No. S270535

In the Supreme Court of the State of California

TAKING OFFENSE,
Plaintiff and Appellant,

v.

STATE OF CALIFORNIA,
Defendant and Respondent.

Third Appellate District, Case No. C088485
Sacramento County Superior Court,
Case No. 34-2017-80002749-CU-WM-GDS
The Honorable Steven Gevercer, Judge

OPENING BRIEF ON THE MERITS

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PARTIES TO THE PROCEEDING

Taking Offense is the plaintiff and appellant. The defendants and respondents are the "California Attorney General, Department of Social Services, and Department of Public Health." (Joint Appendix (JA) 186.) As noted in the petition for review (see PR 8, fn. 1), the superior court substituted these entities for the original named defendant, "the State of California."[1] The Court may wish to update the case caption to reflect that substitution. (Cf., e.g., *Fox v. State Personnel Board* (1996) 49 Cal.App.4th 1034, 1034, fn. 1 [amending case caption "in the interests of accuracy"].)

[1] Taking Offense brought this action against the State of California. (JA 3.) The State requested dismissal on the ground that it was improper to sue the State itself, as distinct from its agencies or officers. (JA 98.) The superior court agreed that Taking Offense's claims must be brought "against a particular agency," not "the 'State.'" (JA 186.) But rather than dismissing the action, the court allowed Taking Offense to substitute the Attorney General and the Departments of Social Services and Public Health as respondents. (*Ibid.*; see JA 142.)

ISSUE PRESENTED

Section 1439.51, subdivision (a)(5), of the Health and Safety Code, enacted in 2017 as part of the Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents' Bill of Rights, prohibits staff at long-term care facilities from discriminating against a transgender resident by "[w]illfully and repeatedly fail[ing] to use [the] resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns."

The issue presented is whether the Court of Appeal, in a pre-enforcement, taxpayer standing-based challenge, erred in facially invalidating this nondiscrimination measure on First Amendment grounds.

INTRODUCTION

In 2017, the Legislature collected and considered evidence that lesbian, gay, bisexual, and transgender (LGBT) residents in long-term care facilities—typically seniors—are highly vulnerable and often subjected to discrimination. The Legislature found that one common form of discrimination is "misgendering": referring to a transgender person by the wrong name or pronouns. Much like racial or ethnic slurs, deliberate misgendering can be demeaning, cruel, and deeply traumatizing, negating a core aspect of the targeted individual's identity and denying that person basic respect as a human being.

In response, the Legislature enacted the LGBT Long-Term Care Facility Residents' Bill of Rights or "S.B. 219." Among other things, it added a new provision to the Health and Safety Code prohibiting intentional misgendering of residents by long-term

care facilities and their staff. The prohibition applies only when a facility or staff member has been "clearly informed" of the resident's name or pronouns, and only when a staff member's misgendering is "willful[]," "repeated[]," and "on the basis" of the resident's LGBT status. Following S.B. 219's enactment, long-term care facilities across the State have moved to comply, training their staff members on how to provide the care and respect to which LGBT residents are legally entitled.

Seeking to prevent that progress before it could even begin, plaintiff Taking Offense filed a pre-enforcement facial challenge to S.B. 219's misgendering provision shortly after the Governor signed the statute into law. According to its complaint, Taking Offense is an unincorporated association that objects on policy grounds to certain LGBT nondiscrimination measures. It does not allege that it owns or operates a long-term care facility or that any of its members is a staff member subject to the statute. Taking Offense asserts standing to seek pre-enforcement facial relief on the ground that one of its members is a California resident and taxpayer who objects to the possibility that tax dollars may one day be used to fund enforcement of the challenged provision. On the merits, Taking Offense contends that the provision violates the First Amendment rights of long-term care facilities and staff members. The superior court denied relief, but the Court of Appeal reversed, invalidating the prohibition against willful, repeated misgendering on its face.

That was a serious departure from ordinary norms of constitutional litigation. Litigants must generally be personally

and concretely affected by a statute to have standing to challenge its constitutionality. Respondents did not contest standing before the lower courts, but as explained in their petition for review, standing is a jurisdictional issue that the Court may—and should—address in the first instance. If Taking Offense were deemed to have standing here, there would be no meaningful limit on the ability of any state resident to seek the pre-enforcement facial invalidation of any newly enacted statute on any state or federal constitutional grounds. That far-reaching result cannot be reconciled with this Court's consistent recognition that California standing doctrine, while more permissive than its federal counterpart, is not boundless. The Court should order the case dismissed for lack of jurisdiction.

If, however, the Court reaches the merits, it should hold that facial invalidation is unwarranted. Facial relief is generally appropriate only where a statute is invalid in all or substantially all applications. That is far from the case here. S.B. 219's prohibition of willful, repeated misgendering serves the compelling government interest of protecting vulnerable transgender long-term care residents from verbal discrimination in the facilities where they live. In that respect, the misgendering provision is materially indistinguishable from nondiscrimination laws forbidding similar forms of verbal discrimination (such as racial slurs and sexual harassment) in settings where victims cannot reasonably avoid that harmful speech (such as the workplace). This Court has upheld such laws against First Amendment challenge. It should do the same here.

STATUTORY BACKGROUND

Transgender people "disproportionately face discrimination, harassment, and violence" in virtually all areas of life, "including housing, education, employment, health care, and law enforcement." (Stats. 2017, ch. 853, § 2, subd. (e), p. 6321.) According to the National Transgender Discrimination Survey, for example, "mistreatment at work is a near universal experience for transgender and gender non-conforming people." (Grant et al., Injustice at Every Turn (2011) p. 56.)[2] Transgender people also frequently experience discrimination in places such as schools, medical settings, and retail stores. (*Id.* at pp. 33, 72, 124.) And the Legislature recently found that "[o]ne in five transgender adults" "ha[s] attempted suicide—a rate six times that of the state's adult cisgender population." (Stats. 2020, ch. 181, § 1, subd. (d), p. 2876.)

In 2017, the California Legislature gathered and reviewed evidence "that discrimination against LGBT people"—transgender persons, in particular—is an especially "serious problem in California's long-term care facilities." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 219 (2017-2018 Reg. Sess.) as amended Sept. 13, 2017, p. 6.) Residents in such facilities, typically elderly individuals, "are particularly vulnerable because they must rely on others for necessary care and services, and may no longer enjoy the privacy

[2] Available at <https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf> (as of Feb. 8, 2022).

of having their own home or even their own room." (Stats. 2017, ch. 483, § 1, subd. (b), p. 3637.) In a 2011 nationwide survey of long-term care residents, "43 percent of respondents reported personally witnessing or experiencing instances of mistreatment of LGBT seniors in a long-term care facility," including "being refused admission or readmission, being abruptly discharged, verbal or physical harassment from staff, staff refusal to accept medical power of attorney from the resident's spouse or partner, discriminatory restrictions on visitation, and staff refusal to refer to a transgender resident by his or her preferred name or pronoun[s]." (*Id.*, subd. (c), citing National Senior Citizens Law Center, Stories from the Field: LGBT Older Adults in Long-Term Care Facilities.)[3] In a similar study focusing on long-term care residents living in San Francisco, "[n]early one-half of the participants . . . reported experiencing discrimination in the prior 12 months because of their sexual orientation or gender identity." (*Id.*, subd. (d), citing Fredriksen-Goldsen et al., Addressing the Needs of LGBT Older Adults in San Francisco (2013).)[4]

In response, the Legislature enacted the LGBT Long-Term Care Facility Residents' Bill of Rights, or "S.B. 219." The statute bars discrimination against residents of long-term care facilities

[3] Available at <https://justiceinaging.org/wp-content/uploads/2015/06/Stories-from-the-Field.pdf> (as of Feb. 8, 2022).

[4] Available at <https://depts.washington.edu/agepride/wordpress/wp-content/uploads/2013/07/SF-LGBTOlderAdults FINAL7-10-13.pdf> (as of Feb. 8, 2022).

"wholly or partially on the basis of [the resident's] actual or perceived sexual orientation, gender identity, gender expression, or [HIV] status." (Health & Saf. Code, § 1439.51, subd. (a).) In particular, it prohibits facilities and their staff from "[d]eny[ing] admission" to an individual or "discharg[ing] or evict[ing] a resident" on the basis of that person's LGBT status (*id.*, subd. (a)(1)); "assigning, reassigning, or refusing to assign a room to a transgender resident other than in accordance with the transgender resident's gender identity" (*id.*, subd. (a)(3)); and among other things, "[p]rohibit[ing] a resident from using . . . a restroom available to other persons of the same gender identity" (*id.*, subd. (a)(4)).[5]

S.B. 219 also prohibits two forms of discriminatory, harassing behavior that experts have found to be especially harmful to transgender and gender non-conforming people: the intentional refusal to use a name consistent with a person's gender identity (such as by using the person's birth name or another former name that the person no longer uses, often called

[5] Staff members subject to the statute include "all individuals employed by or contracted directly with the facility." (Health & Saf. Code, § 1439.50, subd. (f).) "Long-term care facilities" include residential care facilities for the elderly (often referred to as "retirement homes" or "assisted living facilities"), as well as intermediate care facilities and skilled nursing facilities (often referred to as "nursing homes"). (See *id.*, § 1439.50, subd. (e); see Letter of Amici Curiae Cal. Com. on Aging et al., Sept. 13, 2021, pp. 5-6.) Residential care facilities for the elderly "are non-medical facilities"; skilled nursing and intermediate care facilities "provide different levels of health care." (Sen. Rules Com., Off. of Sen. Floor Analyses, *supra*, p. 6.)

