



Via Electronic Filing

September 14, 2021

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

Re: Letter of Amici Curiae Equality California, National Center for Lesbian Rights, Lambda Legal, et al. in Support of Petition for Review
Taking Offense v. State of California, No. S270535
Third Appellate District, No. C088485

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

Pursuant to Cal. Rules of Court, rule 8.500(g), amici curiae Equality California, National Center for Lesbian Rights, Lambda Legal, and 16 additional nonprofit organizations write in support of the Petition for Review of *Taking Offense v. State of California* (2021) 66 Cal.App.5th 696. In *Taking Offense*, the Court of Appeal erroneously concluded that a provision in the Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents' Bill of Rights prohibiting long-term care facilities and staff from "[w]illfully and repeatedly" misusing a resident's name and pronouns because of the resident's sexual orientation, gender identity, or gender expression violates the First Amendment to the U.S. Constitution.

The implications of this decision are of paramount importance to Equality California, the sponsor of the challenged statute, as well as to the National Center for Lesbian Rights, Lambda Legal, and other organizations in California and nationwide. In addition to invalidating a critical non-discrimination protection for residents of long-term care facilities, the decision's flawed reasoning rests on a fundamental misapprehension of key aspects of other California and federal non-discrimination laws. If permitted to stand, the decision could undermine other important civil rights protections.

The Court of Appeal's facial invalidation of the provision requiring equal treatment of residents with respect to names and pronouns rests on numerous legal errors. The Court of Appeal erred in treating the statute—which prohibits singling out lesbian, gay, bisexual, transgender, and queer (LGBTQ) people for disparate treatment—as a regulation of protected speech, rather than conduct. The Court of Appeal also failed to appreciate the full scope of the harm caused by the intentional misuse of transgender people's names and pronouns, which occurs in many settings. This form of discrimination also harms people who are not transgender, including those who are (or are perceived as) lesbian, gay, bisexual, or gender non-conforming. Finally, the Court of Appeal's assumption that such conduct is not "actionable harassment or

discrimination” ignores key principles of California and federal non-discrimination laws. The intentional misuse of a person’s name or pronouns because of their sexual orientation, gender identity, or other protected characteristic violates the Unruh Civil Rights Act and other state and federal non-discrimination laws. The Court of Appeal also erred in assuming that employment law does not prohibit such willful and repeated discriminatory conduct in the workplace. The intentional misuse of a person’s name or pronouns based on sexual orientation, gender identity, or gender expression is a straightforward form of unlawful disparate treatment, and it can also constitute unlawful harassment, especially if done “[w]illfully and repeatedly” as specified in the challenged provision. Amici urge the Court to grant the petition and reverse.

I. Interests of Amici

Founded in 1999, **Equality California (EQCA)** is the nation’s largest statewide lesbian, gay, bisexual, transgender and queer+ (“LGBTQ+”) civil rights organization. Equality California brings the voices of LGBTQ+ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ+ people. We advance civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those we serve. Equality California frequently participates in litigation in support of the rights of LGBTQ+ persons. As the sponsor of the challenged statute, Equality California has a particular interest in this litigation, and it has members throughout the state, including transgender elders, who live in long-term care facilities.

The **National Center for Lesbian Rights (NCLR)** is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases in California and across the country involving constitutional and civil rights. NCLR has a particular interest in ensuring that LGBTQ people of all ages are free from discrimination in many contexts, including public accommodations, employment, housing, education, and health care.

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is the nation’s oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of LGBTQ people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has served as counsel of record or amicus curiae in seminal cases in California and across the country regarding the rights of LGBTQ people and people living with HIV to equal opportunity in employment, housing, health care, public accommodations, and education. (See, e.g., *Bostock v. Clayton County* (2020) 140 S.Ct. 1731; *Wetzel v. Glen St. Andrew Living Community LLC* (7th Cir. 2018) 910 F.3d 856; *Glenn v. Brumby* (11th Cir. 2011) 663 F.3d 1312; *North Coast Women’s Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145; *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824.) Lambda Legal is committed to ensuring that nondiscrimination protections are properly understood and applied to comprehensively address the disparities experienced by the communities we serve in every facet and stage of life, including by LGBTQ older adults.

Additional amici are: American Civil Liberties Union of Northern California, American Civil Liberties Union of San Diego & Imperial Counties, American Civil Liberties Union of Southern California, Bay Area Lawyers for Individual Freedom, California Women’s Law Center, GLBTQ Legal Advocates & Defenders, Impact Fund, Legal Aid at Work, National Center for Transgender Equality, National LGBTQ+ Bar Association, National LGBTQ Task Force, National Women’s Law Center, Tom Homann LGBTQ+ Law Association, Trans Lifeline, Transgender Law Center, and TransLatin@ Coalition. Statements of interest are in the Appendix.

II. The Court of Appeal Erred in Treating the Statute as a Regulation of Protected Speech.

The Court of Appeal erred in treating section 1439.51(a)(5), which prohibits disparate treatment, as a regulation of protected speech rather than conduct. On its face, that section prohibits disparate treatment of residents with respect to names and pronouns based on the resident’s sexual orientation, gender identity, or gender expression.¹ For example, the law prohibits singling out a transgender woman for disparate treatment because of her transgender status by intentionally referring to her as male, while referring to non-transgender people based on their gender identity. It also prohibits intentionally calling a lesbian “he,” while referring to heterosexual women as “she.” Such conduct intentionally treats a person differently, and less favorably, than others based on their actual or perceived sexual orientation, gender identity, or gender expression. Such conduct can also constitute unlawful harassment, especially if done “[w]illfully and repeatedly” as specified in section 1439.51(a)(5).

