p. 151.)

For similar reasons, willful and repeated misgendering of LGBT seniors also may violate the privacy protections of California's Constitution. (See *Pettus*, *supra*, 49 Cal.App.4th at p. 439.) In *Pettus*, the Court held that the constitutional right to privacy is violated where the plaintiff demonstrates (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) conduct by the defendant constituting a serious invasion of privacy. (*Ibid.*) All three of these elements are met here. First, it is well settled that individuals have a legally protected interest in keeping their medical information private. (*Id*. at p. 440.) Second, patients also have a reasonable expectation that information disclosed to health care providers will remain private. (See *id*. at p. 443.) Third, as discussed above, unauthorized disclosure of transgender status is a serious invasion of privacy that can expose the

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transgender individual to hostility and violence, just as much or more than the unauthorized disclosure of substance abuse at issue in *Pettus*. (See *id*. at p. 443-44; Dolan, *supra*, at p. 151.)

Insofar as the repeated and willful misgendering of LGBT seniors violates their right to medical privacy, it cannot be protected speech.[9] Privacy violations often occur through the use of words. And yet long-term care facility employees do not have a free speech right to disclose a patient's private medical information to third parties without the patient's authorization. If this speech were protected, a myriad of medical privacy laws that regulate similar conduct—including the CMIA, Article I of the California Constitution, and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)—would be endangered as well. Such an absurd outcome would not only fly in the face of longstanding precedent; it would mean *no* privacy laws could be passed. Instead, states can and do pass sensible laws—like SB 219's pronouns provisions and the

[9] While some may point to *Sorrell v. IMS Health Inc.* as evidence that unauthorized disclosures of medical information are protected by the First Amendment, this notion is misguided. (See (2011) 564 U.S. 552.) *Sorrell* involved a facially content-based law that prohibited the sale of pharmaceutical prescriber-identifying information for marketing purposes but allowed the sale for other purposes. (*Id*. at p. 564.) While the Court recognized an interest in medical privacy, the statute at issue allowed almost anyone other than pharmaceutical marketers to access prescriber information. (*Id*. at p. 573.) *Sorrell* is therefore inapplicable to the present case, in which the statute affects the conduct of parties likely to have unique access to patients' private medical information.

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CMIA—that protect the private medical information of individuals, especially when the unauthorized disclosure of that information would cause the individuals significant harm. Notably, the unauthorized disclosure of confidential medical information may cause harm regardless of whether it occurs in the patient's presence.

B. SB 219's pronouns provision constitutionally protects LGBT seniors in residential facilities from speech aimed at a uniquely captive audience

Even if SB 219's pronouns provision were not valid as a regulation of verbal conduct—harassment, disparate treatment in healthcare and housing, and/or the unauthorized disclosure of confidential medical information—it would still be constitutional as a regulation of speech affecting a uniquely captive audience.

The United States Supreme Court has stated that speech targeting captive audiences does not receive the protection afforded ordinary expression because such speech "intrudes on the privacy of the home," where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." (*Erznoznik v. City of Jacksonville* (1975) 422 U.S. 205, 209; see also *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298, 302, 304 [public transit cars are "no First Amendment forum" because streetcar audiences are present as a matter of necessity rather than choice]).

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Importantly, a captive audience's interest in avoiding intrusion reaches its pinnacle in the home. In *Rowan v. U.S. Post Office Department*, the Court held that vendors had no First Amendment right to mail materials to the homes of individuals who removed their names from mailing lists. ((1970) 397 U.S. 728, 737.) The Court reasoned: "If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." (*Id*. at p. 738.) In *Madsen v. Women's Health Center, Inc.*, the Court extended this reasoning beyond the home to medical facilities: "while targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance." ((1994) 512 U.S. 753, 768.)

Even courts that have indicated that speech directed at captive audiences falls within the scope of the First Amendment still do not apply strict scrutiny to regulations targeting such speech. In *Communications Workers of America v. Ector County Hospital District*, the Fifth Circuit held that a public hospital's anti-adornment policy for employees was not subject to strict scrutiny in part because hospital patients and family

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members were a captive and involuntary audience who should not be "involuntarily subjected to having messages on matters of public concern indiscriminately conveyed to them on the uniforms worn by on duty Hospital employees." ((5th Cir. 2006) 467 F.3d 427, 441; see also *L.A. Alliance For Survival v. City of Los Angeles*, (2000) 22 Cal.4th 352, 379 [applying intermediate scrutiny to an ordinance prohibiting solicitation of captive audiences in locations such as buses and subways].)