"deadnaming"), and the intentional use of the wrong pronouns. (See Health & Saf. Code, § 1439.51, subd. (a)(5).) These deliberate refusals to recognize a person's gender identity, referred to throughout this brief as "misgendering," can "trigger distress and despair." (E.g., Bennett, *Pioneering Care for Transgender People* (2018) 49 American Psychological Assn. Monitor on Psychology 84.)[6] Indeed, misgendering can lead to "suicidal ideation, psychological distress, and substance abuse" and can be especially distressing for "[t]ransgender older adults, particularly those who [have] transition[ed] later in life," because of the knowledge that they have "limited time . . . to live in their authentic gender." (Letter of Amici Scholars in Social Work, Gerontology, and Social Science, Sept. 1, 2021, pp. 8-9.)[7] Accordingly, "[r]esearch and practitioner guidelines in medicine, nursing, public health, social work, psychology, and gerontology overwhelmingly suggest that clinicians, practitioners, and social service providers should use the affirmed gender pronouns and names" of long-term care residents. (*Id.* at pp. 10-11.)[8]

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[6] Available at <https://www.apa.org/monitor/2018/11/care-transgender> (as of Feb. 8, 2022).

[7] Citing, e.g., Lelutiu-Weinberger et al., *The Roles of Gender Affirmation and Discrimination in the Resilience of Transgender Individuals in the U.S.* (2020) 46 Behavioral Medicine 175, 175-183.

[8] Citing, e.g., American Psychological Assn., Guidelines for Psychological Practice with Transgender and Gender Nonconforming People (2015) pp. 838-840 <https://www.apa.org/practice/guidelines/transgender.pdf> (as of Feb. 8, 2022); see also *Murphy v. Twitter, Inc.* (2021) 60 Cal.App.5th 12, 21 (describing

(continued…)

In line with that "overwhelming[]" expert consensus, the Legislature prohibited long-term facilities and their staff members from "[w]illfully and repeatedly fail[ing] to use a resident's preferred name or pronouns." (Health & Saf. Code, § 1439.51, subd. (a)(5).) For the prohibition to apply, the staff member or facility must be "clearly informed of the preferred name or pronouns." (*Ibid.*) And the staff member or facility must act "wholly or partially on the basis of [the resident's] actual or perceived sexual orientation, gender identity, gender expression, or [HIV] status." (*Id.*, subd. (a).)[9]

S.B. 219 was intended to clarify, rather than change, the law. As the Legislature recognized, "state and local laws already prohibit discrimination" against LGBT people in public accommodations and other settings. (Stats. 2017, ch. 483, § 1,

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(…continued)

Twitter's prohibition of posts "targeting individuals with repeated slurs, tropes or other content that intends to dehumanize, degrade or reinforce negative or harmful stereotypes," including by "misgendering or deadnaming . . . transgender individuals").

[9] People who are not transgender may also "experience the intentional misuse of their names and pronouns, particularly those who are (or are perceived as) lesbian, gay, bisexual, or gender nonconforming." (Letter of Amici Equality California et al., Sept. 14, 2021, p. 6.) Willful, repeated misgendering on that basis violates S.B. 219 as well. (See Health & Saf. Code, § 1439.51, subd. (a)(5); cf., e.g., Stories from the Field: LGBT Older Adults, *supra*, p. 14 [discussing case of a lesbian long-term care resident who had "gone by the name 'Rusty' her entire adult life," and preferred that name, but was willfully and repeatedly called "Hazel," her birth name, by facility staff].)

subd. (e), p. 3638; see Sen. Rules Com., Off. of Sen. Floor Analyses, *supra*, pp. 2-3.) The Unruh Civil Rights Act, for example, bars "all business establishments of every kind whatsoever," including long-term care facilities, from discriminating on the basis of "sexual orientation" or "gender identity or gender expression." (Civ. Code, § 51, subds. (b), (e)(5).) The Fair Housing and Employment Act similarly prohibits discrimination on the basis of LGBT status by "the owner of any housing accommodation," including a long-term care facility. (Gov. Code, § 12955, subd. (a).) And the Health and Safety Code prohibits long-term care facilities from discriminating against residents based on their "actual or perceived sexual orientation, or actual or perceived gender identity." (E.g., Health & Saf. Code, § 1569.269, subd. (b).)[10] By enacting S.B. 219, the Legislature sought "to accelerate the process of freeing LGBT residents and patients from discrimination, . . . by *specifying* prohibited discriminatory acts in the long-term care setting"—that is, by removing any doubt that certain forms of anti-LGBT discrimination, including willful, repeated misgendering, were and remain unlawful. (Stats. 2017, ch. 483, § 1, subd. (e), p. 3638, italics added.)

Consistent with that intent, the Legislature did not enact any new enforcement provisions specific to S.B. 219. Rather, it "limit[ed]" penalties for S.B. 219 violations "to what is already

[10] See also *id.*, § 1599.1; 22 Cal. Code Regs., tit. 22, § 72527, subd. (a)(8); *id.*, § 73523, subd. (a)(12).

enforceable under existing law." (Sen. Rules Com., Off. of Sen. Floor Analyses, *supra*, p. 7.) Specifically, violations of S.B. 219 are subject to "civil and criminal penalties" under general Health and Safety Code remedial provisions. (*Ibid.*)[11] Licensed entities operating long-term care facilities, for example, are subject to the same civil and administrative penalties for staff violations of S.B. 219 that they may face when their staff violate myriad other statutes and regulations, such as those requiring facilities and staff to "treat[] each patient with dignity and respect; provid[e] each patient with good hygiene, such as care of skin, grooming of hair, and cutting of fingernails; provid[e] clean dry skin free of feces and urine; and regularly chang[e] bed linen[s]." (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 292; see Health & Saf. Code, §§ 1294, 1423-1425; *id.*, §§ 1569.49, 1569.50.) Similarly, individual staff members and facility administrators are subject to the same misdemeanor-level criminal penalties—as well as the same administrative penalties, such as license revocation—for S.B. 219 violations that they may face for many other forms of abuse and neglect at long-term care facilities. (See, e.g., Health & Saf. Code, §§ 1290 [authorizing misdemeanor actions against certain facility staff], 1569.40 [same], 1294 [authorizing license suspension and

[11] See Health & Saf. Code, § 1439.54 ("A violation of this [statute] shall be treated as a violation under Chapter 2 [governing "Health Facilities"], Chapter 2.4 [governing "Long-Term Health Facilities"], or Chapter 3.2 [governing "Residential Care Facilities for the Elderly"].").

revocation against certain licensees]; 1337.9, subd. (b) [same with respect to licensed nurses]; 1569.58, subd. (a)(1) [authorizing the State to prohibit certain facilities "from employing" staff members who violate restrictions on abuse and neglect of long-term care residents].)[12]

Following S.B. 219's enactment, facilities subject to the statute and other stakeholders have taken a number of steps to ensure that the law's protections are honored and implemented. For example, the California Assisted Living Association, a trade association representing over 660 assisted living facilities across the State, endorsed the statute and announced plans to "prepar[e] detailed compliance" guidelines to ensure that LGBT seniors would receive "warm, welcoming environments." (Cal. Assisted Living Assn., *2017-2018 Legislation: S.B. 219*.)[13] The California Association of Health Facilities, a trade association representing 900 skilled nursing facilities and 450 intermediate care facilities, likewise stressed the importance of "delivering care that is person-centered and sensitive to the needs of all residents," regardless of sexual orientation or gender identity.

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[12] Current or former residents may also bring civil damages actions under Health and Safety Code, section 1430, subdivision (b), against certain facilities that violate S.B. 219—just as current or former residents may bring such actions for violations of "any other right provided for by federal or state law or regulation." (*Id.*, § 1430, subd. (b).)

[13] Available at <http://caassistedliving.org/advocacy/advocacy-history/2017-2018-legislation/> (as of Feb. 8, 2022); see also Cal. Assisted Living Assn., *About U*s <http://caassistedliving.org/ about-cala/> (as of Feb. 8, 2022).

(Press Release, Cal. Assn. of Health Facilities, Free LGBT Training for Long Term Care Workers (July 2, 2018).)[14] The association also offered and promoted "a free, on-demand webinar to skilled nursing employees to educate workers on the specific needs of residents who identify as lesbian, gay, bisexual and transgender." (*Ibid.*)[15] And institutional partners of the Gerontology Advisory Council, "a broad coalition of . . . long-term care facility administrators, resident advocates, and academics focused on gerontology," "crafted detailed compliance information for hundreds of facility administrators to help them train thousands of staff in providing nondiscriminatory care to LGBT residents across the State of California." (Letter of Amicus Gerontology Advisory Council, Sept. 13, 2021, pp. 1-2.)

STATEMENT OF THE CASE

Plaintiff and appellant Taking Offense is an unincorporated association of individuals who oppose certain LGBT nondiscrimination laws and policies on the ground that "sex is immutable, fixed by genetic realities such as the presence of XX or XY chromosomes in every cell of a person's body . . . and by reproductive capacity." (AOB 1.) In December 2017, about one

[14] Available at <https://www.cahf.org/Resources/Media-Center/Press-Releases/Free-LGBT-Training-Available-for-Long-Term-Care-Workers> (as of Feb. 8, 2022) (statement of Craig Cornett, Cal. Assn. of Health Facilities CEO/President).

[15] See also Cal. Assn. of Health Facilities, *About* <https://www.cahf.org/About> (as of Feb. 8, 2022).

month before S.B. 219 took effect, Taking Offense filed a petition in superior court seeking pre-enforcement facial invalidation of the misgendering provision's "preferred pronouns clause." (Joint Appendix (JA) 62, ellipsis and internal quotation marks omitted; see JA 2, 55.) As relevant here, Taking Offense did not challenge the statute's "protections regarding use of the resident's preferred *name*." (JA 191, fn. 5, italics added; see APR 20.) According to Taking Offense, the "preferred pronouns clause" is facially invalid under the First Amendment's free speech, free exercise, and establishment clauses, the equal protection clause, and the due process clause. (See, e.g., JA 47-85, 187-195.)[16]

In its petition, Taking Offense invoked Code of Civil Procedure, sections 1084-1086, authorizing "beneficially interested" persons to obtain a writ of mandate, as well as section 526a, which provides standing to certain taxpayers "to obtain a judgment . . . restraining and preventing any illegal expenditure of . . . funds [by] . . . a local agency." (See JA 4.) According to Taking Offense, "at least one" of its members is a "California citizen and taxpayer" who objects to paying taxes that might one day be used to fund enforcement of the misgendering provision. (JA 3.) Aside from that bare allegation, there is nothing in the

[16] Taking Offense also challenged the separate S.B. 219 provision concerning room assignments. (Health & Saf. Code, § 1439.51, subd. (a)(3); *ante*, p. 20.) Both the superior court and Court of Appeal rejected that challenge, and Taking Offense did not seek further review in this Court. (See Opinion (Opn.) 27-34.)

record about Taking Offense's membership, activities, or organization.

