September 13, 2021

The Honorable Chief Justice Tani Cantil-Sakauye
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Taking Offense v. State of California*
Docket No. S270535

Amicus Letter of Professors Erwin Chemerinsky and Brian Soucek Supporting the State of California's Petition for Review

Chief Justice Cantil-Sakauye and Associate Justices:

We write to urge this Court to take up and correct the decision of the Court of Appeal in *Taking Offense v. State of California*, which threatens both the lived equality of some of our state's most vulnerable residents and the coherence of our state's free speech doctrine. As professors at California law schools who teach and write about freedom of expression and equality law, we have a professional interest in ensuring that our state avoids both these threats, the personal and the legal. We write as *amici* to suggest doctrinal paths this Court might take in doing so.

In S.B. 219, the Legislature amended the California Health and Safety Code to protect LGBT seniors by "specifying prohibited discriminatory acts in the long-term care setting." One such act—"willfully and repeatedly fail[ing] to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns"—is at issue in this pre-enforcement associational taxpayer standing challenge. The Superior Court found that the statute[1] was narrowly tailored to prohibit discriminatory harassment of vulnerable LGBT long-term care facility residents. But the Court of Appeal, while recognizing the State's compelling interest in protecting LGBT seniors from discrimination in the places where they live and receive care, facially invalidated the statutory provision as a content-based restriction on speech, insufficiently tailored to survive strict scrutiny.[2]

[1] Throughout this letter, "the statute" refers to California Health and Safety Code section 1439.51(a)(5), the prohibition on willful and repeated misnaming or misgendering residents of long-term care facilities by staff members when done "wholly or partially on the basis of a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status."

[2] There is some confusion about whether the Court of Appeal struck down all or just part of 1439.51(a)(5). Taking Offense's First Amendment claim challenged only the statute's pronoun provision, not the preferred name provision. But the Court of Appeal's opinion speaks of subsection

The Court of Appeal took four steps on its way to this result. Each was error.

First, the Court of Appeal treated willful and repeated misnaming and misgendering of long-term care facility residents because of their sexual orientation or gender identity as if it were simply a discussion of contested political issues rather than disparate treatment of patients by caretakers based on a protected identity trait.

Second, the Court of Appeal misapplied this Court's and the U.S. Supreme Court's captive audience doctrine, which is uniquely implicated here, given that the statute protects vulnerable elders from verbal discrimination and harassment at the place where they both live *and* receive medical care.

Third, concerned about hypothesized applications of the statute, the Court of Appeal subjected it to strict scrutiny's overinclusiveness test rather than the overbreadth analysis that more properly applies. Its error here reflects a broader confusion—which this Court could use this case to clarify—about how these tests relate to each other, and when each should be used.

Fourth and finally, the Court of Appeal inexplicably failed to acknowledge, much less follow, this Court's clear commands on when and how to read statutes in a way that would eliminate their potentially unconstitutional applications, save them from facial invalidation, and honor the Legislature's intent.

All of these four errors implicate particularly important questions of law. Left uncorrected, these errors would threaten the orderly and consistent development of free speech law in California, upend the Legislature's judgment that LGBT seniors need the civil rights protections that this statute reenforces, and call into question a disturbing range of other antidiscrimination protections. Both individually and collectively, these errors call out for this Court's reconsideration and correction.

1. The statute regulates the disparate treatment and harassment of vulnerable elders, not discussions of matters of public concern.

Were counsel to address the Justices of this Court by their first names—or worse, to address only the female Justices by their first names while referring to male Justices as "Your Honor"—they would be quickly and rightly rebuked. Were

(a)(5) as a whole, *see* Op. at 2, and the State reads the opinion to invalidate both the pronoun and name provisions of (a)(5), *see* Petition for Review at 19 n.10. Because the Court of Appeal's holding would seem to extend to misnaming no less than the use of incorrect pronouns, this letter does not distinguish between these two forms of willful and repeated misgendering.

they to continue repeating the offense, the First Amendment would provide no shield from the sanctions that would surely follow.

Of course, courtrooms are special places. Different rules apply there than in the public sphere, particularly surrounding speech. Rules of evidence limit what can be said, judges compel answers and sometimes judge their truth, oaths are demanded, and rules of decorum are generally enforced. None of these limits on expression would be permitted in the ordinary realm of public discourse outside the courthouse.