Residents of long-term residential care facilities, who both live *and* receive medical care in these facilities, are thus *doubly* captive under the reasoning of *Rowan and Madsen*. The Court of Appeal recognized this:

> Long-term care facility residents are analogous to citizens in their homes. There is little doubt that many—if not all—residents who have expressed a pronoun preference are an unwilling audience for repeated and willful misgendering, if it should occur, and they have little, if any, ability to simply avoid harassing or discriminatory speech.

(*Taking Offense*, *supra*, 66 Cal.App.5th at p. 714.) Unfortunately, having recognized long-term care facility residents as uniquely captive, the Court of Appeal went on to misapply captive audience doctrine in three critical ways.

First, the court erred in finding that long-term care facility *employees* "are not readily able or expected to go elsewhere to express their views." (*Taking Offense*, *supra*, 66 Cal.App.5th at p. 715.) The employees at these facilities, unlike the residents, remain free to leave the facility and express

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their views elsewhere. Justice Werdegar's concurrence in *Aguilar* made this important point. She noted that the speaker in that case was free to express his racist views in any other public forum, including "in his home, on the sidewalk, in the park, in his local restaurant or on the Internet." (*Aguilar*, *supra*, 21 Cal.4th at p. 164). Similarly here, nothing in SB 219's pronouns provision prevents employees of long-term care facilities from expressing transphobic, sexist, or homophobic views anywhere they like, as long as at work they use the correct name and pronoun of their residents. As this Court has previously held and a plurality repeated in *Aguilar*, "the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs." (*In re M.S.* (1995) 10 Cal.4th 698, 710.) Nothing in SB 219 prevents workers from engaging in public dialogue about gender identity, from seeking to persuade legislators or fellow citizens that laws like SB 219 are misguided, or even from voicing views about gender that others find offensive. Put differently, the First Amendment rights of long-term care facility employees are not meaningfully infringed here.

Second, and relatedly, the Court of Appeal erred by concluding that the interests of the speakers in this case—long-term care facility employees—outweighed the interests of the captive-audience listeners—

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LGBT residents in long-term care facilities. This runs contrary to the entire line of captive audience cases, the whole point of which is to proscribe otherwise permitted speech when the audience cannot avoid exposure. The United States Supreme Court has concluded that a politician's interest in campaigning did not outweigh the interests of riders on a transit system (see *Lehman*, *supra*, 418 U.S. at p. 304); that marketers' interests in advertising did not outweigh the interests of individuals in their homes (see *Rowan*, *supra*, 397 U.S. at p. 737); and that antiabortion activists' interest in picketing did not outweigh the interests of medical facility patients (see *Madsen*, *supra*, 512 U.S. at p. 768). LGBT seniors in long-term care facilities are even more captive than transit riders, who are exposed to unwanted messages for only a limited period of time during their commutes. And the emotional distress and offense experienced by these seniors is greater than that experienced by either transit riders or residents receiving unwanted mail at home, warranting greater protection. Indeed, the interests of LGBT seniors are most akin to those of the patients in *Madsen*, whose psychological well-being was threatened by receiving unwanted messages in a medical care setting. (See *Madsen*, *supra*, 512 U.S. at p. 768.) The Supreme Court's conclusion in all these cases that the captive audience's interests outweighed speakers' interests compels an analogous result in this case.

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Third, the Court of Appeal failed to see that its misapplication of the captive audience doctrine would gravely endanger whole swaths of antidiscrimination law. Laws such as FEHA and Title VII require that individuals in the workplace refrain from speech amounting to discrimination. (See *Aguilar*, *supra*, 21 Cal.4th at pp. 141-42; *R.A.V.*, *supra*, 505 U.S. at p. 383.) By suggesting that "the First Amendment rights of employees in their workplace" outweigh the needs of captive listeners, the Court of Appeal ignored important contexts in which courts have long held otherwise. (*Taking Offense*, *supra*, 66 Cal.App.5th at p. 715.) A speaker cannot make statements denying equal access to public accommodation (see *Daniel v. Paul* (1969) 395 U.S. 298, 300), expressing racial preferences in the rental of housing (see *Trafficante v. Metropolitan Life Ins. Co.* (1972) 409 U.S. 205, 208), or creating a hostile workplace environment (see *Aguilar*, *supra*, 21 Cal.4th at pp. 141-42). By applying strict scrutiny to SB 219, the Court of Appeal prioritized the protection of the speaker's speech in a manner contrary to both the captive audience doctrine and well-established antidiscrimination protections.