The superior court denied Taking Offense's request for relief in its entirety. Noting that Taking Offense did not challenge the misgendering provision's "preferred name" clause (JA 191, fn. 5), the court focused on the "preferred pronouns" clause, concluding that it "is narrowly-tailored to serve a significant state interest in preventing discrimination" and thus comports with the First Amendment (JA 192). Invoking this Court's decision in *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 147, the court explained that the State's interest in preventing discrimination "has a particularly strong application against asserted burdens to First Amendment rights where," as in the case of a long-term care facility, "the subject of the regulation is a place of public accommodation, a workplace, and a provider of housing." (JA 191.) The court also stressed that the pronouns clause "is limited in scope": it "prohibit[s] only 'willful' and 'repeated' failures" (JA 188), "makes punishable only conduct that is motivated by [a] resident's actual or perceived sexual orientation, gender identity, gender expression, or [HIV] status" (*ibid.*), and applies only if a staff member or facility engages in willful misgendering of a resident "after clearly being informed" of the resident's pronouns (JA 187).

The Court of Appeal reversed in relevant part. Unlike the superior court, it failed to distinguish between the "preferred name" and "preferred pronouns" clauses and appeared to facially invalidate "Section 1439.51, Subdivision (a)(5)" in its entirety.

(Opn. 6; see opn. 2, 25-27.)[17] The court reasoned that the misgendering provision is a "content-based restriction of speech" subject to strict scrutiny under the First Amendment. (Opn. 15.) Applying that standard, the court agreed with the State that the government "has a compelling interest in eliminating discrimination on the basis of sex" (opn. 21), including on the basis of "sexual orientation or transgender status" (opn. 22). The court also recognized that "[l]ong-term care facility residents are analogous to citizens in their homes" (opn. 18); that the "interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society" (opn. 17, internal quotation marks omitted); and that transgender long-term care residents "have little, if any, ability to simply avoid harassing or discriminatory speech" in the facilities where they live (opn. 18).

The court nonetheless invalidated the misgendering provision on its face. According to the court, the provision would not serve the State's "legitimate and laudable" objectives in cases in which the resident is not "*aware* of the misgendering" (opn. 25)—such as where the discriminatory language is used in a

[17] There is some ambiguity on this score because, at times, the Court of Appeal referred to "section 1439.51, subdivision (a)(5)" as "the pronoun provision" (e.g., opn. 2), even though subdivision (a)(5) contains both the "preferred name" and "preferred pronouns" clauses. For the sake of being comprehensive, and because the Legislature enacted both clauses to serve the same nondiscrimination interests (*ante*, pp. 20-22), respondents generally refer throughout this brief to the "misgendering provision" as a whole.

hallway conversation with other residents, staff, or visitors to the facility. (See opn. 26.) The court also construed the provision to bar "occasional, off-hand, or isolated instances of misgendering." (Opn. 26.) For that reason, the court held that the misgendering provision is "overinclusive" and therefore not "narrowly tailored" (opn. 25), rendering it "facial[ly]" invalid (opn. 2, 5-6; see opn. 25-27). The court did not reach other arguments pressed by Taking Offense, such as its void-for-vagueness challenge under the due process clause. (Opn. 27.)

Justice Robie wrote separately to stress that he recognized the "laudable goal" of the misgendering provision. (Conc. opn. 1.) In his view, however, the Legislature enacted "a prophylactic remedy . . . that just went too far," "unwisely ma[king] misuse of pronouns a crime." (*Ibid.*) Justice Hull concurred on grounds not relevant here. (Conc. opn. 1 [addressing S.B. 219's separate "room assignments provision"]; see *ante*, p. 27, fn. 16.)

SUMMARY OF ARGUMENT

The LGBT Long-Term Care Facility Residents' Bill of Rights, or S.B. 219, bars long-term care facilities and their staff members from discriminating against a transgender resident by willfully and repeatedly failing to use the resident's name or pronouns after being clearly informed of them. As the Legislature recognized in extensive findings adopted alongside the statute, such discrimination was all too common in the State's long-term care facilities, denying and demeaning transgender residents' very identities and subjecting them to serious psychological harm. Since the statute's enactment, facilities across the State have

made progress in addressing such abuse, instituting trainings for thousands of staff members on how to provide nondiscriminatory care to LGBT residents.

The Court of Appeal disrupted that progress by erroneously invalidating S.B. 219's misgendering provision on its face. As a threshold matter, the courts below had no jurisdiction to reach the merits because Taking Offense lacks standing. While respondents did not contest standing below, this Court may address jurisdictional issues, including standing, in the first instance. The Court should do so here. Taking Offense's sole asserted basis for standing to seek pre-enforcement facial relief is that one of its members is a California resident and taxpayer. If that bare assertion were sufficient, there would be no meaningful limits on the ability of any state resident who simply disagrees with a state law or policy to seek pre-enforcement facial invalidation on any constitutional grounds whatsoever.

That result is irreconcilable with the standing requirements that this Court has long applied. Under Code of Civil Procedure, section 1086, plaintiffs must show that they are "beneficially interested" to have standing to obtain mandate relief. Taking Offense cannot satisfy that requirement because it has not suffered (and will not suffer) any concrete, personal injury as a result of S.B. 219's misgendering provision. Nor can Taking Offense satisfy the "public interest" exception to the "beneficial interest" requirement. That exception serves the important purpose of ensuring that standing doctrine does not effectively insulate a law or policy from any prospect of judicial review. But

there is no risk of that here. To the contrary, should any of the State's numerous long-term care facilities and staff members believe that the misgendering provision presents constitutional problems, any of them would have standing to challenge the provision. Trade associations representing such facilities (or organizations, such as unions, representing staff members) would likewise have standing to bring such a challenge. To date, no such challenges have materialized. But that does not suggest any need for a court-made exception to ordinary standing principles; it is simply a reflection of the fact that our system does not contemplate or require a lawsuit for every law.

Taking Offense also fails to show that it has standing under the State's "taxpayer standing" statute, section 526a of the Code of Civil Procedure. Consistent with the 19th and early 20th century tradition that the Legislature intended to codify, section 526a provides standing for taxpayers to bring suit against certain *local* government actors. But Taking Offense has sued only *state-level* entities. Although the Court suggested in passing a half century ago that there may be a *non-statutory* common law-based taxpayer standing doctrine that allows suits against state entities in certain circumstances, the Court has more recently hewed closely to the text of section 526a. In any event, it has never held that any such common law doctrine is expansive enough to authorize Taking Offense's suit here. The Court should order the case dismissed for lack of jurisdiction.

If, however, the Court reaches the merits, it should reverse the Court of Appeal's invalidation of the misgendering provision

on its face. As this and other courts have recognized, the First Amendment does not bar the government from prohibiting verbal discrimination in certain "captive audience" settings—that is, places where victims have no practical ability to avoid unwelcome discriminatory remarks. The government may, for example, validly prohibit racial slurs in the workplace because such discrimination is seriously harmful and workers should not have to quit their jobs to avoid that harm.

The willful, repeated misgendering prohibited under S.B. 219 is not materially different. Like racial epithets, willful, repeated misgendering demeans the targeted individual's identity, causing humiliation, feelings of despair, and serious psychological injury. Just as the government has a compelling interest in barring discrimination on the basis of race, it has a compelling interest in eliminating discrimination on the basis of sex, including on the basis of transgender status or sexual orientation. And just as victims of discrimination cannot avoid racial epithets in their places of work, transgender long-term care residents cannot escape willful, repeated misgendering by the staff at the residential facilities where they live.

The Court of Appeal nonetheless facially invalidated the misgendering provision, concluding that it is "overinclusive" because it bars "occasional, isolated, off-hand instances" of misgendering, as well as misgendering that does not occur in the targeted resident's presence. But far from prohibiting "occasional, isolated, off-hand" misgendering, the statute plainly reaches only "willful," "repeated" misgendering that occurs after

the resident "clearly informs" facility staff of the resident's name or pronouns. And the Legislature had good reason to prohibit willful, repeated misgendering, even if it occurs outside of the targeted resident's presence: allowing such misgendering would foster a hostile, discriminatory environment within the long-term care facility—an environment all but certain to have a detrimental effect on the quality of care and support that long-term care residents receive.

Even if the misgendering provision could be viewed as slightly "overinclusive," however, that would not justify facial invalidation. Where courts have constitutional concerns about hypothetical applications of a statute, the proper approach is to address those concerns, as they arise, on an as-applied basis. Facial invalidation is a disfavored remedy, generally appropriate only where the challenged statute is invalid in all or substantially all of its applications. Because that is far from the case here, the Court should reverse the judgment facially invalidating S.B. 219's bar on willful, repeated misgendering.

ARGUMENT

I. TAKING OFFENSE LACKS STANDING

Taking Offense alleges that "at least one" of its members is a "California citizen and taxpayer" who objects to paying taxes that might one day be used to fund enforcement of the misgendering provision. (JA 3.) On that basis alone, Taking Offense asserts that it has standing to seek pre-enforcement facial invalidation of S.B. 219's misgendering provision—pursuant to either a writ of mandate under Code of Civil Procedure, sections 1084-1086, or

an injunction issued under Code of Civil Procedure, section 526a. Although California's "state Constitution has no case or controversy requirement" akin to the federal Constitution's (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-1248), this Court has nonetheless "recognize[d] the need for limits" on "how and when parties should be entitled to seek relief under particular statutes" (*id.* at p. 1248). Here, Taking Offense cannot satisfy the standing requirements of either statute that it invokes. The Court should order the case dismissed for lack of jurisdiction.[18]

A. Taking Offense lacks standing to seek a writ of mandate—either as a directly interested litigant or on public interest grounds

To have standing to petition for a writ of mandate, litigants are "generally required to have a direct and substantial beneficial interest." (*Weatherford*, *supra*, 2 Cal.5th at p. 1248; see Code of Civ. Proc., § 1086 [writ issued "upon . . . petition of the party beneficially interested"].) That means petitioners "must plead an actual justiciable controversy and have some 'special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.'" (*San Diegans for Open Government v. Public Facilities*

[18] Respondents did not contest Taking Offense's standing below. (See PR 28, fn. 18.) But as noted in the petition for review (*ibid.*), "contentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding" (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361).