The Court of Appeal’s contrary conclusion wrongly assumes that because the discriminatory conduct prohibited by this provision involves verbal communication, the provision is a restriction of expression and requires heightened First Amendment scrutiny. But both the U.S. Supreme Court’s and this Court’s precedent expressly reject that erroneous assumption. As the U.S. Supreme Court has long held, “it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” (*Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (2006) 547 U.S. 47, 62 [quoting *Giboney v. Empire Storage & Ice Co.* (1949) 336 U.S. 490, 502].) It observed that “Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading “White Applicants Only” hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.” (*Ibid.*)

Here, the challenged provision simply requires that staff refrain from discriminatory conduct when interacting with or otherwise providing services, housing, and care for residents. The requirement that staff address and refer to residents without singling them out for negative treatment based on their sexual orientation or gender identity requires equal treatment and ensures that all residents are able to receive equal, non-discriminatory services. When staff

¹ Section 1439.51 prohibits certain actions taken “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.” (Health & Saf. Code, § 1439.51, subd. (a).)

address or refer to residents, they are not doing so to express a message, but to provide care. Similarly, the purpose of the law is not to regulate expression, but to ensure that residents are treated equally in the provision of long-term care.

The Court of Appeal’s holding that the challenged provision is facially unlawful is also inconsistent with *Aguilar v. Avis Rent a Car System, Inc.* (1999) 21 Cal.4th 121. As the plurality opinion observed, “[a] statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity.” (*Id.* at p. 134.) The plurality opinion noted that “[t]his reasoning applies equally when spoken words, either alone or in conjunction with conduct, amount to employment discrimination.” (*Ibid.*) The parties in *Aguilar* did not dispute that the First Amendment permits liability under the Fair Employment and Housing Act for the creation of a hostile work environment, which the Court found unsurprising given that U.S. Supreme Court case law “leave[s] little room for doubt on this score.” (*Id.* at pp. 135-36.) The challenged provision, which prohibits disparate treatment and harassment, is no different from other non-discrimination statutes that can be violated using words.

For example, by prohibiting disparate treatment in the way staff address and refer to residents, the challenged provision is similar to the statute’s prohibition of disparate treatment based on sexual orientation, gender identity, and gender expression with respect to the right to wear clothing permitted for any other resident or to use restrooms consistent with a resident’s gender identity. (Health & Saf. Code, § 1439.51, subs. (a)(6), (a)(4).) These provisions require equal treatment. That they may be violated using words—whether by telling a lesbian “you cannot wear a tie,” or telling a transgender woman “you cannot use the women’s restroom” or intentionally referring to her as “he”—does not transform such conduct into “speech” for First Amendment purposes. The law requires equal treatment, and any impact on speech as such is incidental.

III. The Misuse of a Transgender Person’s Name or Pronouns Is a Common and Harmful Form of Discrimination.

The Court of Appeal failed to appreciate the pervasiveness of the prohibited conduct and the serious harms it may cause. This type of discrimination occurs frequently in health care settings. A 2020 study from the Center for American Progress found that 32% of transgender respondents—and 46% of transgender respondents of color—reported that in the last year, a doctor or health care provider intentionally used the wrong name or pronouns when addressing or referring to them.² Research has confirmed that being referred to by the wrong name and pronouns results in psychological distress, including “anxiety- and depression-related symptoms [and] stress”³

² Medina et al., Ctr. for Am. Progress, *Protecting and Advancing Health Care for Transgender Adult Communities* fig. 13 (Aug. 18, 2021) <<https://perma.cc/7N5V-AZ4S>>.

³ McLemore, *A Minority Stress Perspective on Transgender Individuals’ Experiences with Misgendering* (2016) 3 *Stigma and Health* 53, 59; see McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals* (2014) 14 *Self and Identity* 51, 60 (finding a correlation between frequency of misgendering and negative views

The deliberate refusal to treat a person consistent with their gender identity can also result in denials of health care. Kyler Prescott, a transgender boy, was admitted to a hospital inpatient psychiatric unit in San Diego because of his suicidal thoughts. (*Prescott v. Rady Children's Hospital-San Diego* (C.D.Cal. 2017) 265 F.Supp.3d 1090, 1096.) Although hospital staff assured Kyler's mother that Kyler's gender identity would be respected and that staff would refer to Kyler with male gender pronouns, staff repeatedly addressed and referred to Kyler as a girl. (*Ibid.* [citing complaint].) Kyler reported that one employee said, "Honey, I would call you he, but you're such a pretty girl." (*Id.* at p. 1097 [citing complaint].) "Despite concerns over Kyler's continuing depression and suicidal thoughts, Kyler's medical providers concluded that he should be discharged early from the hold at [the hospital] because of the staff's conduct." (*Ibid.* [citing complaint].)