C. Facial challenges to SB 219's pronouns provision are doomed under the overbreadth doctrine

The lower court's strict scrutiny analysis was misguided, as stated above, because the object of SB 219's pronouns provision is verbal conduct, *see* Section A, that is aimed at a captive audience, *see* Section B.

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But *even if* this Court were to conclude—as did the Court of Appeal—that the statute potentially reaches a mix of protected speech and unprotected speech or conduct, strict scrutiny would *still* be the wrong framework to employ. Instead, an overbreadth analysis would then be required.

1. Strict scrutiny and overbreadth analysis apply in different contexts

The distinction between strict scrutiny and overbreadth analysis is of paramount importance, yet it is often misunderstood by courts and commentators.[10] This Court could use the present case to provide much needed guidance on when to employ each approach.

When a statute regulates <u>only</u> protected expression, strict scrutiny asks whether the statute does so in a way that is narrowly tailored to further a compelling government interest. (See *Reed*, *supra* 576 U.S. at p. 163.) If the statute is not narrowly tailored to further a compelling government interest, it must be facially invalidated. (*Ibid.*) Overbreadth analysis, by contrast, applies when a statute regulates a *mix* of protected expression <u>*and*</u> unprotected speech or conduct. It asks how far the regulation potentially reaches beyond the speech and conduct that is legitimately proscribed.

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[10] See generally Marc Rohr, *Parallel Doctrinal Bars: The Unexplained Relationship Between Facial Overbreadth and "Scrutiny" Analysis in the Law of Freedom of Speech* (2019) 11 Elon L.J. 95. Here, the Court of Appeal sidestepped the distinction entirely, failing to offer any justification at all for applying strict scrutiny's overinclusiveness test rather than the distinct line of doctrine regarding overbreadth.

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A facial challenge is allowed only if the overreach is substantial compared to "the statute's plainly legitimate sweep." (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 615.)

A good example of strict scrutiny appropriately applied in the free speech context comes from *Keenan v. Superior Court of Los Angeles County*, where this Court considered the constitutionality of California's "Son of Sam" law. ((2002) 27 Cal. 4th 413, 415-416.) This Court correctly applied strict scrutiny there because the law solely regulated protected speech: expressive works (*e.g.*, a movie, book, or magazine) about one's past crimes. The *Keenan* Court struck down the law because, although the state had a compelling interest in compensating crime victims, the law was "calculated to confiscate all income from a wide range of protected expressive works by convicted felons, on a wide variety of subjects and themes, simply because those works include substantial accounts of the prior felonies." (*Id.* at p. 418; see also *Simon & Schuster v. Members of N.Y. State Victims Crime Bd.* (1991) 502 U.S. 105 [applying strict scrutiny to an analogous New York law and finding it similarly overinclusive]). In other words, the "Son of Sam" law was not narrowly tailored.

The point of strict scrutiny is to ensure that a law that regulates protected speech is justified in doing so. This requires both a compelling interest behind the regulation and a close fit between the interest and the regulation enacted to meet it. Laws that regulate more speech than

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needed—those that are *overinclusive*—limit expression unnecessarily. But overinclusive laws also suggest another constitutional worry—and, importantly, so do *underinclusive* laws that regulate *less* speech than the allegedly compelling interest merits. Overinclusive and underinclusive restrictions alike "raise[] serious doubts about whether the government is in fact pursuing the interest it invokes." (*Brown v. Entertainment Merchants Ass'n*, (2011) 564 U.S. 786, 802; see also *Williams-Yulee v. Florida Bar* (2015) 575 U.S. 433, 449 ["Underinclusiveness can also reveal that a law does not actually advance a compelling interest."].) This is why a law found not to be narrowly tailored must be invalidated in its entirety: the government's very purpose for regulating protected expression has been called into question

Not to be confused with *overinclusion*, *overbreadth* analysis applies when a statute that regulates unprotected speech or conduct potentially also extends to protected expression. Instead of smoking out pretextual or less-than-compelling governmental interests, overbreadth analysis separates wheat from chaff: that which the federal and state constitutions guard (protected speech) from that which the government is largely free to regulate (unprotected speech or conduct). The point of the overbreadth doctrine is to ensure that laws are not drafted in a way that, perhaps inadvertently, substantially sweeps in protected speech.