Financing Authority of City of San Diego (2019) 8 Cal.5th 733, 738.) In particular, petitioners must show that they have suffered, or will suffer, an injury "that is concrete and actual, and not conjectural or hypothetical." (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 599, internal quotation marks omitted; see *Associated Builders*, *supra*, 21 Cal.4th at p. 362 ["equivalent to the federal 'injury in fact' test"]; see, e.g., *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 170 [standing based on "severe and immediate effect" of challenged ordinance on plaintiff's business].)

Standing requirements, including the "beneficial interest" standard, serve important purposes. They help to ensure that a plaintiff has a sufficient "stake in the resolution of [the] complaint" to "vigorously present his case." (*Harman v. City & County of San Francisco* (1972) 7 Cal.3d 150, 159; see *Weatherford*, *supra*, 2 Cal.5th at p. 1248.) They also help to ensure that the case will present a concrete "set of facts . . . fram[ing] [the issues] with sufficient definiteness to enable the court" to reach an informed decision (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170) and avoid rendering an "advisory opinion" (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912). Absent such standing requirements, the judiciary would threaten to become "a super-legislature, able to overturn a statute enacted by the People's duly elected representatives, despite the absence of any parties who can show that they are being harmed." (*People ex rel.*

Becerra v. Superior Court (2018) 29 Cal.App.5th 486, 497; see *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 801.)

As Taking Offense appears to acknowledge (see, e.g., APR 22-23), it has no "direct and substantial beneficial interest" in the facial invalidation of S.B. 219's misgendering provision. (*Weatherford*, *supra*, 2 Cal.5th at p. 1248.) According to Taking Offense's petition, it is an unincorporated association devoted to the promotion of certain causes and beliefs (*ante*, p. 26); it does not own or operate a long-term care facility subject to S.B. 219. And none of its members is alleged to be a staff member subject to the challenged statute. Taking Offense thus cannot show that it or any of its members has suffered (or will suffer) a concrete and personal injury.

Nor can Taking Offense establish standing under the "judicially recognized" public interest "exception to . . . the usual requirement of a beneficial interest." (*Weatherford*, *supra*, 2 Cal.5th at p. 1249, internal quotation marks omitted.) This exception, also known as the public interest standing doctrine, "protect[s] citizens' opportunity to 'ensure that no governmental body impairs or defeats . . . a public right.'" (*Id.* at p. 1248, quoting *Green v. Obledo* (1981) 29 Cal.3d 126, 144.) Public interest standing allows petitioners to seek mandate relief, "even absent a [beneficial] interest" (*Weatherford*, *supra*, 2 Cal.5th at p. 1249, internal quotation marks omitted), where the challenged government policy would otherwise "be effectively insulated from judicial review" (e.g., *Weiss v. City of Los Angeles* (2016) 2 Cal.App.5th 194, 206).

In *Weiss*, for example, the court held that a motorist had public interest standing to challenge certain city traffic citation-related practices because "typically only a minimal fine is at issue on any individual citation" and "only a short window of time is available" before citations become final. (2 Cal.App.5th at p. 206.) Those factors made it exceptionally difficult for directly affected motorists to "mount[] a challenge." (*Ibid.*; see, e.g., *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 480 [emphasizing that directly "interested individuals would have trouble participating in the litigation due to its size and complexity"]; *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100 [similar]; *People ex. rel Becerra*, *supra*, 29 Cal.App.5th at p. 504 [noting that plaintiffs had not shown, absent public interest standing, that "no one would have standing to seek a remedy for the asserted constitutional violation"]; *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1992) 11 Cal.App.4th 1513, 1519 [examining whether challenge would be "effectively removed from judicial review" absent public interest standing]; *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 875 [similar]; *Madera Cmty. Hosp. v. County of Madera* (1984) 155 Cal.App.3d 136, 142-143, 145-146 [similar]; *McDonald v. Stockton Met. Transit Dist.* (1973) 36 Cal.App.3d 436, 443 [similar].)

The State agrees that it is appropriate—indeed, important—to recognize public interest standing in such circumstances. Doing so ensures that there is a judicial forum available for

challenging the legality of executive or legislative action. (See *Weatherford*, *supra*, 2 Cal.5th at p. 1248; *Reynolds*, *supra*, 223 Cal.App.4th at p. 875, italics omitted; Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions* (1993) 54 U. Pitt. L.Rev. 351, 391-402.) Other weighty public interests may, in appropriate circumstances, support public interest standing as well.[19] But "prudential and separation of powers considerations" counsel strongly against transforming public interest standing into an unfettered doctrine. (*Weatherford*, *supra*, 2 Cal.5th at p. 1248.) "[T]he public interest standing doctrine is designed to ensure that government misconduct *can* be challenged, not that alleged government misconduct *will* be challenged in every case." (*Reynolds*, *supra*, 223 Cal.App.4th at p. 875; see *Department of Consumer Affairs v. Superior Court* (2016) 245 Cal.App.4th 256, 262 ["public interest standing is not freely available to any party"].)[20]

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[19] For example, in *Green*, *supra*, 29 Cal.3d at pp. 143-145, the Court allowed certain recipients of welfare benefits to challenge several subparts of a state regulation governing benefit levels, even though the plaintiffs were directly affected by just one subpart (and there were presumably other potential plaintiffs directly affected by the remaining subparts). It made sense to recognize public interest standing in those circumstances because the petitioners were challenging each subpart of the regulation on similar legal grounds. (See *id.* at pp. 143-144.) There were thus important judicial economy advantages to hearing the related legal arguments in the same suit. (See *ibid.*)

[20] A number of high courts in other jurisdictions have endorsed a similar approach, holding that public interest standing (or similar doctrines) should generally be inapplicable

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Taking Offense cannot demonstrate that it has public interest standing here. Given the large number of long-term care facilities and staff members directly subject to S.B. 219 (see *ante*, p. 25), the statute's misgendering provision will not be effectively insulated from judicial review if this suit is dismissed on standing grounds. Any facilities or staff members who believe that the provision presents constitutional problems may challenge it in actions "for declaratory and injunctive relief" (e.g., *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 480), or by way of defenses in civil or criminal enforcement actions (see, e.g., *People v. Martinez* (2020) 59 Cal.App.5th 280, 290, review granted March 21, 2021, S267138). Trade associations, employee organizations, and unions may also bring challenges on behalf of the facilities or staff members that they represent. (See Asimow et al., Cal. Practice Guide: Administrative Law (The Rutter Group, Nov. 2021 update) 14:85 to 14:86 [describing associational standing]; see, e.g., *Associated Builders*, *supra*, 21 Cal.4th at p. 363.) There is thus no basis—especially in this pre-

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when there are "plaintiff[s] more directly affected by the challenged conduct" in a position to bring suit. (*Ruckle v. Anchorage Sch. Dist.* (Alaska 2004) 85 P.3d 1030, 1035; see, e.g., *Schwartz v. Lopez* (2016) 132 Nev. 732, 743; *Pittsburgh Palisades Park, LLC v. Commonwealth* (2005) 585 Pa. 196, 207-208; *Transactive Corp. v. Dept. of Soc. Serv.* (N.Y. 1998) 706 N.E.2d 1180, 1184; *Common Cause v. State* (Me. 1983) 455 A.2d 1, 9; *Jenkins v. Swan* (Utah 1983) 675 P.2d 1145, 1150; cf. *Canada v. Downtown Eastside Sex Workers United Against Violence Society* (Can. 2012) 2 S.C.R. 524 ¶¶ 60-76.)

enforcement action, filed before S.B. 219 took effect (*ante*, pp. 26-27)—to assume that challenges by directly affected facilities or staff (or the associations representing them) could not be brought.

Nor can Taking Offense point to any other public interest sufficient to confer standing. To the contrary, if Taking Offense had standing to bring this pre-enforcement facial challenge based on the mere allegation that one of its members is a "California citizen and taxpayer" (JA 3), the public interest "*exception* to the beneficial interest requirement" would swallow the rule (*Weatherford*, *supra*, 2 Cal.5th at p. 1248, italics added). *Any* California resident dissatisfied with the work of the political branches could presumably bring a facial pre-enforcement challenge to *any* state law or policy on *any* constitutional ground whatsoever. Public interest standing would become an unfettered doctrine (see *id.* at p. 1250), rendering important aspects of this Court's precedent effectively dead letter.

The Court has rejected such an unbounded view of standing, repeatedly applying, for example, the rule barring litigants from asserting the constitutional rights of "other, differently situated individuals" not before the Court. (*People v. Buza* (2018) 4 Cal.5th 658, 675, citing, e.g., *In re Cregler (*1961) 56 Cal.2d 308, 313.)[21] That is exactly what Taking Offense seeks to do here:

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[21] See, e.g., *Buza*, *supra*, 4 Cal.5th at p. 675 (refusing to allow an individual facing serious felony charges to challenge the constitutionality of a DNA collection statute, as applied to persons arrested for committing relatively minor offenses); *Mathews v. Becerra* (2019) 8 Cal.5th 756, 768 ("declin[ing] to address" a privacy-rights challenge to a statute imposing certain

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assert the First Amendment rights of long-term care facilities and staff members who could have brought suit, but have thus far chosen not to do so. If Taking Offense has standing in this case, there would be little (if anything) left of the longstanding rule barring such challenges.