To acknowledge this, though, is already to accept that not every place and type of communication is subject to general First Amendment rules.[3] As relevant to this case: speech targeting specific individuals is different than generalized insults, much less abstract discussions of contested political or social issues. Relationships between caretakers and their patients are regulable in a way that interactions among citizens in the world are not. And long-term care facilities are at once workplaces, businesses, housing facilities, and sites of medical care—not primarily marketplaces of ideas.

The Court of Appeal's opinion in this case failed to recognize these constitutionally salient distinctions. Instead of following this Court's case law upholding the regulation of targeted, discriminatory expression in the workplace, *see, e.g.*, *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, the Court of Appeal took its cue from *Reed v. Town of Gilbert* (2015) 135 S. Ct. 2218, a U.S. Supreme Court case about content-based regulations of signs placed on public land and aimed at the general populace. *See* Op. at 7 ("We are required to apply strict scrutiny to the law by the high court's decision in *Reed*. . . ."). As the Court of Appeal noted, *Reed* holds that speech regulation is content-based, and thus subject to strict scrutiny, whenever the regulation's enforcer has to read or listen to the content of the speech to know whether the regulation applies. *See id.* But *Reed*'s holding does not extend to all contexts where speech occurs—to courts and care facilities no less than streets and sidewalks. Were *Reed*'s analysis to apply to the workplace (or in housing and healthcare contexts), then laws like Title VII and FEHA that are violated "when spoken words, either alone or in conjunction with conduct, amount to employment discrimination," *Aguilar*, 21 Cal.4th at 134, would all face strict scrutiny. And yet this Court has refused to apply strict scrutiny in these contexts. *See id.* at 135 (plurality opinion); *id.* at 166 (Werdegar, J., concurring).

[3] Because we are unaware of any differences between the U.S. Constitution's Free Speech Clause and the Liberty of Speech Clause of the California Constitution as they apply to any of the issues discussed in this letter, all references to the First Amendment should be read to apply to both federal and state protections of speech.

The Court of Appeal's decision to follow *Reed*'s generalized guidance instead of the more specific and relevant holding of *Aguilar* requires correction by this Court for several reasons.

For one thing, the lower court proceeded as if repeatedly calling someone by the wrong name and pronoun in a professional care setting is merely a way to express one's views about gender identity, a contested matter of public concern. It is not. As this Court has previously held and a plurality repeated in *Aguilar*, "the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs." *In re M.S.* (1995) 10 Cal.4th 698, 710 (quoted in *Aguilar*, 21 Cal.4th at 134).

Nothing in S.B. 219 prevents workers from engaging in public dialogue about gender identity, from seeking to persuade legislators or fellow citizens that laws like S.B. 219 are misguided, or even from voicing views about gender that others find offensive. The statute does one thing: it prohibits long-term care facility workers from willfully and repeatedly calling one of their residents by a name or pronoun which they have been clearly told is incorrect. In this, the statute's misnaming and misgendering provision is hardly different from a requirement that facility workers must check the resident's preferred gender box on their intake form, despite the fact that a refusal to do so—like most disparate treatment—would undoubtedly have expressive power.

When a caretaker addresses some patients but not others by their chosen name and pronouns, much as when a lawyer addresses some Justices but not others with the title they merit, the speaker has not just expressed a viewpoint, they have treated people differently—in short, they have discriminated. This is the insight that drives this Court's decision in *Aguilar*. *See* 21 Cal.4th at 137 n.6 ("[J]ust as it is perfectly clear that the First Amendment does not protect an individual's right to commit treason (or, for that matter, securities fraud) through the use of the spoken word, it is equally clear that the First Amendment does not protect an employer's or employee's right to engage in employment discrimination through the use of the spoken word.").

Here, the Court of Appeal acknowledged that "harassing speech that is sufficiently severe or pervasive to constitute employment discrimination" under FEHA or Title VII is not protected by the First Amendment. Op. at 9 (quoting *Aguilar*, 21 Cal.4th at 137). But it found in the present case that decisions to misname or misgender someone based on their sexual orientation or gender identity are only "potentially offensive or harassing to the listener," not something that necessarily creates a hostile environment. Op. at 10. What the lower court failed to recognize is that speech does not have to create a hostile environment in order to constitute discrimination and thereby fall outside the First Amendment's

protections. Aside from being harassing, speech can also be the vehicle for illegal disparate treatment, as here. *See Aguilar*, 21 Cal.4th at 137 n.6 (offering the example of a "Whites Only" sign placed outside a workplace).