The intentional misuse of transgender people's names and pronouns also occurs in housing and schools. For example, a recent study of housing discrimination against transgender people found that a housing provider "improperly and repeatedly referred to the tester by their legal first name, not the name by which the tester had initially introduced themselves and asked the housing provider to use."⁴ Such mistreatment is also widespread in schools. GLSEN's 2019 National School Climate Survey found that in California, 1 in 3 transgender students were prevented from using their chosen name or pronouns in school.⁵ Treating transgender youth consistent with their gender identity is a fundamental aspect of treating them equally and avoiding the serious negative health impacts of unequal treatment. In particular, research demonstrates that "[t]ransgender and nonbinary youth who report having their pronouns respected by all or most of the people in their lives attempted suicide at half the rate of those who did not have their pronouns respected."⁶

In the workplace, where the intentional misuse of transgender people's names and pronouns is also pervasive, this type of mistreatment harms transgender workers and interferes with their ability to do their jobs. The National Transgender Discrimination Survey found that more than half of transgender respondents had been referred to by the wrong pronoun at work,

of self); *Hampton v. Baldwin* (S.D.Ill. Nov. 7, 2018, No. 3:18-CV-550-NJR-RJD) 2018 WL 5830730, at *2 (describing expert testimony at evidentiary hearing "explain[ing] that misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating").

⁴ Langowski et al., *Transcending Prejudice: Gender Identity and Expression-Based Discrimination in the Metro Boston Rental Housing Market* (2018) 29 *Yale J.L. & Feminism* 321, 345.

⁵ GLSEN, *School Climate for LGBTQ Students in California (State Snapshot)* (2021), <<https://perma.cc/QQ4E-J4J6>>.

⁶ The Trevor Project, *2020 National Survey on LGBTQ Youth Mental Health* 9 (2020), <<https://perma.cc/MYV9-R696>>; see also Russell et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior among Transgender Youth*, 63 *J. Adolescent Health* 503 (2018) (concluding that transgender youth who were able to use names and pronouns that affirmed their gender identities experienced a 29 percent decrease in reported thoughts of suicide and a 56 percent decrease in suicidal behavior).

“repeatedly and on purpose.”⁷ When an employer refers to a transgender worker in a way that negates their gender, that employer compromises the employee’s privacy and safety by publicly disclosing their transgender status without the employee’s consent, and at the same time, singles the person out in a negative way that prevents them from being able to do their jobs. For example, after Tamara Lusardi, a civilian employee of the U.S. Army, notified her colleagues of her gender transition, her supervisor “repeatedly referred” to her “by her former male name, by male pronouns, and as ‘sir.’” (*Lusardi v. McHugh* (E.E.O.C. Apr. 1, 2015, EEOC DOC 0120133395) 2015 WL 1607756, at *3.) Ms. Lusardi testified that her supervisor “seemed to especially call her male names when in the presence of other employees as a way to reveal that [she] is transgender . . .” (*Id.* at *11.) The Equal Employment Opportunity Commission concluded the supervisor’s “actions and demeanor made clear” that his “use of a male name and male pronouns in referring to [Ms. Lusardi] was not accidental” and that his “repeated and intentional conduct was offensive and demeaning . . . and would have been so to a reasonable person in [Ms. Lusardi’s] position.” (*Ibid.*)

Similarly, when Alyx Tinker informed his coworkers and management that he was undergoing a gender transition and asked to be called by his new name and male pronouns, his supervisor “refused to comply with his request and regularly referred to or addressed” him as “she” or used a nickname for his former female name. (*Mass. Com. Against Discrimination v. Securitas Security Services USA, Inc.* (M.C.A.D. Aug. 9, 2016, No. 13-BEM-01906) 2016 WL 4426971, at *1-2 (*Tinker*.) The supervisor “continued to refer to [Mr. Tinker] as female and a ‘girl,’ in situations where the reference could no longer be deemed accidental or unintentional.” (*Id.* at *8.) As the hearing officer noted, Mr. Tinker “merely wanted to be treated respectfully . . .” (*Ibid.*) Being singled out for negative treatment based on a protected characteristic makes it more difficult for any employee to do their job. As a respondent to a study from the Anti-Violence Project explained, “constantly having to . . . advocate for people to use my pronouns, and correct people when they make offensive comments is exhausting and is a distraction from my ability to do my job.”⁸

People who are not transgender also experience the intentional misuse of their names and pronouns, particularly those who are (or are perceived as) lesbian, gay, bisexual, or gender non-conforming. For example, in a study of LGBTQ older adults, their loved ones, and the providers who care for them, 80 individuals reported that they, a loved one, or a client had experienced a refusal by long-term care staff to refer to a resident by their requested name and/or pronoun.⁹ A man in San Francisco shared the experience of his lesbian friend in a skilled nursing facility:

⁷ Grant et al., Nat. Center for Transgender Equality & Nat. Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011) 57 <https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf>.

⁸ Ray et al., Anti-Violence Project, *Individual Struggles, Widespread Injustice: Trans and Gender Non-Conforming Peoples’ Experiences of Systemic Employment Discrimination in New York City* (2018) 18 <https://avp.org/wp-content/uploads/2018/12/AVP_EmploymentDiscrimination.pdf>.

⁹ Justice in Aging et al., *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field* (2015) 14 <<https://justiceinaging.org/wp-content/uploads/2015/06/Stories-from-the-Field.pdf>>.