Recognizing standing here would also undercut the oft-repeated rule that the "rendering of advisory opinions falls within neither the functions nor the jurisdiction" of the State's judicial branch. (E.g., *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860, quoting *People ex rel. Lynch*, *supra*, 1 Cal.3d at p. 912.) Taking Offense's suit is in many ways indistinguishable from a request for an advisory opinion. For example, it asks the Court "to resolve a hypothetical future disagreement"—that is, the validity of S.B. 219's potential, future application to a long-term care facility or staff member. (*Nat. Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 432, fn. 14; see *People v. Slayton* (2001) 26 Cal.4th 1076, 1084.) It is not predicated on any "personal interest in the outcome of the litigation" beyond Taking Offense's disagreement with the Legislature's policy judgment. (*Carsten*,

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disclosure obligations on therapists, as applied to therapists treating "minors who engage in consensual sexting," because the "complaint [did] not allege that any of the plaintiffs treat" such minors); see also *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 205, 218-219 & fn. 10 (noting that the only challenge properly before the Court, in a case involving a statute governing multiple types of charter-school license revocations, was a challenge to the type of revocation that directly affected the challenger).

supra, 27 Cal.3d at p. 798; see *Neary v. Regents of University of California (*1992) 3 Cal.4th 273, 282.) And it proceeds on a "factually barebones record[]," asking the judiciary to invalidate an important component of S.B. 219 before "[t]he State has had [an] opportunity to implement" the statute in a way that would inform the Court's constitutional analysis. (*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 450, internal quotation marks omitted; see *People v. Guerra* (1984) 37 Cal.3d 385, 429 [emphasizing need to address important legal questions "in a case in which they are presented as dispositive issues on a satisfactory record"].)

Fundamental, longstanding tenets of this Court's standing and justiciability doctrines should not be so easily evaded. The Court should order Taking Offense's petition for a writ of mandate dismissed for lack of standing.

B. Taking Offense also lacks taxpayer standing under Code of Civil Procedure, section 526a

Taking Offense also alleges that it has standing to seek facial invalidation of S.B. 219's misgendering provision under Code of Civil Procedure, section 526a. That is incorrect. Taking Offense has named only state officers and agencies as respondents here. (See *ante*, p. 14, & fn. 1.) But section 526a authorizes suit only to "restrain[] . . . illegal expenditure[s] of . . . *local agenc[ies]*." (Code Civ. Proc., § 526a, subd. (a), italics added.) The statute makes no mention of "actions against State officers" or entities. (22 Ops.Cal.Atty.Gen. 93, 96 (1953).) And this Court recently stressed that it has not "reforge[d] section

526a into a statute granting unfettered standing" or applied the statute "in a manner inconsistent with the explicit statutory limits it imposes on taxpayer standing." (*Weatherford*, *supra*, 2 Cal.5th at pp. 1250, 1251; see 22 Ops.Cal.Atty.Gen., *supra*, at p. 96 [concluding that "the failure to specify the State" in the statute means that section 526a suits may not be brought against state-level actors].)

That limitation to suits against "local agenc[ies]" reflects prevailing common law norms at the time of section 526a's 1909 enactment. In the 19th and early 20th centuries, there was widespread consensus among state and federal courts that a taxpayer has a "direct and immediate" interest in preventing misuse of local government finances—an interest sufficient to support standing to obtain an injunction blocking unlawful local government expenditures. (*Massachusetts v. Mellon* (1923) 262 U.S. 447, 486; see, e.g., *Bradford v. San Francisco* (1896) 112 Cal. 537, 543, citing *Crampton v. Zabriskie* (1879) 101 U.S. 601, 609; *Winn v. Shaw* (1891) 87 Cal. 631, 636; see also 2 Dillon, Commentaries on the Law of Municipal Corporations (4th ed. 1890) §§ 914-922.) There was no such consensus, however, about a taxpayer's "comparatively minute and indeterminable" interest in *state* or *federal-level* expenditures. (*Mellon*, *supra*, 262 U.S. at p. 487; see 22 Ops.Cal.Atty.Gen., *supra*, at p. 95, citing, e.g., *Asplund v. Hannett* (N.M. 1926) 249 P. 1074, 1080.) It thus

makes sense that the Legislature chose to limit taxpayer standing under section 526a to suits against local governments.[22]

Taking Offense points to statements made by this Court nearly a half century ago suggesting, "without any real analysis," that taxpayers may have standing to sue the State on a non-statutory common law theory of taxpayer standing. (*Cornelius v. L.A. County Etc. Auth.* (1996) 49 Cal.App.4th 1761, 1775-1776; see APR 22-23; Asimow, Rutter Group, *supra*, ¶ 14:250.)[23] But such "summary and conclusory" statements generally lack precedential weight. (E.g., *Ryan v. Rosenfeld* (2017) 3 Cal.5th 124, 132, internal quotation marks omitted.) And it is not at all clear that there is any need for a non-statutory common law taxpayer standing doctrine in light of the interests served by the separate public interest standing doctrine. As discussed above (*ante*, pp. 37-39), public interest standing "protects citizens' opportunity to ensure that no governmental body"—including at the state level—"impairs or defeats . . . a public right." (*Green*,

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[22] In recent decades, state and federal courts have continued to draw a "local vs. state/federal" distinction for purposes of taxpayer standing. (See, e.g., *Paige v. State* (2018) 209 Vt. 379, 386; *DaimlerChrysler Corp. v. Cuno* (2006) 547 U.S. 332, 345, 349; *Goldman v. Landsidle* (2002) 262 Va. 364, 372.)

[23] See, e.g., *Stanson v. Mott* (1976) 17 Cal.3d 206, 222-223; *Serrano v. Priest* (1971) 5 Cal.3d 584, 618, fn. 38; see Asimow, Rutter Group, *supra*, ¶ 14:260 (*Stanson* "assum[ed] without explanation that taxpayer actions against state officials are permissible"); *id.* ¶ 14:254 (similar with respect to *Serrano*); see *id.* ¶ 14:250 (noting that "the relationship between § 526a and common law taxpayer actions is confusing and poorly defined").

supra, 29 Cal.3d at p. 144; cf. *Weatherford*, *supra*, 2 Cal.5th at p. 1249 [distinguishing the "legislative decision" to authorize taxpayer standing under section 526a with the "judicially recognized" public interest standing doctrine].)

But the Court need not reach the question of whether any non-statutory common law taxpayer standing doctrine exists. Even if it did exist, this suit would not qualify because Taking Offense cannot show that the suit's resolution would further the purposes that taxpayer standing doctrine is designed to serve. The principal purpose of taxpayer standing is preventing the "expensive and wasteful" expenditure of public funds. (*Clouse v. San Diego* (1911) 159 Cal. 434, 438; cf. *Santa Clara County v. Superior Court of Santa Clara County* (1949) 33 Cal.2d 552, 558; *Fiske v. Gillespie* (1988) 200 Cal.App.3d 1243, 1246.) S.B. 219, however, bars only conduct that was *already unlawful* and authorizes only remedies *already available* under preexisting law. (*Ante*, pp. 22-25.) It is thus entirely speculative to think that enactment of S.B. 219's misgendering provision has made or will make any material difference to government spending levels. (Cf. Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 219 (2017-2018 Reg. Sess.) as amended Sept. 13, 2017, p. 7 [estimating that increased government expenditures, if any, from S.B. 219's enforcement by the Departments of Public Health and Social Services would be "minor and absorbable"].)[24]

[24] Nor is it necessary to recognize taxpayer standing here to provide a forum for "challeng[ing] governmental action which would otherwise go unchallenged in the courts because of the

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More fundamentally, the same "prudential and separation of powers considerations" counseling strongly against transforming public interest standing into an unfettered standing doctrine (*Weatherford*, *supra*, 2 Cal.5th at p. 1248; see *ante*, pp. 36-37, 41-43), counsel strongly against turning taxpayer standing doctrine into an unfettered standing doctrine. To prevent the taxpayer and public interest standing doctrines from providing an unqualified invitation for litigation by plaintiffs with strong opinions but no personal, concrete interests at stake, the Court should order this case dismissed for lack of standing.

II. S.B. 219'S BAR ON WILLFUL, REPEATED MISGENDERING IS CONSTITUTIONALLY VALID

If the Court holds that Taking Offense has standing, it should reverse on the merits. The Court of Appeal was wrong to facially invalidate S.B. 219's misgendering provision on First Amendment grounds. "Although stated in broad terms, the right

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standing requirement." (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268, internal quotation marks omitted.) As discussed above, the State's many long-term care facilities and staff members (as well as the associations and organizations representing them) would be in a position to challenge the misgendering provision on First Amendment grounds if, in fact, the provision posed any genuine First Amendment concerns. (*Ante*, p. 40; see *Cornelius*, *supra*, 49 Cal.App.4th at p. 1779 [refusing to expand taxpayer standing doctrine where there was "no reason to believe that a party who fulfills the case law requirement of actual injury [could not] come forward"]; see also Urquart, *Disfavored Constitution, Passive Virtues?* (2012) 81 Fordham L.Rev. 1263, 1283; Comment, *A Remedy for Every Right* (2010) 98 Cal. L.Rev. 1595, 1625.)

to free speech is not absolute." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 134 (opn. of George, C.J.).) Both this Court and the U.S. Supreme Court have made clear, for example, that the First Amendment provides no right to use racial epithets, or engage in verbal sexual harassment and discrimination, in the workplace. Willful, repeated misgendering in long-term care facilities is not materially distinguishable. Like all members of society, LGBT long-term care residents are entitled to a sanctuary from unwelcome discrimination and harassment in the places where they live.

A. Both this Court and the U.S. Supreme Court have made clear that the government may validly prohibit verbal discrimination in the workplace

In *Aguilar*, *supra*, 21 Cal.4th at p. 135, this Court rejected a First Amendment challenge similar to Taking Offense's challenge here (albeit in a case where the challenger was subject to statutory liability and thus plainly had standing).[25] The Court upheld an injunction barring an Avis car rental manager from continuing to violate the Fair Employment and Housing Act

[25] Three justices joined Chief Justice George's opinion in *Aguilar*, and a fourth, Justice Werdegar, concurred in that opinion in substantial part. (See *Aguilar*, 21 Cal.4th at pp. 147, 169, fn. 9 (conc. opn. of Werdegar, J.).) The way to "accurately characterize[] *Aguilar*" is by "reading the plurality opinion and [the] concurring opinion together." (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1172 (conc. & dis. opn. of Werdegar, J.).) Unless otherwise noted, all citations to *Aguilar* are to Chief Justice George's opinion.