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Overbreadth analysis asks whether a regulation's potential effects on protected speech should be dealt with on a case-by-case basis or whether they are substantial enough to justify striking down the regulation in its entirety. As the U.S. Supreme Court has long instructed, an overbroad statute should be facially struck down *only if* the portion that regulates protected speech or conduct—the "overbreadth"—is substantial, "judged in relation to the statute's plainly legitimate sweep." (*Broadrick, supra,* 413 U.S. at p. 615; see also Chemerinsky, Constitutional Law, Principles and Policies (6th ed., 2019) at pp. 1027–32 [summarizing the substantive aspect of overbreadth doctrine as saying that "in an area where the government can regulate speech, such as obscenity, a law that regulates much more expression than the Constitution allows to be restricted will be declared unconstitutional"].)

Overbreadth analysis can be applied in two contexts. First, it applies to laws that regulate unprotected speech alongside potentially protected speech. For example, the U.S. Supreme Court in *Broadrick* considered the constitutionality of an expansive statute that regulated "a broad range of political activities and conduct" on the part of state employees, from partisan political activities like addressing political caucuses and conventions that the Court found unquestionably regulable to "arguably protected conduct" like the use of bumper stickers. (See *Broadrick*, *supra*, 413 U.S. 601 at pp. 603, 617-18). Finding the latter, hypothetical

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applications insignificant in comparison to the former, legitimate ones, the Court refused to find the regulations in question unconstitutional on their face. (*Ibid.*) Similarly, the Court in *Schad v. Borough of Mount Ephrain* considered the constitutionality of a municipal code that prohibited "live entertainment, including nude dancing." ((1981) 452 US 61, 65, quotations omitted.) The Court in that case struck down the entire law because it "totally exclude[d] *all* live entertainment, including nonobscene nude dancing that is otherwise protected by the First Amendment." (*Id.* at p. 76.) In other words, the "overbreadth" of the statute, *i.e.* the prohibition of all live entertainment (including much protected speech), was substantial "in relation to the statute's plainly legitimate sweep," *i.e.*, prohibiting obscene nude dancing (unprotected expression). (*Broadrick, supra,* 413 U.S. at 615.)

Second, courts apply the overbreadth analysis to laws that regulate potentially protected speech alongside regulable *conduct*. In *In re Bushman*, for example, this Court upheld a "breach of the peace" statute because it was clear from the text that it criminalized only "acts that are themselves violent or that tend to incite others to violence," *i.e.*, unprotected conduct. ((1970) 1 Cal.3d 767, 773.) The Court was therefore comfortable that the statute did not abridge protected speech. Similarly, this Court also applied the overbreadth analysis to uphold a statute prohibiting the knowing filing of a false charge of police misconduct

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(unprotected conduct) because it was clear the statute "d[id] not apply to [all accusations] of misconduct against police officers" (*i.e.* protected speech). (*People v. Stanistreet*, (2002) 29 Cal.4th 497, 501).

2. Overbreadth analysis applies in this case

This case clearly merits use of the overbreadth analysis, not strict scrutiny. As the Court of Appeal itself recognized, SB 219's pronouns provision is primarily aimed at unprotected conduct: the willful and repeated misgendering of LGBT seniors in long-term care facilities. (See *Taking Offense*, *supra*, 66 Cal.App.5th at p. 720 [misgendering "amount[s] to actionable harassment or discrimination as those terms are legally defined"]; *id.* at p. 708 [citing *Aguilar* for the proposition that regulations of "harassing speech . . . do[] not run afoul of the First Amendment"].)

While Respondent in this case has not identified any of its members whose protected speech has been chilled, or even any members who are subject to this statute at all, the court below imagined situations in which the statute might *potentially* restrict the protected speech of long-term care facility employees. The court's hypotheticals included "occasional, isolated, [or] off-hand" instances of misgendering and misnaming, ones that occur without residents' awareness, or those that do not impact residents' access to care. (*Taking Offense*, *supra*, 66 Cal. App. 5th at p. 720.) Regulating these situations, the Court of Appeal said, was unnecessary to advance the State's admittedly compelling interest in "rooting out

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discrimination against LGBT residents of long-term care facilities." (*Ibid*.) This it is not just untrue but inapposite: the question under overbreadth analysis is not whether the court can imagine applications of the statute to protected speech, but whether those applications are substantial in relation to the statute's clearly allowable regulation of unprotected speech or conduct. A facial challenge can survive only if the answer to this latter question is yes.