My lesbian friend . . . has gone by the name “Rusty” her entire adult life (she is in her 80s). The staff in the skilled nursing facility insists on calling her [by her given name]. Mentally, she is very astute, but it is rare that other residents or staff interact or make conversation with her. I feel that she has been excluded or isolated often. My friend has been transferred from place to place several times.¹⁰

In the employment context, the court in *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 870, described a “relentless campaign of insults, name-calling, and vulgarities” against a male restaurant worker, including “coworkers and a supervisor repeatedly refer[ring] to [the plaintiff] in Spanish and English as ‘she’ and ‘her’” and mocking him for “walking and carrying his serving tray ‘like a woman.’”

In sum, this type of mistreatment is common and harmful in many settings. In the long-term care setting, where residents often depend on staff for intimate care and assistance, the harm to a resident when a staff member intentionally refers to them by the wrong name and gender cannot be overstated. The Court of Appeal’s failure to grasp the prevalence and severity of the harm caused by this type of discrimination underscores the need for this Court’s review.

IV. The Court of Appeal’s Decision Ignores Key Principles of California and Federal Non-Discrimination Laws.

The Court of Appeal also erred when it based its decision, in part, on the incorrect assumption that apart from the challenged provision, intentionally using the wrong name or pronoun for transgender people does not otherwise “amount[] to actionable harassment or discrimination as those terms are legally defined . . .” (*Taking Offense, supra*, 281 Cal.Rptr.3d at p. 319.) That assumption is incorrect for three reasons. First, in looking solely to Title VII, the Court of Appeal ignored that the intentional misuse of names or pronouns independently violates California and federal laws applicable to long-term care facilities, such as the Unruh Civil Rights Act. As set forth in the LGBT Long-Term Care Facilities Residents’ Bill of Rights’ findings, this provision was not written on a blank slate. Rather, it incorporates the non-discrimination principles of existing laws applicable to long-term care settings, spelling out with greater specificity the types of “prohibited discriminatory acts in the long-term care setting.” (Stats. 2018, ch. 483, § 1, subd. (e).) Second, the Court of Appeal erred in assuming that employment law does not prohibit such discriminatory conduct in the workplace. In fact, the intentional misuse of a person’s name or pronouns because of their sexual orientation, gender identity, or other protected characteristic is a straightforward form of prohibited disparate treatment under both state and federal employment law. Third, to the extent the standards for workplace harassment may be relevant, the Court of Appeal erred in concluding that the prohibited conduct would not be actionable, especially if done “[w]illfully and repeatedly” as specified in the challenged provision.

First, in addressing whether the conduct prohibited by section 1439.51(a)(5) is otherwise unlawful, the decision focuses solely on employment and fails to consider that such conduct violates the Unruh Civil Rights Act, which prohibits discrimination in business establishments,

¹⁰ *Ibid.*

including public accommodations, health care facilities, and housing providers. The Unruh Act provides that “[a]ll persons” in the State, regardless of sex, sexual orientation, gender identity, gender expression, and other characteristics, are “entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” (Civ. Code, § 51, subs. (b), (e).) Courts must construe the Act liberally to effectuate its “broad preventive and remedial purposes.” (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1025.)

When a business, including a long-term care facility, intentionally treats a person less favorably because that person is LGBTQ—whether by misusing the person’s name or pronouns or by subjecting them to any other form of disparate treatment—it violates the Unruh Act’s requirement to provide “full and equal” treatment regardless of sex, sexual orientation, and gender identity. The Unruh Act’s guarantee of “full and equal” privileges and services “clearly is not limited to exclusionary practices.” (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 29.) Rather, the “[t]he Legislature’s choice of terms evidences concern not only with access to business establishments, but with equal treatment of patrons in all aspects of the business.” (*Ibid.*; see also, e.g., *Trigueros v. Sw. Airlines* (S.D.Cal. Aug. 30, 2007, Civil No. 05-CV-2256-L(AJB)) 2007 WL 2502151 (denying summary judgment to airline on Unruh Act claims based on evidence from Black passengers that they received unequal treatment on a flight because of their race).)

The Court of Appeal’s focus on whether the conduct prohibited by section 1439.51(a)(5) would be considered “severe or pervasive” ignores that the Unruh Act’s requirement of equal treatment does not require discriminatory conduct to be “severe or pervasive.”¹¹ In *Koire*, for example, this Court rejected the argument that a “Ladies’ Day” discount at a car wash did not injure anyone. (*Koire, supra*, 40 Cal.3d at p. 33.) Rather, “by passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is *per se* injurious[,]” and “Section 51 provides that all patrons are entitled to *equal* treatment.” (*Ibid.*) This is why the statute provides for minimum statutory damages for “every violation of section 51, regardless of the plaintiff’s actual damages.” (*Ibid.*)

In addition to violating the Unruh Act, the intentional misuse of a person’s names or pronouns based on sexual orientation, gender identity, or gender expression also violates other state and federal non-discrimination laws. California’s non-discrimination laws explicitly prohibit discrimination based on sex, sexual orientation, gender identity, and gender expression. Federal sex discrimination laws also prohibit discrimination because a person is LGBTQ. As the U.S. Supreme Court unequivocally held in *Bostock v. Clayton County* (2020) 140 S.Ct. 1731, it is “impossible to discriminate against a person” for being LGBTQ “without discriminating against that individual based on sex,” *id.* at p. 1741.