(FEHA) by using certain "derogatory racial or ethnic epithets" (21 Cal.4th at p. 128) to target "Avis's Hispanic employees" in the workplace (*id.* at p. 145). As the Court explained, the government has compelling interests in prohibiting "spoken words [that], either alone or in conjunction with conduct, amount to employment discrimination." (*Id.* at p. 134.)

Concurring, Justice Werdegar emphasized that the targeted Avis employees were not "reasonably free to walk away when confronted with . . . racial slurs" at work. (21 Cal.4th at pp. 160-161.) "Although [the employees] could have avoided the undesired speech by quitting their jobs and seeking employment with more racially tolerant supervisors," "[t]he Constitution does not require [workers] to sacrifice their employment to avoid a racially clamorous work environment." (*Id.* at p. 161.) Justice Werdegar also stressed that the injunction left the manager at issue "ample alternatives for advocating, espousing or simply stating his beliefs"—even with offensive racial epithets—so long as he refrained from using the prohibited epithets in the workplace. (*Id.* at p. 164.) He could engage in such speech "anywhere and at any time outside of his place of employment, whether it be in his home, on the sidewalk, in the park . . . or on the Internet." (*Ibid.*) For that reason, the challenged injunction was "analogous to a . . . time, place and manner restriction on speech." (*Id.* at p. 162.) And "[a]s a general matter," Justice Werdegar explained, "speech . . . may be subject to reasonable time, place and manner restrictions." (*Ibid.*)

Both the lead *Aguilar* opinion and Justice Werdegar's concurrence relied, in part, on guidance provided by the U.S. Supreme Court in *R.A.V. v. St. Paul* (1992) 505 U.S. 377. There, the high court struck down an overbroad statute prohibiting the use of any "symbol, object, appellation, characterization or graffiti . . . [which] arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"—not just in a workplace setting, but on any "public or private property," including the public square. (*Id.* at p. 380; see *id.* at pp. 391-392.) In invalidating the statute, the majority directly responded to—and disavowed—the suggestion by four justices writing separately that the majority's analysis threatened to "suddenly [render] unconstitutional" federal Title VII liability for certain forms of verbal discrimination. (*Id.* at p. 409 (opn. of White, J. conc. in the judgment).) The majority stressed that the First Amendment does not bar application of "Title VII's general prohibition" to verbal discrimination in the workplace—for example, to "sexually derogatory" words that violate the statute's prohibition of sex or gender-based discrimination. (*Id.* at p. 389.) Thus, "[w]hen the majority and concurring opinions are viewed in conjunction, it appears that all nine Justices participating in *R.A.V.* assumed that the core Title VII prohibition against speech that creates a discriminatorily hostile work environment would pass constitutional muster." (*Aguilar*, *supra*, 21 Cal.4th at p. 136, quoting Fallon, *Sexual Harassment, Content Neutrality, and the*

First Amendment Dog That Didn't Bark, 1994 Sup. Ct. Rev. 1, 12.)[26]

B. Just as the State may validly bar verbal discrimination in the workplace, it may prohibit willful, repeated misgendering of long-term care residents in the facilities where they live

The application of FEHA considered in *Aguilar* is not materially distinguishable from S.B. 219's prohibition of willful, repeated misgendering. Just as derogatory racial or ethnic epithets "produc[e] feelings of anger, hostility and humiliation" that are "damag[ing] . . . psychologically" (*Aguilar*, *supra*, 21 Cal.4th at pp. 151, 169 (conc. opn. of Werdegar, J.)), willful, repeated misgendering demeans and denies a transgender person's very identity, often "trigger[ing] distress and despair" (e.g., Bennett, *Pioneering Care for Transgender People* (2018) 49 American Psychological Assn. Monitor on Psychology 84.)[27] Just as the government has a profound interest in prohibiting

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[26] Following *R.A.V.*, the high court continued to "implicitly [reject] . . . any suggestion" that racial epithets, sexual harassment, and other forms of verbal discrimination "[are] constitutionally protected." (*Aguilar*, *supra*, 21 Cal.4th at p. 135.) For example, in *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, the Court upheld a Title VII judgment in the face of briefing urging it to "cut back sharply on accepted theories of Title VII liability" on First Amendment grounds. (*Aguilar*, *supra*, 21 Cal.4th at p. 154 (conc. opn. of Werdegar, J.), internal quotation marks omitted; see also *Wisconsin v. Mitchell* (1993) 508 U.S. 476, 487.)

[27] Available at <https://www.apa.org/monitor/2018/11/care-transgender> (as of Feb. 8, 2022); see also *ante*, pp. 20-22.

discrimination on the basis of race, it has a "compelling interest in eliminating discrimination on the basis of sex" (opn. 21), including on the basis of "sexual orientation and transgender status" (opn. 22, citing, e.g., *Bostock v. Clayton County* (2020) 140 S.Ct. 1731, 1741).[28] And just as employees are not "reasonably free to walk away when confronted with . . . racial slurs" at work (*Aguilar*, *supra*, 21 Cal.4th at pp. 160-161 (conc. opn. of Werdegar, J.)), transgender residents of long-term care facilities are not "reasonably free" to avoid willful, repeated misgendering directed at them by staff members in the facilities where they live.

Indeed, a person's residence is "uniquely deserving of protections" from unwelcome harassment, discrimination, and other disturbances. (Opn. 17, citing *Frisby v. Schultz* (1988) 487 U.S. 474, 484.) In *Frisby*, for example, the high court "upheld an

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[28] See *Bostock*, *supra*, 140 S.Ct. at p. 1741 (describing Title VII's "simple and momentous" act of making "homosexuality or transgender status" irrelevant to employment decisions); *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1158 (pointing to "California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation"); *Obergefell v. Hodges* (2015) 576 U.S. 644, 667 (emphasizing that the journey from "[o]utlaw to outcast may [have been] a step forward," but gays and lesbians now deserve "the full promise of liberty"); *Grimm v. Gloucester County School Bd.* (4th Cir. 2020) 972 F.3d 586, 610-611 (concluding that "'one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of [protections from discrimination] than transgender people'"); see also *ante*, p. 22, fn. 9 (explaining that S.B. 219 prohibits willful, repeated misgendering on the basis of, not just gender identity and expression, but also sexual orientation).

ordinance that prohibited . . . picketing"—"generally characterized as core political speech" protected by the First Amendment—because the ordinance was limited to picketing focused, on and taking place in front of, an individual's home. (*Aguilar*, *supra*, 21 Cal.4th at p. 159 (conc. opn. of Werdegar, J.), citing *Frisby*, *supra*, 487 U.S. at p. 474; see *id.* at pp. 479, 482.) The Court explained that, "in many locations, we expect individuals simply to avoid speech they do not want to hear," but "the home is different." (*Frisby*, *supra*, 487 U.S. at p. 484.) The home is "'the last citadel of the tired, the weary, and the sick.'" (*Ibid.*, quoting *Gregory v. Chicago* (1969) 394 U.S. 111, 125 (conc. opn. of Black, J.).) "[I]ndividuals are not required to welcome unwanted speech into their own homes and . . . the government may protect this freedom." (*Id.* at p. 485.)

S.B. 219's misgendering provision furthers this important interest in "protecting the well-being, tranquility, and privacy of the home." (*Frisby*, *supra*, 487 U.S. at p. 484.) As the Legislature recognized, individuals residing in long-term care facilities often "rely on others for necessary care and services," and "no longer enjoy the privacy of having their own home or even their own room." (Stats. 2017, ch. 483, § 1, subd. (b), p. 3637.) That leaves residents "particularly vulnerable" to discrimination because, unlike people who reside in their own private homes, long-term care residents cannot simply avoid unwelcome, discriminatory speech by barring entry to those who seek to discriminate against them. (*Ibid.*) S.B. 219's prohibition of willful, repeated misgendering thus provides transgender

residents with at least a modicum of the basic residential privacy protections that other members of society legitimately expect and enjoy. (See, e.g., *ibid.*; cf. *Montano v. Bonnie Brae Convalescent Hosp., Inc.* (C.D. Cal. 2015) 79 F.Supp.3d 1120, 1125 ["To the . . . elderly persons who . . . reside there, the nursing home [is] their home, very often for the rest of their lives."] (internal quotation marks and brackets omitted).)

The misgendering provision also furthers the important government interest in safeguarding the "psychological [and] . . . physical . . . well-being of the patient held 'captive' by medical circumstance." (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 768.) Many long-term care facilities are not just workplaces and homes; they are also health care facilities. (See Health & Saf. Code, § 1439.50, subd. (e); *ante*, p. 20, fn. 5.) Patients should not be forced to endure discrimination and harassment when receiving needed medical care and assistance from staff with "routine daily tasks," such as "walking, eating, . . . getting into bed," "getting dressed, using the toilet, and taking a bath or shower." (Letter of Amici Cal. Com. on Aging et al., Sept. 13, 2021, p. 6.) Discrimination by health care providers can call into question the reliability and quality of every aspect of a patient's care. If, for example, a nurse were to willfully and repeatedly refuse to use an LGBT long-term care resident's name and pronouns, that resident may reasonably question whether the nurse is otherwise failing to act in the best interests of the resident's health. (See Bennet, *Pioneering Care for Transgender People*, *supra* [misgendering in the context of medical care

"undermines trust" and the quality of care]; cf. *post*, pp. 61-63 [similar].)

Taking Offense offers several responses, including that S.B. 219, unlike the application of the FEHA considered in *Aguilar*, is "enforceable by criminal penalties." (APR 10.) But as discussed above (*ante*, pp. 23-25), misdemeanor-level criminal prosecution is not required; it is just one of a host of available enforcement measures. Violations of S.B. 219 are subject to both "civil and criminal penalties" under general Health and Safety Code remedial provisions that equally apply to all manner of abusive, unlawful actions by long-term care facilities and their staff members. (Sen. Rules Com., Off. of Sen. Floor Analyses, *supra*, p. 7.) In other words, S.B. 219 reflects the Legislature's judgment that violations of the statute, including willful, repeated misgendering, should be treated the same as the many other forms of abuse and neglect of long-term care residents (such as failing to provide clean, sanitary facilities and bed linens, unjustifiably barring residents from hosting visitors or spending time with fellow residents, serving unhealthful or spoiled food, or neglecting a resident's healthcare needs). (See *ibid.*; see, e.g., Health & Saf. Code, §§ 1439.54, 1569.269; *ante*, pp. 24-25.)