When a worker in a long-term care facility enters Sally's room and says "Get up John!", or asks Sally's visiting family member "How long has he been sleeping?", the worker is demanding that Sally or her family members recognize "John" and "he" as referring to Sally, the patient in the room. (They have to do so even in order to respond "Her name is Sally.") Were Sally simply to refuse to respond—justifiably, since she does not believe the name "John" refers to her—the ensuing breakdown in care would cause harm that the Legislature is well within its rights to regulate. Contrast this with debate within the public sphere, the chief concern of the First Amendment. There we can generally ignore others' offensive expression without giving up vital services like health care or housing. (To the extent we cannot, we probably then qualify as a "captive audience," as discussed in the following Section.)

Speech that targets and treats differently certain residents of long-term care facilities because of their sexual orientation or gender identity is hardly analogous to signs alongside a road. *Reed* and its strict scrutiny test are thus inapposite in the present case.

2. Residents of long-term care facilities are a paradigmatically captive audience, justifying greater protection from discriminatory, harassing, and offensive speech.

Regulation of discriminatory speech is, if anything, *more* permissible here than it was in *Aguilar*. For while treating employees in the workplace as a "captive audience" was a matter of dispute in *Aguilar*, *compare* 21 Cal.4th at 159-62 (Werdegar, J., concurring), *with id.* at 184-85 (Kennard, J., dissenting), no one, including the Court of Appeal, questions the doctrine's applicability in the present case.

Under its captive audience doctrine, the U.S. Supreme Court has made clear that the government can "selectively . . . shield the public from some kinds of speech" based on its offensiveness—something the First Amendment would otherwise not permit—"when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. City of Jacksonville* (1975) 422 U.S. 205, 209 (citing *Rowan v. Post Office Dept.* (1970) 397 U.S. 728; *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298, 303 (plurality opinion); *id.* at 307 (Douglas, J., concurring)). In *Madsen v. Women's Health Center* (1994) 512 U.S. 753, 768, the Court extended its captive audience doctrine from home to health care, noting with approval the Florida Supreme Court's observation that "while targeted picketing of the home

threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance."

Residents of long-term care facilities—the people protected by S.B. 219—are by definition both residents and patients, thus doubly "captive" to the speech of their caretakers. The Court of Appeal recognized this, as it must. *See* Op. at 18 ("There is little doubt that many—if not all—residents who have expressed a pronoun preference are an unwilling audience for repeated and willful misgendering, if it should occur, and they have little, if any, ability to simply avoid harassing or discriminatory speech.").

In applying the captive audience doctrine, however, the Court of Appeal erred by focusing on the interests of the *speakers* in this case: workers at long-term care facilities. In the lower court's words, "we must consider the legitimate speech interests of employees, who, like residents, are not readily able or expected to go elsewhere to express their views." Op. at 18; *see also id.* ("Given the First Amendment rights of employees in their workplace, we decline to rely on the captive audience doctrine here to apply less than strict scrutiny."). This is an astonishing claim not just on its own terms, but also in its disregard of precedent and its implications for antidiscrimination law more broadly.

First, on its own terms, the claim's analogy between employees and residents of long-term care facilities makes little sense. According to the Court of Appeal, long-term care facility "employees, . . . *like residents*, are not readily able or expected to go elsewhere to express their views." *Id.* (emphasis added). Even assuming for the sake of argument that calling a patient by the wrong name or pronoun counts as an expression of one's views, employees at long-term care facilities have an entire life beyond the facility that residents there generally lack. Whereas residents are not "readily able or expected to go elsewhere" to engage in protected expression because they either literally cannot or should not be expected to leave their home to speak, workers leave at the end of every shift. There is little comparison between the expressive opportunities available to these two groups.

Second, the "legitimate speech interests of employees" in this case are surely no greater than those at stake in any of the Supreme Court's precedential captive audience cases of the last fifty years. The interest employees may have in repeatedly misnaming and misgendering those in their care can hardly compare to the interest of political candidates wanting to place campaign ads on public transit, *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298, the mail order businesses prevented from sending material to certain addresses, *Rowan v. U.S. Post Office Dept.* (1970) 397 U.S. 728, George Carlin and the radio station that broadcast his "Filthy Words" monologue, *F.C.C. v. Pacifica Foundation* (1978) 438 U.S. 726, or activists protesting outside abortion clinics, *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753. In none of those cases were the interests of the speakers seen

to outweigh those of the captive audience, and in none did the U.S. Supreme Court subject the law regulating their speech to strict scrutiny, as the Court of Appeal did here.