¹¹ Apart from the Unruh Act, Civil Code section 51.9 provides a separate cause of action for sexual harassment in certain business relationships outside the workplace, with standards of liability applicable only to that section. (Civ. Code, § 51.9 subs. (a), (d); see *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1044 fn.1 [noting that Civil Code section 51.9 is not part of the Unruh Act].)

These state and federal non-discrimination laws collectively protect residents of long-term care facilities from being singled out for disparate treatment because of their sex, sexual orientation, or gender identity. For example, the Residential Care Facilities for the Elderly Residents' Bill of Rights, which "shall be in addition to any other rights provided by law," states that "[a] licensed residential care facility for the elderly shall not discriminate against a person seeking admission or a resident based on sex, actual or perceived sexual orientation, or actual or perceived gender identity." (Health & Saf. Code, § 1569.269, subs. (e), (b).) Health programs and activities receiving federal financial assistance are subject to Section 1557 of the federal Affordable Care Act, which prohibits sex discrimination. (42 U.S.C. § 18116(a).) In *Prescott*, discussed above, the court found an actionable claim under Section 1557 against a children's hospital based on the staff's "continuous" misgendering of Kyler, a teenage boy.¹² (*Prescott*, *supra*, 265 F.Supp.3d at pp. 1099-1100.) Entities that receive financial assistance from the State are subject to section 11135 of the Government Code, which prohibits discrimination based on sex, sexual orientation, gender identity, and gender expression and guarantees "full and equal access" to the benefits of the program or activity at issue. (Gov. Code, § 11135, subs. (a), (c).) The protections in the Fair Employment and Housing Act (FEHA) and the federal Fair Housing Act from housing discrimination may also apply.¹³ (Gov. Code, § 12955, subs. (a), (d); Cal. Code Regs., tit. 2, § 12005(o) [defining "housing accommodation" or "dwelling"]; 42 U.S.C. § 3604(b).)

Second, contrary to the Court of Appeal's assumption, employment law also prohibits the intentional misuse of names and pronouns, which constitutes straightforward disparate treatment. The FEHA prohibits "discriminat[ion] . . . in terms, conditions or privileges of employment." (Gov. Code, § 12940, subd. (a).) This prohibited discrimination includes "[d]isparate treatment," which occurs when an "employer . . . treats some people less favorably than others because of their [protected characteristic]." (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335-36, fn. 15].) To constitute prohibited discrimination, such disparate treatment must involve "some official action taken by the employer." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706 [emphases omitted].) An employer's intentional misuse of an employee's name or pronouns

¹² In *Prescott*, Kyler passed away prior to the litigation, and his mother brought sex discrimination claims on Kyler's behalf under the Affordable Care Act and the Unruh Act. Ms. Prescott also brought state-law disability discrimination claims on Kyler's behalf, including under the Unruh Act, based on Kyler's gender dysphoria. (See Civ. Code, § 51, subd. (e)(1) [referring to Gov. Code, § 12926.1, subd. (c)].) Because the court held that Ms. Prescott stated a claim for sex discrimination on Kyler's behalf under Section 1557, it "need not decide whether she has sufficiently pled claims under other theories of liability." (*Prescott*, *supra*, 265 F.Supp.3d at p. 1100 fn.4.)

¹³ Courts have applied the FEHA and Fair Housing Act to continuing care retirement communities and skilled nursing facilities. (See *Herriot v. Channing House* (2008 N.D.Cal. Aug. 26, 2008, No. 06-cv-6323-JF) 2008 WL 3929214 [evaluating discrimination claims under the FEHA and Fair Housing Act brought against continuing care retirement community]; *Montano v. Bonnie Brae Convalescent Hospital* (C.D.Cal. 2015) 79 F.Supp.3d 1120, 1125 [concluding that skilled nursing facility was a covered entity under the FEHA and Fair Housing Act].)

based on the employee’s sex, sexual orientation, gender identity, or gender expression is unlawful disparate treatment.¹⁴

The FEHA regulations specify ways that an employer must treat workers equally in the “Terms, Conditions, and Privileges of Employment.” (See Cal. Code Regs., tit. 2, § 11034.) The regulations contain several provisions requiring employers to treat all employees consistent with their gender identity. For example, employers “shall permit employees to use facilities that correspond to the employee’s gender identity or gender expression, regardless of the employee’s assigned sex at birth.” (*Id.* § 11034, subd. (e)(2)(A).) The regulations also require that “[i]f an employee requests to be identified with a preferred gender, name, and/or pronoun, including gender-neutral pronouns, an employer or other covered entity who fails to abide by the employee’s stated preference may be liable under the Act”¹⁵ (*Id.* § 11034, subd. (h)(3).) An employer’s intentional misuse of an employee’s name or pronouns because the employee is transgender (or has any other protected characteristic), constitutes explicit disparate treatment in the terms, conditions, and privileges of employment.

In multiple contexts, courts and civil rights enforcement agencies have recognized that the intentional misattribution of a person’s name or pronouns is a form of unlawful discrimination based on sex and/or gender identity. (See, e.g., *Prescott, supra*, 265 F.Supp.3d 1090 at pp. 1099-1100; *Eric S. v. Shinseki* (E.E.O.C. Apr. 16, 2014, EEOC DOC 0120133123) 2014 WL 1653484, at *2 [reversing dismissal of transgender employee’s sex discrimination claim based on employer’s refusal to change the employee’s name in the employer’s records]; see also *Bd. of Educ. of Highland v. U.S. Dept. of Educ.* (S.D. Ohio 2016) 208 F.Supp.3d 850, 879 [entering preliminary injunction ordering school district to “treat Jane Doe as the girl she is, including referring to her by female pronouns and her female name,” as well as permitting her to use the girls’ restrooms].)