That legislative judgment is constitutionally valid. The First Amendment does not place criminal penalties off limits when the State is enforcing an otherwise valid prohibition on verbal discrimination. "[C]riminal penalties"—especially the misdemeanor variety authorized under S.B. 219—are "not always more severe than civil penalties, and civil actions often offer

fewer procedural safeguards than their criminal counterparts." (Opn. 24-25, citing, e.g., *New York Times v. Sullivan* (1964) 376 U.S. 254, 277.) It is thus generally "a matter within the legislature's range of choice" to decide "[w]hether proscribed conduct is to be visited by . . . criminal prosecution" or civil remedies (or both "in combination"). (*Kingsley Books, Inc. v. Brown* (1957) 354 U.S. 436, 441 (opn. of Frankfurter, J.); see, e.g., *Holder v. Humanitarian Law Project* (2010) 561 U.S. 1, 8-11, 28-33 [upholding application of criminal statute to certain First Amendment-protected forms of expression].)[29]

Taking Offense also argues that a "hostile environment . . . finding [is constitutionally] required under *Aguilar*," rendering S.B. 219's misgendering provision invalid because it requires no such finding. (APR 10.) That is incorrect. *Aguilar* discussed the hostile work environment standard only because the case involved a statutory claim of hostile work environment liability under the FEHA. (See *Aguilar*, *supra*, 21 Cal.4th at pp. 126, 131.) The Court nowhere suggested that the *statutory* "hostile work environment" standard operates as a *constitutional* requirement for any type of ban on willful discrimination—including prohibitions that apply, not just in

[29] Even if the Court had concerns about the hypothetical enforcement of S.B. 219 in future criminal actions, the appropriate course would be to await such actions and restrict enforcement of S.B. 219 on an as-applied basis. (See generally *post*, pp. 64-68.) There would be no reason to facially invalidate the statute in this pre-enforcement posture, thereby barring its enforcement in all cases, criminal and non-criminal alike.

workplace environments, but also, as here, in residential facilities that function as both workplaces and as homes.[30]

If the statutory "hostile work environment" standard were a constitutional requirement, it would cast doubt on the validity of a number of state and federal nondiscrimination laws—laws that can properly be applied to prohibit certain forms of verbal discrimination. The Unruh Civil Rights Act, for example, does not impose a "hostile work environment" requirement (or the equivalent). (See Civ. Code, § 51; cf. *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33-34.) A business establishment would violate the act by using derogatory terms to refer to a customer who is a member of a racial or ethnic minority (or any other protected group). There would be no need for such a customer to demonstrate that she was subjected to the equivalent of a hostile work environment. (Cf., e.g., *Los Angeles County Metropolitan Transportation Authority v. Superior Court* (2004) 123 Cal.App.4th 261, 264 [Unruh Civil Rights Act claim based, in part, on "derogatory and homophobic remarks"]; *Martinez v.*

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[30] The "hostile work environment" standard originated in the specific statutory language Congress used in Title VII's federal workplace discrimination ban. Because the statute bars discrimination in the "terms, conditions, or privileges of employment" (42 U.S.C. § 2000e-2(a)(1)), disparaging remarks or other forms of verbal abuse must be "sufficiently severe or pervasive 'to alter the *conditions* of [the victim's] employment and create an abusive working environment.'" (*Meritor Savings Bank, FSB v. Vinson* (1986) 477 U.S. 57, 67, italics added.) The "hostile work environment" standard thus constitutes an element of certain statutory workplace discrimination claims; it has nothing to do with First Amendment concerns.

Optimus Properties, LLC (C.D. Cal. Mar. 14, 2017) 2017 WL 1040743, at *2, 6 ["derogatory comments" about "disability status or national origin"]; *Sturm v. Davlyn Investments Inc.* (C.D. Cal. Sept. 30, 2013) 2013 WL 8604662, at *2 [use of the "n-word"].)[31]

In any event, Taking Offense overstates what is necessary to make out a "hostile work environment" claim. While the existence of a hostile work environment generally "depends upon the totality of the circumstances" (Gov. Code, § 12923, subd. (c)), a "single incident of harassing conduct"—including a single act of verbal discrimination—can suffice to show that a hostile work environment exists under either the FEHA or Title VII (*id.*, subd. (b); see *Ayissi-Etoh v. Fannie Mae* (D.C. Cir. 2013) 712 F.3d 572, 580 (conc. opn. of Kavanaugh, J.) [collecting cases]). It thus follows that willful, *repeated* misgendering—a form of highly demeaning, often traumatizing, verbal abuse—would suffice to create a hostile environment in all or substantially all circumstances.

Finally, Taking Offense asserts that willful, repeated misgendering is not a truly "discriminatory action[]." (APR 16.) "Offensive speech," Taking Offense asserts, "cannot simply be labelled 'discrimination' and outlawed or enjoined." (APR 17.) But that just ignores the Legislature's findings. After collecting and carefully considering the evidence, the Legislature

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[31] See also Letter of Amici Equality California et al., Sept. 14, 2021, pp. 7-12 (collecting additional examples of nondiscrimination laws which do not impose any "hostile work environment" requirement or the equivalent).

determined that misgendering is not just "offensive speech"; it is an especially harmful, all-too-prevalent form of transphobic, discriminatory abuse. (*Ante*, pp. 18-22.) Indeed, Taking Offense appears to acknowledge that it is a form of discrimination to call a transgender resident by the wrong *name*: that is presumably why "Taking Offense has not challenged the requirement to use residents' preferred names." (APR 20; see *ante*, p. 27.) If it is discrimination to misgender a transgender individual by using the wrong *name*, it is discrimination to misgender that same person by using the wrong *pronouns*. Both demean and deny the victim's gender identity. The First Amendment does not require transgender long-term care residents to endure such discriminatory abuse in their own homes.

C. The Court of Appeal erred in facially invalidating the misgendering provision

The Court of Appeal agreed with much of the foregoing analysis. It had no trouble concluding, for example, that S.B. 219's misgendering provision serves a "compelling interest"—indeed, a "legitimate and laudable" interest (opn. 25)—in eliminating discrimination on the basis of "sexual orientation or transgender status" (opn. 22, citing, e.g., *North Coast Women's Care Medical Group*, *supra*, 44 Cal.4th at p. 1158.) The court also had "little doubt" that, because "[l]ong-term care facility residents are analogous to citizens in their homes," such residents are "an unwilling audience for repeated and willful misgendering . . . [and] have little, if any, ability to simply avoid harassing or discriminatory speech." (Opn. 18.) And the court

highlighted the Legislature's extensive findings that, among other things, "many LGBT seniors are members of multiple underrepresented groups, making them 'doubly marginalized' [and] causing them to avoid accessing necessary care and services"; "[w]hen those seniors do attempt to access care, they are often subject to mistreatment and discrimination by the very staff designated to care for them"; and "discrimination and mistreatment against LGBT seniors continues to have a pernicious effect on the ability and willingness of those individuals to obtain long-term care." (Opn. 26, citing Stats. 2017, ch. 483, § 1, subds. (a)-(d), pp. 3637-3638.)

The Court of Appeal nonetheless facially invalidated the misgendering provision on the ground that it is "overinclusive." (Opn. 25.) That was error. The statute is not overinclusive in the ways that the court identified. And even if it were, that would not justify the sweeping, disfavored remedy of facial invalidation.

1. The misgendering provision is not overinclusive

The Court of Appeal concluded that the misgendering provision is overinclusive because, as the court understood it, the provision applies to two categories of speech that need not be prohibited for the government to "achieve [its] compelling interest in eliminating discrimination": first, "occasional, isolated, off-hand instances" of misgendering (opn. 25), and, second, misgendering that does "not occur in the [targeted] resident's presence" (opn. 26). The court's analysis was flawed on both counts.

As to the suggestion that the provision sweeps in "occasional," "off-hand" remarks, the court simply misread the statute. The plain text of the statute makes clear that it applies only to "willful[] and repeated[]" misgendering occurring after the resident "clearly inform[s]" the facility or staff of the resident's name or pronouns. (Health & Saf. Code, § 1439.51, subd. (a)(5).) Further, the statute "makes punishable only conduct that is motivated by [a] resident's actual or perceived sexual orientation, gender identity, gender expression, or [HIV] status." (JA 188; see Health & Saf. Code, § 1439.51, subd. (a).) If, for example, "a transgender woman has moved into a nursing facility, after living in the community as a woman for many years" and "'clearly inform[s]' staff of how she wishes to be addressed," the statute would prohibit "a nurse [from] '[w]illfully and repeatedly' refer[ring] to the resident as 'he,' and address[ing] her with the male name that she explicitly has rejected." (Letter of Amici Cal. Com. on Aging et al., *supra*, at pp. 3-4.) "Nothing about such conduct should be dismissed as [occasional, isolated, or] 'off-hand.'" (*Id.* at p. 4.)

As to willful, repeated misgendering that does "not occur in the [targeted] resident's presence" (opn. 26), the Court of Appeal correctly construed the statute to reach such misgendering but erred in concluding that the State lacks compelling interests in barring it. As this Court recognized in *Aguilar*, which upheld an injunction against the use of racial epithets "even outside the hearing of" the targeted employees (21 Cal.4th at p. 146), discriminatory language can "contribute to an atmosphere of

. . . hostility" even if "the invective is not directed at or even heard by the victims" (*id.* at pp. 145-146). In the context of long-term care, an employee's repeated and willful misgendering of a resident in front of other employees, other residents, or visitors to the facility can create a similar atmosphere or "culture of discrimination," undermining the treatment transgender residents receive by suggesting that their preferences—indeed, their very identities—are without value. (Letter of Amici Scholars in Social Work, Gerontology, and Social Science, Sept. 1, 2021, p. 9.)