Third, the Court of Appeal's approach would endanger a broad swath of antidiscrimination law, which regularly and quite properly requires employees to "go elsewhere to express their views." Employees have to go elsewhere to express their views, for example, whenever expressing them at work would create a hostile work environment, deny customers equal access to public accommodations, or express a racial or similarly proscribed preference with regard to the sale or rental of housing. Unless every antidiscrimination law that regulates employee speech in some fashion is to face strict scrutiny, the Court of Appeal's unprecedented deference to the speech rights of employees cannot stand.

3. This case calls for overbreadth analysis rather than strict scrutiny.

Because the statute regulates modes of address that discriminate based on a protected identity trait, *see* Section 1, and target a particularly captive audience, *see* Section 2, the Court of Appeal's application of strict scrutiny flies in the face of this Court's and the U.S. Supreme Court's free speech case law. But *even if* one were to disagree and find, as the Court of Appeal did, that the statute covers a mix of unprotected and, potentially, protected speech, strict scrutiny would *still* be the wrong framework to employ. Even then, overbreadth would be the more appropriate mode of analysis—and the statute would easily satisfy it, since "it has not been suggested that the[] arguably impermissible applications of the statute amount to more than a tiny fraction of the [speech] within the statute's reach." *New York v. Ferber* (1982) 458 U.S. 747, 773.

In the opinion below, the Court of Appeal understood that the statute aims at speech that is unprotected since it "amount[s] to actionable harassment or discrimination as those terms are legally defined." Op. at 25; *see also id.* at 9 (citing *Aguilar* for the proposition that regulation of "harassing speech . . . does not run afoul of the First Amendment"). But the lower court also hypothesized situations in which it thought the statute might bar speech that *is* protected under the federal and state constitutions. Its imagined examples included "occasional, isolated, [or] off-hand" instances of misgendering and misnaming, ones that occur without residents' awareness, or those that do not impact residents' access to care. *Id.* at 25. Regulating situations like these, it said, was not a necessary means of advancing the State's admittedly compelling interest in "rooting out discrimination against LGBT residents of long-term care facilities." *Id.* at 25-26. The statute, in other words, was deemed overinclusive. Finding that the statute failed strict scrutiny for this reason, the Court of Appeal did not reach plaintiff's alternative claim that the statute is unconstitutionally overbroad. *Id.* at 27.

The distinction between limitations on speech that are *overinclusive*—and therefore fail strict scrutiny—and those that are *overbroad* is one that has caused considerable confusion among courts and commentators. *See generally* Marc Rohr, *Parallel Doctrinal Bars: The Unexplained Relationship Between Facial Overbreadth and "Scrutiny" Analysis in the Law of Freedom of Speech* (2019) 11 ELON L.J. 95. Here, however, the Court of Appeal sidestepped the distinction entirely, failing to offer any justification at all for applying strict scrutiny's overinclusiveness test rather than the distinct line of doctrine regarding overbreadth. This Court could use the present case to provide much needed guidance on when each approach should be employed.

Overbreadth doctrine has two important aspects. As a substantive matter, the doctrine says that "in an area where the government can regulate speech, such as obscenity, a law that regulates much more expression than the Constitution allows to be restricted will be declared unconstitutional." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (6th ed., 2019), p.1027. Procedurally, as an exception to ordinary standing principles, overbreadth claims can be brought by speakers whose own expression or conduct does not merit protection in order to prevent overly broad laws from chilling speech that *is* protected. *Id.* at 1030; *see also, e.g.*, *People v. Fogelson* (1978) 21 Cal.3d 158, 163.

Amidst the confusion about which approach should apply, one clear rule for choosing between strict scrutiny and overbreadth analysis would be as follows. Strict scrutiny should apply to laws that regulate *protected* speech to advance some compelling governmental interest. When the law under review abridges more or less speech than in necessary to further that interest—in other words, when the law is overinclusive or underinclusive—it will fail the narrow tailoring prong of the strict scrutiny test. On the other hand, overbreadth analysis should apply when a law aims to regulate *unprotected* speech (or conduct) but allegedly spills over to speech that the federal or state constitution protects. The spillover is the "overbreadth," and the law in question will be facially struck down only if the overbreadth is substantial, "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 615. If the overbreadth is not substantial, chilling worries are lessened, and challenges to the law can be brought on a case-by-case basis by those few whose protected expression actually gets abridged.