Third, to the extent the standards for workplace harassment may be relevant,¹⁶ the Court of Appeal erred in assuming that the conduct prohibited by section 1439.51(a)(5) would not be actionable harassment. While harassment is fact-specific, and a single incident of harassing conduct can be actionable under the FEHA (Gov. Code, § 12923, subd. (b)), “[w]illfully and repeatedly fail[ing] to use a resident’s preferred name or pronouns after being clearly informed of the preferred name or pronouns,” as section 1439.51(a)(5) requires, would satisfy the criteria for unlawful harassment under federal and state law if such conduct occurred in the workplace.

¹⁴ The misuse of a transgender employee’s name or pronouns may also be unlawful disability discrimination, as gender dysphoria can be a disability under the FEHA. (See Gov. Code, § 12926.1, subd. (c); see also, e.g., *Tay v. Dennison* (S.D. Ill. May 1, 2020, No. 19-cv-00501-NJR) 2020 WL 2100761, at *3 [denying motion to dismiss federal disability discrimination claim brought by transgender incarcerated person challenging prison’s housing assignment policy].)

¹⁵ An employer “must identify the employee in accordance with the employee’s gender identity and preferred name” except when using the employee’s legal name is “necessary to meet a legally-mandated obligation” (Cal. Code Regs., tit. 2, § 11034, subd. (h)(4).)

¹⁶ As noted above, a claim of discrimination under the Unruh Act does not require a plaintiff to demonstrate they experienced harassment or the equivalent of a hostile work environment.

Civil rights enforcement agencies and courts have recognized that the intentional and repeated misuse of a transgender person’s name or pronouns is actionable harassment. In *Lusardi*, for example, a federal Title VII case discussed above, the EEOC found that the supervisor’s “repeated and intentional” use of a male name and pronouns in referring to Ms. Lusardi, a transgender woman, was “offensive and demeaning to Complainant and would have been so to a reasonable person in Complainant’s position.” (*Lusardi, supra*, 2015 WL 1607756, at *11.) The agency concluded that Ms. Lusardi proved her claim of hostile work environment based on sex and that the employer was liable for the supervisor’s harassment. (*Id.* at *13.) Other enforcement agencies and courts have also found actionable hostile work environment or harassment claims where the evidence or allegations included the intentional and repeated misuse of a transgender person’s name or pronouns. (See, e.g., *Tinker, supra*, 2016 WL 4426971 [enforcement agency finding employer liable on transgender man’s hostile work environment claim where evidence included the supervisor’s intentional and repeated misuse of the employee’s name and pronouns]; see also *Tay, supra*, 2020 WL 2100761, at *2 [denying motion to dismiss incarcerated plaintiff’s equal protection claim of harassment based on gender identity, where allegations included that “correctional and medical staff constantly misgender Plaintiff, referring to her as ‘mister’ and using male pronouns even though they are aware that she is a transgender woman”].)

Such conduct can also constitute actionable harassment when directed at a person who is not transgender. In *Nichols*, for example, the Ninth Circuit reversed the trial court’s judgment in favor of the defendant on hostile work environment claims under Title VII and state law. (*Nichols, supra*, 256 F.3d at p. 874.) The Ninth Circuit concluded that the plaintiff, a restaurant worker, was harassed “because of sex” because he did not “act as man should act,” noting that the plaintiff’s “co-workers and one of his supervisors repeatedly reminded [the plaintiff] that he did not conform to their gender-based stereotypes, referring to him as ‘she’ and ‘her.’” (*Ibid.*)

The Court of Appeal also ignored the Legislature’s recent clarification on the application of the FEHA’s harassment standards, including what kind of conduct is sufficiently severe or pervasive to be actionable. (Gov. Code, § 12923.) Harassment creates a hostile work environment “when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim’s emotional tranquility in the workplace, affect the victim’s ability to perform the job as usual, or otherwise interfere with and undermine the victim’s personal sense of well-being.” (*Id.* at subd. (a).) The Legislature also confirmed that a single incident of harassing conduct can be sufficient to create a triable issue of hostile work environment, and it rejected the “stray remarks doctrine.” (*Id.* at subds. (b), (c).)

“Willfully and repeatedly” misusing a person’s name or pronouns “after being clearly informed of the preferred name or pronouns,” and doing so because of a person’s sexual orientation, gender identity, or gender expression, as section 1439.51(a)(5) requires, easily meets the criteria for unlawful harassment in the workplace under the FEHA and Title VII. Being subjected to such treatment is degrading and humiliating and likely to cause serious psychological harm and emotional distress.¹⁷ It would be highly likely to “disrupt the victim’s

¹⁷ Courts have rejected the argument that treating a transgender person inconsistent with their gender identity is only a “perceived slight[.]” (*Rumble v. Fairview Health Services* (D.Minn.

emotional tranquility” by calling unwanted attention to a person’s transgender identity in a demeaning and stigmatizing manner, and it would be similarly likely to “undermine the victim’s personal sense of well-being” by negating a core aspect of personal identity. (Gov. Code, § 12923, subd. (a); see also *Lusardi, supra*, 2015 WL 1607756, at *13 [concluding that “repeated and intentional” misuse of transgender employee’s name and pronouns violated Title VII].)