If, for example, staff members at a long-term care facility view it as acceptable to misgender a resident so long as they do so out of earshot of that resident, those staff members will be less likely to otherwise treat transgender residents with the dignity and respect they deserve, less likely to stop by those residents' rooms to have cheerful conversations with them, and among other things, less likely to check in on those residents' health to ensure they are receiving needed care.[32] Misgendering

[32] See, e.g., Romanelli & Hudson, *Individual and Systemic Barriers to Health Care: Perspectives of Lesbian, Gay, Bisexual, and Transgender Adults* (2017) 87 American J. of Orthopsychiatry 714, 721 (describing how a discriminatory atmosphere in care facilities "fostered a service environment where LGBT care-seekers received inadequate care"); Jihanian, *Specifying Long-Term Care Provider Responsiveness to LGBT Older Adults* (2013) 25 J. of Gay & Lesbian Social Services 210, 213-214, 221-225 (similar); see generally Smedley et al., Institute of Medicine, Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care (2003) p. 163 (discussing how

(continued…)

transgender residents around other residents can also "exacerbate an already challenging and hostile living environment for transgender residents." (Letter of Amici Scholars in Social Work, Gerontology, and Social Science, *supra*, at p. 9.) Scholars have "found that older adults are more likely than other age groups to hold bias against transgender and nonbinary people." (*Ibid.*, collecting authorities.) "Misgendering transgender residents" in front of other residents "conveys to [those] residents that misgendering is acceptable and presents more opportunities for transgender residents to experience this discrimination." (*Ibid.*) The Legislature thus had ample reason to conclude that abiding long-term care staff members' cavalier disregard of transgender residents' identities—even if it occurs out of their presence—would adversely affect attitudes, relationships, and the quality of care throughout the facility.

Moreover, by barring all willful, repeated misgendering, whether or not it occurs in the targeted resident's presence, the Legislature was able to establish an easily administrable bright-line, zero-tolerance rule.[33] And it was able to protect *all* potential victims of misgendering in long-term care facilities—not just transgender residents subject to misgendering, but also other

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(…continued)

"differences in care may result from conscious or unconscious biases on the part of physicians and other healthcare providers").

[33] See Ehrlich and Posner, *An Economic Analysis of Legal Rulemaking* (1974) 3 J. Legal Stud. 257, 262-266 (discussing the benefits of bright-line rules from a policymaking perspective).

residents, staff members, and visitors to the facility who suffer harm when forced to witness or overhear anti-transgender verbal discrimination. Those individuals may themselves be transgender. And even if not, employees, visitors, and residents alike still have a legitimate interest in not being exposed to discriminatory, transphobic language in the place where they live, work, or visit their loved ones—in much the same way that all employees in a particular workplace, no matter their race or gender, have a legitimate interest in not being forced to listen to racial slurs or view pornography while at work. (See, e.g., *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [recognizing that discriminatory, "offensive remarks" may seriously injure a listener or bystander, even if the remarks are "directed to or perpetrated upon" a different person].)

2. Even if the misgendering provision were overinclusive in the ways identified by the Court of Appeal, that would not justify facial invalidation

Even if the misgendering provision were "overinclusive" in the ways identified by the Court of Appeal (opn. 25), that would not warrant invalidation of the provision on its face. Facial invalidation of a statute is a "severe," "disfavored" remedy. (*Mathews*, *supra*, 8 Cal.5th at p. 797 (dis. opn. of Cantil-Sakauye, C.J.), citing, e.g., *Today's Fresh Start*, *supra*, 57 Cal.4th at p. 218.) It "is not casually employed." (*Los Angeles Police Dept. v. United Reporting Publishing Corp.* (1999) 528 U.S. 32, 39.) Under the "'exacting'" standard for facial relief, the Court generally will not facially invalidate a statute "unless it 'pose[s] a present total and fatal conflict with applicable constitutional prohibitions.'"

(*California School Boards Assn. v. State of California* (2019) 8 Cal.5th 713, 723-724.) While this and other courts "recognize[] 'a second type of facial challenge'" in "the First Amendment context," called an overbreadth challenge (*United States v. Stevens* (2010) 559 U.S. 460, 473), facial relief is still far from the norm: under the overbreadth standard, statutes are facially invalid only if they are "substantially overbroad." (*Id.* at p. 482; see *People v. Toledo* (2001) 26 Cal.4th 221, 234.)

The Court of Appeal did not suggest that the misgendering provision is "substantially overbroad." To the contrary, it appeared to recognize that the provision is constitutionally valid in the vast majority of applications, serving the "legitimate and laudable goal of rooting out discrimination against LGBT residents of long-term care facilities." (Opn. 25; see opn. 21-22, 25-26.) The court concluded, however, that because the misgendering provision is a "content-based restriction" of speech subject to strict scrutiny (opn. 27), it may not be overbroad in any respect (opn. 25). The court reasoned that strict scrutiny requires a statute to be "narrowly tailored to achieve a compelling government objective" (opn. 7) and that any amount of overbreadth—however slight—renders a statute impermissibly "overinclusive" and not "narrowly tailored" (opn. 22).

Even if that were a valid understanding of strict scrutiny (but see *post*, pp. 67-68), the court had no need to apply that standard here. *Aguilar* is instructive. In considering an application of the FEHA that is materially indistinguishable from S.B. 219's misgendering provision (*ante*, pp. 51-54), neither the

three justices joining the lead opinion nor Justice Werdegar in concurrence found it necessary to apply strict scrutiny. (See 21 Cal.4th at p. 135; *id.* at p. 166 (conc. opn. of Werdegar, J.).)

That was for good reason. While "content-based laws" are often "subject to strict scrutiny" (opn. 10, citing, e.g., *Reed v. Town of Gilbert* (2015) 576 U.S. 155, 163), that is not always the case.[34] A less exacting standard is appropriate where, as here, a statute shields an "unwilling and captive audience" from verbal discrimination. (*Aguilar*, *supra*, 21 Cal.4th at p. 166 (conc. opn. of Werdegar, J.); see *id.* at pp. 162-169.) Such statutes not only protect the "weighty right of [individuals] to be . . . free of . . . discrimination" in settings such as homes and workplaces (*id.* at p. 166), but also preserve "ample alternative speech venues" (*ibid.*). Here, for example, S.B. 219 leaves long-term care staff members free to engage in any expression they wish "anywhere and at any time outside of [long-term care facilities], whether it be in [their] home[s], on the sidewalk, in the park . . . or on the Internet." (*Id.* at p. 164.) In that respect, laws like S.B. 219's misgendering provision are more "analogous to . . . time, place and manner restriction[s] on speech"—restrictions subject to intermediate scrutiny—than to the types of

[34] See Fallon, *supra*, 1994 Sup. Ct. Rev. at pp. 23-27 (listing "several categories within which content-based regulation" does not trigger strict scrutiny under U.S. Supreme Court precedent); see, e.g., *Mahanoy Area School Dist. v. B. L.* (2021) 141 S.Ct. 2038, 2044-2045 (recognizing several content-based "categories of student speech" subject to lesser First Amendment scrutiny "'in light of the special characteristics of the school environment'").

content-based restrictions properly subject to strict scrutiny. (*Id.* at p. 162; see Letter of Amici Professors Chemerinsky and Soucek, Sept. 13, 2021, pp. 5-7; compare, e.g., *R.A.V.*, *supra*, 505 U.S. at pp. 380, 395 [applying strict scrutiny to a statute barring certain expression on *any* "public or private property," including traditional public forums like sidewalks and parks].)[35]

Even if strict scrutiny applied, however, S.B. 219's bar on willful, repeated misgendering would satisfy it. The Court of Appeal concluded otherwise because it viewed the statute as slightly "overinclusive" and thus not "narrowly tailored." (*Ante*, p. 60.) While neither this Court nor the U.S. Supreme Court has attempted to define precisely how overinclusive a statute must be to fail strict scrutiny (see generally Rohr, *Parallel Doctrinal Bars: The Unexplained Relationship Between Facial Overbreadth and "Scrutiny" Analysis in the Law of Freedom of Speech* (2019) 11 Elon L.Rev. 95), the high court has made clear that strict scrutiny "requires that [a law] be narrowly tailored, not that it be '*perfectly* tailored'" (*Williams-Yulee v. Florida Bar* (2015) 575 U.S.

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[35] While time, place, and manner restrictions are generally "content-neutral" (e.g., *City of Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 48), it would be impossible as a practical matter for the government to craft a truly content-neutral law shielding LGBT long-term care residents from verbal discrimination. The State could not, for example, feasibly prohibit all communications, no matter their content, between facility staffers and residents. (Cf. Volokh, *Freedom of Speech and Workplace Harassment* (1992) 39 UCLA L.Rev. 1791, 1867 [recognizing that there is "no practical alternative to harassment law that still serves the state interest in ensuring equality of working conditions," while doing so "in a content-neutral [way]"].)

433, 454, italics added). In light of that guidance, as well as everything this and other courts have said about the need to apply the "'strong medicine'" of facial invalidation "'sparingly and only as a last resort'" (e.g., *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1112; see *ante*, pp. 64-65), it would be anomalous if a slight degree of overinclusiveness were enough to facially invalidate an otherwise valid provision.

Facial invalidation was especially inappropriate here because the Court of Appeal could have "remed[ied] [any] constitutional defect[s]" by reading additional elements into the statute. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 643; see *ibid.* ["[C]ourts possess the authority in 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.'"]; see PR 30-31.) While respondents firmly believe that no additional elements are constitutionally required, it would be far more "consistent with legislative intent" (*Kopp*, *supra*, 11 Cal.4th at p. 643) to reform the statute than to render it entirely unenforceable, exposing vulnerable transgender seniors residing at long-term care facilities to the kind of verbal discrimination that the Legislature enacted S.B. 219 to prevent.

CONCLUSION

The Court should reverse the Court of Appeal's facial invalidation of S.B. 219's bar on willful, repeated misgendering.

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February 9, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 13,859 words.

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