Dividing cases in this way is faithful both to precedent and the theoretical underpinnings of each approach. This Court has rightly turned to strict scrutiny in cases where all of the expression regulated by the challenged law is constitutionally protected. For example, in *Keenan v. Superior Court of Los Angeles County* (2002) 27 Cal.4th 413, this Court considered California's "Son of Sam law," a content-based financial penalty on constitutionally protected expressive works. Finding that the law regulated protected speech more broadly than its compelling purpose required, the *Keenan* Court struck it down on its face. *See also Simon & Schuster v. Members of N.Y. State Victims Crime Bd.* (1991) 502 U.S. 105 (applying strict scrutiny to an

analogous New York law and finding it similarly overinclusive). The point of strict scrutiny is to ensure that regulation of protected speech is justified; this requires both a compelling need for regulation and a good fit between the need and the regulation enacted to meet it. Overinclusiveness, like underinclusiveness, calls into question whether the asserted need really motivates the regulation. That is why regulations found not to be narrowly tailored must be invalidated in their entirety.

Overbreadth cases operate differently. Instead of smoking out illegitimate or less-than-compelling motives, overbreadth analysis separates wheat from chaff: that which the federal and state constitutions guard from that which the government is largely free to regulate. This Court and the U.S. Supreme Court have applied the overbreadth doctrine to regulations of *conduct* that also allegedly abridge speech. *See, e.g.*, *Schad v. Mount Ephraim* (1981) 452 US 61 (striking down a law that prohibited nude dancing but also fully protected forms of entertainment); *Broadrick v. Oklahoma* (1973) 413 U.S. 601 (reviewing a law said to cover both solicitation of money and the display of campaign messages); *In re Bushman* (1970) 1 Cal.3d 767 (interpreting a breach of peace statute). They have also applied it to regulations of expression that falls outside the First Amendment's coverage if the regulations also sweep in some expression that *is* covered. *See, e.g.*, *People v. Stanistreet* (2002) 29 Cal.4th 497 (distinguishing formally filed, knowingly false accusations from casual falsehoods); *City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789 (regulating signs in order to prevent visual clutter). In both types of cases the point of the doctrine is to ensure that regulations are not drafted in a way that, perhaps inadvertently, sweeps substantially beyond that which the First Amendment allows the government to regulate.

This case clearly merits the latter approach. As the Court of Appeal itself recognized, the statute here is primarily aimed at harassing or otherwise discriminatory speech that falls beyond constitutional protections. And although the plaintiff in this case has not identified any of its members whose protected speech would be covered (or has been chilled) by this statute—in fact, plaintiff has not identified any members who are even subject to this statute at all—the Court of Appeal imagined particular situations in which the statute might potentially restrict the constitutionally protected speech of long-term care facility staff. Put a different way, the lower court acknowledged that the statute aims at unprotected expression but also hypothesized potential spillover cases. Applying overbreadth analysis, then, the resulting question should have been: Are the situations the Court of Appeal hypothesized—the statute's potential restrictions on protected speech—substantial, judged in relation to speech that is unprotected (*i.e.*, harassing or discriminatory speech)?

To that question, unlike the overinclusiveness analysis demanded under strict scrutiny, the answer is clearly no. This is a "statute whose legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. And as the following Section argues, *even if* a court were to find otherwise in this case, the

proper response would be to read the statute in a way that forecloses the few impermissible applications that the Court of Appeal was able to imagine.

4. Limiting constructions of the statute would eliminate any potentially unconstitutional applications while remaining faithful to the Legislature's clear intent.

Even if everything we have said so far proved unconvincing—that is, even if the statute were seen as regulating some protected discourse rather than unprotected disparate treatment, even if that discourse were not found to be aimed at a captive audience, and even if potentially protected applications were thought substantial enough to call the statute's constitutionality into question—there is still another reason why the statute should have been upheld. Instead of facially invalidating a statutory civil rights provision based on hypothetical unconstitutional applications, the Court of Appeal should simply have read the statute in way that would avoid any such applications in the first place. As this Court has made clear, "courts 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.'" *Kopp v. Fair Political Practices Commission* (1995) 11 Cal.4th 607, 643 (quoting *Arp v. Workers' Compensation Appeals Board* (1977) 19 Cal. 3d 395, 407-08). In this case, the rewriting needed would be minimal.

The constitutional problem identified by the Court of Appeal—the sole basis it provided for invalidating the statute—was the possibility that the statute could be read to "criminaliz[e] occasional, off-hand, or isolated instances of misgendering, that need not occur in the resident's presence and need not have a harassing or discriminatory effect on the resident's treatment or access to care." Op. at 26. Such applications, said the Court of Appeal, would criminalize more speech than necessary to advance the State's "legitimate and laudable goal of rooting out discrimination against LGBT residents of long-term care facilities." Op. at 25. As the previous Section noted, this was the *sole* reason why the Court of Appeal found the statute to fail the strict scrutiny analysis it chose to apply.