In addition, while the Court of Appeal focused solely on employment, the conduct prohibited by section 1439.51(a)(5) would also constitute unlawful harassment in the housing context. (Gov. Code, § 12955, subds. (a), (d); *Id.* § 12955.7; 42 U.S.C. §§ 3604(b), 3617.) The housing regulations under the FEHA define “hostile environment harassment” as “unwelcome conduct that is sufficiently severe or pervasive as to interfere with . . . [the] use or enjoyment of a dwelling . . . the provision or enjoyment of services or facilities in connection therewith . . . or constitute any kind of adverse action.” (Cal. Code Regs., tit. 2, § 12120, subd. (a)(2).) Harassment can also include “revealing private information to a third party about a person, without their consent” (*id.* § 12120, subd. (a)(c)(7)), such as revealing a long-term care resident’s transgender status to other residents by misusing their name or pronouns. Hostile environment harassment does not require “a change in the terms, conditions, or privileges of the dwelling . . . or housing-related services or facilities” or showing “psychological []or physical harm,” and a single instance of harassing conduct may be sufficient. (*Id.* at § 12120, subds. (a)(2), (a)(2)(A)(ii), (d); see also *Salisbury v. Hickman* (E.D.Cal. 2013) 974 F.Supp.2d 1282, 1292 [in case under the FHA, FEHA, and Civil Code section 51.9, noting that “[c]ourts have recognized that harassment in one’s own home is particularly egregious and is a factor that must be considered in determining the seriousness of the alleged harassment”].)

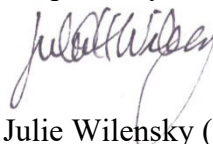
In sum, the Court of Appeal misconstrued state and federal non-discrimination law, which already prohibits “[w]illfully and repeatedly” misusing a person’s name or pronouns in many contexts. (Health & Saf. Code, § 1439.51, subd. (a)(5).)

V. Conclusion

For the reasons above and in the State’s Petition for Review, Amici ask that the Court grant review and reverse the judgment of the Court of Appeal.

Dated: September 14, 2021

Respectfully submitted,



Julie Wilensky (SBN 271765)
Shannon Minter (SBN 168907)
NATIONAL CENTER FOR

Mar. 16, 2015 No. 14-cv-2037 (SRN/FLN)) 2015 WL 1197415, at *25.) In *Rumble*, the court denied a hospital’s motion to dismiss a patient’s sex discrimination claim, concluding that “misgendering of [plaintiff] could be considered objectively offensive behavior” where a hospital clerk intentionally gave a transgender male patient a hospital bracelet identifying him as “female.” (*Id.* at *26.)

LESBIAN RIGHTS

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Appendix

The **American Civil Liberties Union of Northern California (ACLU NorCal)**, the **American Civil Liberties Union of San Diego & Imperial Counties (ACLU-SDIC)**, and the **American Civil Liberties Union of Southern California (ACLU SoCal)** are affiliates of the national American Civil Liberties Union (ACLU) with more than 270,000 members and supporters in California, working to protect and advance the civil rights and civil liberties of all Californians. ACLU NorCal, ACLU-SDIC, and ACLU SoCal have a long history of vigorously safeguarding LGBTQ rights and specifically advocating for the rights of transgender and nonbinary people. ACLU NorCal, ACLU-SDIC, and ACLU SoCal have served as counsel of record in numerous cases that have helped shape and define LGBTQ protections in California, including *Robertson v. Block*, No. 82-1442-WPG(Px) (C.D. Cal. 1985) (treatment in jail); *Nguon v. Wolf*, 517 F.Supp.2d 1177 (C.D. Cal. 2007) (student privacy rights); *In re Marriage Cases*, 43 Cal. 4th 757 (2008) (marriage equality for same-sex couples); *McKibben v. McMahan*, No. EDCV142171JGBSPX, 2019 WL 1109683 (C.D. Cal. Feb. 28, 2019) (treatment in jail); and *Minton v. Dignity Health*, 39 Cal. App. 5th 1155 (2019), *review denied* (Cal. Dec. 18, 2019), *petition for certiorari filed* (U.S. March 13, 2020) (No. 19-1135) (access to gender-affirming health care).

Bay Area Lawyers for Individual Freedom (BALIF) is a bar association of approximately 500 lesbian, gay, bisexual, transgender, queer and intersex (“LGBTQI”) members in the San Francisco Bay Area legal community. BALIF promotes the professional interests and social justice goals of its members and the legal interests of the LGBTQI community at large. For nearly 40 years, BALIF has actively participated in public policy debates concerning the rights of LGBTQI people and has authored and joined amicus efforts concerning matters of broad public importance.

The **California Women’s Law Center’s (CWLC)** mission is to break down barriers and advance the potential of women and girls through transformative litigation, policy advocacy, and education. Our priorities include gender discrimination, women’s health and reproductive justice, violence against women, and economic justice. For over 30 years, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination based on sexual orientation and sexual identity. CWLC remains committed to supporting equal rights for LGBTQ people, and to eradicating discrimination in all forms.

