

September 13, 2021

Honorable Chief Justice Tani G. Cantil-Sakauye
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

**Re: Amicus Curiae Letter Supporting Petition for Review;
Taking Offense v. California, No. S270535**

**Improper Invalidation of Key Provision of
LGBT Long-Term Care Facility Residents' Bill of Rights**

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Supreme Court of California:

Amici the California Commission on Aging, Services and Advocacy for GLBT Elders, Justice in Aging, California Advocates for Nursing Home Reform, and Openhouse submit this letter in support of the Petition for Review filed by Defendants California Attorney General, California Department of Social Services, and California Department of Public Health. The Court of Appeal erred by invalidating a pivotal provision of the Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents' Bill of Rights (LGBT Residents' Bill of Rights).

Amici write to emphasize the difficult position faced daily by LGBT residents of long-term care facilities. The LGBT Residents' Bill of Rights provides them with important rights to maintain their quality of life and sense of identity and safety, but the Court of Appeal's ruling has eliminated this right from long-term care facility law.

I. Interests of *Amici*

The **California Commission on Aging** is an independent state advisory body created in state law to serve as the principal advocate for older Californians and their families. The Commission's mandate is to ensure that all Californians can age with dignity and respect in the setting of their choice. Through the work of advocacy and advising, the Commission serves as a catalyst for change that supports and celebrates Californians as they age. With members appointed by the Governor and both houses of the Legislature, Commissioners represent the racial and ethnic diversity of the state, as well as the state's

cultural and geographic diversity The Commission’s work is guided by the values of equity and inclusion, promotion of autonomy and choice, a system that serves older adults with respect and integrity, and collaboration to build a unified voice to support California’s aging population.

Services and Advocacy for GLBT Elders (“SAGE”) is the country’s oldest and largest organization dedicated to improving the lives of LGBT older adults. In conjunction with 30 affiliated organizations in 22 states and Puerto Rico, SAGE offers supportive services and resources to LGBT older adults and their caregivers, advocates for public policy changes that address the needs of LGBT older people, and provides training for organizations that serve LGBT older adults. As part of its mission, SAGE provides services to LGBT older adults who face discrimination when they seek access to care.

Justice in Aging is a national non-profit organization with the principal mission of protecting the health and economic security of low-income older Americans. Justice in Aging’s work puts special emphasis on persons who have historically been disadvantaged, including women, members of the LGBT community, people of color, and people with limited English proficiency. Justice in Aging also has a long-standing record of advocacy for residents of long-term care facilities, including federal advocacy dating back to the 1987 enactment of the federal Nursing Home Reform Law.

California Advocates for Nursing Home Reform (CANHR) is a non-profit advocacy organization founded in 1983 with the goal of improving the choices, care, and quality of life for California’s long-term care consumers. Among its programs and services, the organization provides counseling to long-term care consumers regarding their complaints with facilities and their rights to redress. CANHR has long focused on the special concerns and challenges facing LGBT people in congregate healthcare settings, and offers consumers resources and counseling on these issues.

Openhouse, founded in 1998, enables San Francisco Bay Area LGBT seniors to overcome the unique challenges they face as they age by providing housing, direct services, transformational training and community programs. Openhouse centers the voices and experiences of LGBT older adults by providing opportunities to make social connections and build community in a safe environment that encourages and supports community members to share their diverse perspectives and identities.

II. The Court of Appeal Justified a “Not Narrowly Tailored” Finding by Mischaracterizing the Pronoun Provision of the LGBT Residents’ Bill of Rights.

The Petition for Review concerns the “pronoun provision” of the LGBT Residents’ Bill of Rights. Under this provision, it is unlawful for a long-term care facility and its staff members to “[w]illingly and repeatedly fail to use a resident’s preferred name or nounouns after being clearly informed of the preferred name or pronouns.”¹

In analyzing this provision, the Court of Appeal found that the pronoun provision was supported by the State’s compelling interest in eliminating discrimination on the basis of sexual orientation or transgender status.² The Court of Appeal, however, then erred in finding that the pronoun provision was not “narrowly tailored” to address that compelling interest. The Court of Appeal justified this erroneous finding by claiming inaccurately that “the law criminalizes even occasional, isolated, off-hand instances of willful misgendering—provided there has been at least one prior instance—without requiring that such occasional instances of misgendering amount to harassing or discriminatory conduct.”³

This claim by the Court of Appeal simply cannot be reconciled with the actual statutory language. The law is clear: a facility or staff member is in violation only through willful and repeated misgendering “after being clearly informed of the preferred name or pronouns.”⁴ Nothing in the statutory text supports the Court of Appeal’s intimation that someone could face criminal charges by twice, off-handedly, referring to a resident with the incorrect pronoun or name. This error by the Court of Appeal is pivotal, as it justified the Court’s finding that the law is not narrowly tailored, which in turn led to a finding of an unconstitutional infringement upon speech.