3. SB 219's pronouns provision is not overbroad, especially when properly construed

SB 219's pronouns provision is a "statute whose legitimate reach dwarfs its arguably impermissible applications." (*New York v. Ferber*, (1982) 458 U.S. 747, 773.) Indeed, "the[] arguably impermissible applications of the statute amount to [no] more than a tiny fraction of the [speech] within the statute's reach." (*Ibid*.) Properly applied, overbreadth analysis thus dooms Taking Offense's facial challenge to SB 219.

But even if this Court were to find otherwise, facial invalidation of the law *still* would not be the proper response. Instead, the Court should simply construe the statute in a way that forecloses any of its hypothetical applications to protected expression. (See *Broadrick*, *supra*, 413 U.S. 601 at p. 613 ["Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."]) As this Court has made clear, California "courts possess the authority, in

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appropriate cases, 'to remedy a constitutional defect by literally rewriting statutory language' when doing so is 'more consistent with legislative intent than the result that would attend outright invalidation.'" (*Kopp v. Fair Political Practices Com.* (1995) 11 Cal.4th 607, 643 [quoting *Arp v. Workers' Compensation Appeals Bd.* (1977) 19 Cal. 3d 395, 407-08].)

In this case, any rewriting needed would be minimal. The Court of Appeal's sole basis for invalidating the statute was an imagined case in which the statute were read to "criminaliz[e] occasional, off-hand, or isolated instances of misgendering, that need not occur in the resident's presence and need not have a harassing or discriminatory effect on the resident's treatment or access to care." (*Taking Offense*, *supra*, 66 Cal.App.5th at p. 721.) SB 219's text, however, need not be read so broadly. Each of the Court of Appeal's four specific worries are easily avoided.

First, the Court of Appeal expressed concern that SB 219' pronouns provision potentially criminalizes "even occasional, isolated, off-hand instances of willful misgendering— provided there has been at least one prior instance." (*Taking Offense*, *supra*, 66 Cal.App.5th at p. 720.) But the statute's text requires employees of long-term care facilities to refrain from "willfully and repeatedly" misgendering LGBT senior residents, proscribing only patterns of behavior, not just stray or isolated remarks. (Health & Saf. Code, § 1439.51(a).)

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Second, the Court of Appeal worried that the statute does not require "that such occasional instances of misgendering amount to harassing or discriminatory conduct." (*Taking Offense*, *supra*, 66 Cal.App.5th at p. 721.) This is simply incorrect. The statute prohibits misnaming and misgendering only when it occurs "wholly or partially *on the basis of* a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status" (emphasis added)—which is to say, when it amounts to discriminatory conduct in housing, health care, and public accommodation based on a statutorily and, in most cases, constitutionally protected ground. (Health & Saf. Code, § 1439.51(a).)

Third, the Court of Appeal found the statute to be insufficiently tailored because it does not require that "the misgendering at issue here negatively affect any resident's access to care or course of treatment." (*Taking Offense*, *supra*, 66 Cal.App.5th at p. 720.) The extent to which a long-term care facility's employees' discriminatory conduct negatively affects LGBT senior residents' care is a factor explicitly written into the statute's penalty provision. (See *id*. at p. 704, n.4 [listing among the non-exclusive list of factors for the court to consider when determining punishment "[w]hether the violation had a direct or immediate relationship to the health, safety, or security of the patient" (quoting Health & Saf. Code § 1290)].) The Legislature explicitly envisioned lesser punishment when a

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staff member's actions less negatively affect residents' care. A limiting construction of the statute that would require at least some showing of a negative effect on care would thus be consistent with legislative intent, were this Court to believe that some hypothetical category of nonharmful yet discriminatory workplace conduct were constitutionally protected.

Fourth, the Court of Appeal objected that the statute does not require that residents be aware of being misgendered for a violation to occur. It would be feasible for courts to read an awareness requirement into the statute were that deemed necessary to avoid the drastic step of invalidation. But it is also probably unnecessary to do so for two reasons. First, insofar as misgendering which takes place out of residents' earshot affects their care, prohibiting it is no different than, for example, prohibiting racist or sexist considerations that are voiced in a hiring meeting, a university admissions office, or jury deliberations, as antidiscrimination law routinely (and constitutionally) does. And second, insofar as intentional misgendering of patients by their caretakers violates the patients' medical privacy, the location of the violation is irrelevant to the harm SB 219 seeks to prevent.

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III. CONCLUSION

For the foregoing reasons, and those stated by the State of California and other amici, this Court should reverse the Court of Appeal and affirm the trial court's judgment.

Dated: July 25, 2022

Respectfully submitted,

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Dated: July 25, 2022

/s/ Sharif E. Jacob
Sharif E. Jacob

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