The statute's text, however, need not be read so broadly. Each of the constitutional limits the Court of Appeal thought the statute might potentially overstep can either be found in, or read into, the statute itself. Consider the Court of Appeal's four specific worries (all from Op. at 25)—and the simple solutions that would avoid them, make invalidation of the statute unnecessary, and preserve the Legislature's choice to protect the rights of LGBT long-term care facility residents.

First, the Court of Appeal expressed concern that the statute potentially criminalizes "even occasional, isolated, off-hand instances of willful misgendering—

provided there has been at least one prior instance." But the statute's requirement that staff members' misnaming and misgendering of residents must be done "willfully and repeatedly" can naturally be read to proscribe patterns of behavior, not just stray or isolated remarks.

Second, the Court of Appeal worried that the statute does not require "that such occasional instances of misgendering amount to harassing or discriminatory conduct." This is simply incorrect. The statute prohibits misnaming and misgendering only when it occurs "wholly or partially on the basis of a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status"—which is to say, when it amounts to discriminatory conduct based on a statutorily and, in most cases, constitutionally protected ground.

Third, the Court of Appeal found the statute to be insufficiently tailored because it does not require that "the misgendering at issue here negatively affect any resident's access to care or course of treatment." However, the extent to which staff members' discriminatory conduct negatively affects residents' care is a factor explicitly written into the statute's penalty provision, as the court below recognized elsewhere in its opinion. *See* Op. at 5 n.4 (listing among the non-exclusive list of factors for the court to consider when determining punishment "[w]hether the violation had a direct or immediate relationship to the health, safety, or security of the patient" (quoting Cal. Health & Safety Code § 1290)). The Legislature explicitly envisioned lesser punishment when a staff member's actions less negatively affect residents' care. A limiting construction of the statute that would require at least some showing of a negative effect on care would thus be fully consistent with legislative intent.

Fourth, the Court of Appeal objected that the statute does not require that residents be aware of being misgendered in order for a violation to occur. But this objection, if not simply unfounded, is easily avoided. It would be simple and appropriate for courts to read an awareness requirement into the statute to avoid the drastic step of invalidation. But it is also probably unnecessary to do so, for laws prohibiting discriminatory treatment often prohibit speech that occurs out of earshot of those who are affected. Racist or sexist considerations that are voiced in a hiring meeting, a university admissions office, or jury deliberations are illegal, even though they are unheard by those being discussed.

* * *

S.B. 219 prohibits discrimination against LGBT residents of long-term care facility. As the Legislature found when it passed the law, discrimination can take a variety of forms—including repeated and willful misnaming and misgendering of residents by facility staff.

In striking down the law's prohibition on this kind of discriminatory speech, the Court of Appeal failed to see the difference between discriminatory modes of address and public street signs; between captive audiences and employees who come and go; between constitutional overbreadth and strict scrutiny's tailoring requirement; and between readings of the statute that reflect the Legislature's purpose versus those that would extend to hypothetical expression the Legislature has no interest in regulating.

Correcting any one of these failures would be enough to reverse the decision below and restore the civil rights protections the Legislature enshrined in S.B. 219. Correcting them all would contribute greatly to the coherent development of free speech law here in California. For these reasons, we urge this Court to grant the State's Petition for Review.

Sincerely,

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

Brian Soucek
Professor of Law and Chancellor's Fellow
University of California, Davis School of Law[4]

[4] *Amici* write in their personal capacities; their institutional affiliations and titles are provided only for identification purposes.

CERTIFICATE OF SERVICE

Taking Offense v. State of California
Supreme Court of California, No. S270535

I, Brian Soucek, declare that am not a party to this case, I am over the age of 18 years, and on this date, I served a copy of the foregoing Amicus Letter using TrueFiling to all of the parties in this case.

In addition, I sent the Supreme Court of California an unbound paper copy of the foregoing Amicus Letter by First-Class Mail to the following address:

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

I also sent the Superior Court an unbound paper copy of the foregoing Amicus Letter by First-Class Mail to the following address:

Clerk of the Court, Department 5
Sacramento County Superior Court
Gordon D. Schaber Downtown Courthouse
720 Ninth Street
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 13, 2021, in San Francisco, California.

/s/ Brian Soucek

Brian Soucek
Professor of Law and Chancellor's Fellow
University of California, Davis School of Law