In addition, the Court of Appeal’s presentation of the issue trivializes the misgendering prohibited by California law. Assume a transgender woman has moved into a nursing facility, after living in the community as a woman for many years. She “clearly

¹ Health & Safety Code § 1439.51(a)(5).

² *Taking Offense v. State of California*, 66 Cal. App. 5th 696, 716-18 (Cal. Ct. App., 3rd Dist. 2021).

³ *Id.* at 720.

⁴ Health & Safety Code § 1439.51(a)(5).

inform[s]” staff of how she wishes to be addressed but, regardless, a nurse “[w]illingly and repeatedly” refers to the resident as “he,” and addresses her with the male name that she explicitly has rejected. Nothing about such conduct should be dismissed as “off-hand.”

In an analogous case, a hospital intake clerk intentionally identified a transgender male patient as female on a hospital identification bracelet, even though he had explained that he had transitioned to identifying as male. In defending the conduct in subsequent litigation, the hospital attempted to minimize the staff’s conduct as “name-calling” and “perceived slights,” but the federal district court found the misgendering to constitute “objectively offensive behavior” for purposes of anti-discrimination law.⁵

Indeed, the type of behavior minimized by the Court of Appeal is proscribed by the Unruh Civil Rights Act, which states that Californians “are entitled to the full and equal accommodation, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever,” regardless of (as relevant here) sex, sexual orientation, gender identity, or gender expression.⁶ In an analogous case from a federal court in California, two Black airline passengers could state a claim under the Unruh Act for being reprimanded by airline personnel in a dispute over carry-on luggage, when similarly-situated Caucasian passengers were treated deferentially.⁷ In this case, likewise, referring to a transgender resident with the wrong name or pronoun would deny that resident the “full and equal” treatment enjoyed by other residents.

Thus, the misgendering prohibited by the LGBT Residents’ Bill of Rights should not be minimized. Contrary to the Court of Appeal’s position, a facility staff member’s willful and repeated misgendering, in defiance of a resident’s clear request, would be destructive to the resident and worthy of sanction under California law specific to long-term care facilities. Discrimination against transgender persons has been found to be linked to depression and psychological distress. Most alarmingly, 42 percent of surveyed

⁵ *Rumble v. Fairview Health Services*, 2015 WL 1197415, at *25-26 (D. Minn. 2015).

⁶ Civ. Code § 51(b), (e)(5).

⁷ *Trigueros v. Southwest Airlines*, 2007 U.S. Dist. LEXIS 64234, at *2-3, 12-13 (S.D. Cal. 2007).

transgender persons reported that they had attempted suicide in response to transgender-related discrimination.⁸

III. The Protections Provided by the LGBT Residents' Bill of Rights Are Vital to LGBT Long-Term Care Facility Residents.

It is an unavoidable fact of life: as persons age, they often need assistance with life's routine daily activities. Some people remain living in houses or apartments, and receive needed assistance from family members or paid aides. Other persons move into long-term care facilities.

The vast majority of in-home assistance—83% in one study—is provided by family members and friends, as opposed to paid aides.⁹ But this option is less likely to be available to aging LGBT Californians, as they are 1) less likely to have children, and 2) more likely to be estranged from family, due to family rejection of LGBT identity.¹⁰ As a result, as they age, LGBT Californians frequently are forced to move into a long-term care facility in order to receive necessary assistance.

In general, older Californians receive services in two types of long-term care facilities: residential care facilities for the elderly (RCFEs) and nursing facilities.¹¹ In the vernacular, these types of facilities often are referred to as “assisted living facilities” and

⁸ Caroline Medina et al., Ctr. for Am. Progress, *Protecting and Advancing Health Care for Transgender Adult Communities*, at text surrounding endnotes 32-41, and Figure 4 (Aug. 2021), <https://perma.cc/7N5V-AZ4S>.

⁹ Esther M. Friedman et al., *U.S. Prevalence and Predictors of Informal Caregiving for Dementia*, *Health Affairs*, vol. 34, No. 10, at 1638 (Oct. 2015), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2015.0510>.

¹⁰ Soon Kyu Choi & Ilan H. Meyer, The Williams Institute, UCLA School of Law, *LGBT Aging: A Review of Research Findings, Needs and Policy Implications*, at 8 (Aug. 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-Aug-2016.pdf>.

¹¹ See Health and Safety Code §§ 1569- 1569.889 (RCFEs); 22 Cal. Code Regs. §§ 72001- 72713 (nursing facilities), 87100- 87795 (RCFEs); 42 U.S.C. § 1396r (federal nursing facility law); 42 C.F.R. §§ 483.1- 483.95 (federal nursing facility regulations). Federal law applies to virtually every nursing facility in California, because almost all nursing facilities accept federal reimbursement through Medicare or Medicaid, or both.

“nursing homes,” respectively. The facility becomes the resident’s home for potentially many years.

In either type of facility, residents depend heavily upon staff to help the resident with routine daily tasks – for example, assistance in walking, eating, or getting into bed. Assistance includes the most private of activities, including getting dressed, using the toilet, and taking a bath or shower.¹² Furthermore, because of residents’ conditions and care needs, they often spend all or almost all of their days within the facility’s four walls. This isolation has been particularly pronounced during the current COVID-19 pandemic, due to the infection risk and consequent prohibitions on visitors.¹³

For LGBT residents, these difficulties can be dramatically magnified. In a study cited by the California Legislature, 43 percent of respondents observed or experienced mistreatment of LGBT residents. Similarly, 89 percent of respondents stated that staff members would discriminate against LGBT residents, and 53 percent said that staff discrimination would rise to the level of abuse or neglect.

Consistent with these legislative findings, a recent report identified similar problems in the relationship between transgender persons and health care providers generally. Thirty-two percent of transgender respondents reported that a health care provider had intentionally misgendered them or used an incorrect name. Furthermore, 19 percent reported that a health care provider had used harsh or abusive language during treatment.¹⁴

¹² 22 Cal. Code Regs. § 87459; 42 C.F.R. § 483.24(b).

¹³ See, e.g., Cal. Dep’t of Soc. Services, Provider Information Notice, PIN 20-08-ASC (March 18, 2020) (prohibiting visitors in RCFEs), https://www.cdss.ca.gov/Portals/9/CCLD/PINs/2020/ASC/PIN_20-08-ASC.pdf; Centers for Medicare and Medicaid Services, Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes, QSO-20-14-NH (March 13, 2020) (prohibiting visitors in nursing facilities), <https://www.cms.gov/files/document/qso-20-14-nh-revised.pdf>.

¹⁴ Sharita Gruberg et al., Ctr. for Am. Progress, *The State of the LGBTQ Community in 2020*, Figure 13 and accompanying text (Oct. 2020), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/>.

Furthermore, all of these problems are exacerbated by a longstanding reality of long-term care: many facilities provide substandard care year after year, and seem to be impervious to the many reform efforts implemented over the past decades.¹⁵ These types of problems have become particularly prominent in the past 18 months, due to the hundreds of thousands of nursing facility residents who have died from COVID-19.¹⁶

IV. The Protections Provided by the LGBT Residents' Bill of Rights Are Vital to LGBT Long-Term Care Facility Residents.

Thus, LGBT residents face multiple obstacles when confronting misgendering and other discriminatory actions in long-term care facilities. They live with significant health challenges, must rely on assistance from facility staff for routine and intimate activities and, when confronting problems, often must deal with intransigent facility operators.

Amici have on-going, first-hand experience with the discrimination faced by LGBT residents of long-term care facilities, and urge the Court to grant the appellate review requested by Defendants.

Dated: September 13, 2021

Respectfully submitted,

JUSTICE IN AGING

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¹⁵ *See, e.g.*, HHS Office of Inspector General, Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries, OEI-06-11-00370, at 17-19 (Feb. 2014) (22% of residents suffered harm during Medicare-reimbursed short-term stay in nursing facility); GAO, Nursing Homes: Despite Increased Oversight, Challenges Remain in Ensuring High-Quality Care and Resident Safety, GAO-06-117, at 13-14 (Dec. 2005) (18% of government inspections missed serious deficiencies within the facilities).

¹⁶ *See, e.g.*, AARP, AARP Nursing Home COVID-19 Dashboard, <https://www.aarp.org/ppi/issues/caregiving/info-2020/nursing-home-covid-dashboard.html>.

DECLARATION OF ELECTRONIC SERVICE,
AND SERVICE BY FIRST CLASS MAIL

The undersigned certifies that on September 13, 2021, he served the foregoing *Amicus* Letter Supporting Petition for Review through the Court's TrueFiling electronic filing system to counsel for Plaintiff/Respondent and Defendants/Petitioners, and to the Clerk of the Court of the Third Appellate District of the Court of Appeal:

- David Llewellyn, Counsel for Plaintiff/Respondent Taking Offense
- Anna Ferrari, Counsel for Defendants/Petitioners California Attorney General, California Department of Social Services, and California Department of Public Health
- Office of the Clerk; California Court of Appeal, Third Appellate District

The Superior Court, which is not registered with the TrueFiling system, was served by first class mail, placed in the United States Mail today, addressed to the following address:

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

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 13, 2021, at Los Angeles, California.

/s/ Eric M. Carlson
Eric M. Carlson