Founded in 1978, *amicus curiae* **GLBTQ Legal Advocates & Defenders (GLAD)** is New England’s leading public interest legal organization dedicated to creating a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has successfully litigated many cases in the state and federal appellate courts, including as amicus, to secure constitutional rights and protections for LGBTQ people and people living with HIV, including *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015) and *Bragdon v. Abbott*, 524 U.S. 624 (1998). In representing people from their earliest years to their passing, GLAD has addressed many First Amendment issues as amicus, including how to define free expression and the scope of speech regulations on speech, including *Doe v. Reed*, 561 U.S. 186 (2010), *Masterpiece Cakeshop v. Colo. Commission on Civil Rights Comm’n*, 138 S. Ct. 1719 (2018), and state cases.

The **Impact Fund** is a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in a number of major civil rights cases brought under federal, state, and local laws, including cases challenging employment discrimination; unequal treatment of people of color, people with disabilities, and LGBTQ people; and limitations on access to justice. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

Legal Aid at Work (LAAW) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBTQ community, and the working poor. LAAW has litigated a number of cases under Title IX of the Education Amendments of 1972 as well as Title VII of the Civil Rights Act of 1964. LAAW has appeared in discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g., National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an *amicus curiae* capacity. *See, e.g., U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). With respect to transgender rights under state law, LAAW and other *amici* submitted a brief in support of the Plaintiff in *DFEH v. American Pacific Corp.*, Case No. 2013-001511153-CU-CR. LAAW's interest in preserving the protections afforded to employees and students by this country's antidiscrimination laws is longstanding.

National Center for Transgender Equality is a non-profit organization that advocates to change policies and society to increase understanding and acceptance of transgender people. In California and throughout the country, NCTE works to replace disrespect, discrimination, and violence with empathy, opportunity, and justice. NCTE has an interest in the case before the Court because it will help the transgender people who we serve to avoid some risks of discrimination, harassment, and even violence in long-term care facilities.

The **National LGBTQ+ Bar Association** is a nonprofit membership-based 501(c)(6) professional association. The National LGBTQ+ Bar Association's more than 10,000 members and subscribers include lawyers, judges, legal academics, law students, and affiliated legal organizations supportive of lesbian, gay, bisexual, transgender, and queer ("LGBTQ+") rights. The National LGBTQ+ Bar Association and its members work to promote equality for all people regardless of sexual orientation or gender identity or expression, and fight discrimination against LGBTQ+ people as legal advocates. The National LGBTQ+ Bar Association is a membership organization and files this brief on behalf of its members, who object to discrimination in health care services and housing on the bases of sexual orientation and gender identity or expression.

The **National LGBTQ Task Force (Task Force)** advances full freedom, justice, and equality for LGBTQ people. We're building a future where everyone is free to be themselves in every aspect of their lives. Today, despite all the progress we've made to end discrimination, millions of LGBTQ people face barriers in every aspect of their lives; in housing, employment, healthcare, retirement, and basic human rights. These barriers must go. The Task Force joins this letter to advance the vital interests of LGBTQ people in CA, especially transgender and nonbinary people, to be treated in a non-discriminatory manner that fully respects their authentic gender identity and expression. Transgender and nonbinary people living in long-term care facilities often need the most personal types of care and are as equally deserving of the highest level of care and respect as non-LGBTQ people. Long-term care facilities have a legal (as well as moral) obligation to uplift their humanity by fully respecting their authentic selves.

The **National Women's Law Center (NWLC)** is a nonprofit legal advocacy organization dedicated to the advancement and protection of the legal rights of women and girls and the rights of all people to be free from sex discrimination, including LGBTQ individuals. Since its founding in 1972, NWLC has focused on issues of importance to women and girls, including economic security, employment, education, reproductive rights and health, with attention to the needs of low-income women, women of color and others who face multiple and intersecting forms of discrimination. NWLC has participated as counsel or amicus curiae in a range of cases before the Supreme Court, federal Courts of Appeals, and state courts to secure equal treatment and opportunity in all aspects of society through enforcement of the Constitution and other laws prohibiting sex discrimination.

The **Tom Homann LGBTQ+ Law Association (THLA)** is a San Diego legal association dedicated to the advancement of lesbian, gay, bisexual, transgender, and queer issues throughout California and the nation. THLA facilitates a space for regional LGBTQ+ and ally law students, attorneys, judges, and other legal professionals to network, build relationships and develop their careers. THLA also aims to utilize its network of legal professionals to protect LGBTQ+ communities in all contexts, including in public accommodations, employment, housing, education, and healthcare, through community service, community education, and advocacy. Because of its mission, THLA has a particular interest in ensuring that all LGBTQ+ people, especially the most vulnerable members of our communities, are free from discrimination and harassment.

Trans Lifeline is a grassroots hotline and microgrants non-profit organization offering direct emotional and financial support to trans people in crisis throughout the U.S. and Canada. By providing care, Trans Lifeline also has unique insights into how policy and legal precedent impacts trans communities. Whenever legislation and court decisions that impact trans people are discussed, trans people turn to Trans Lifeline for emotional support. For example, in May of 2021, we saw a 72% increase in calls to our Hotline from trans people in Texas when legislation targeting trans people was under consideration by the Texas legislature. Trans Lifeline has particular interest in this litigation for both the negative impact it will have on trans elders in long-term care facilities who rely on our services and also due to the impact legally sanctioned discrimination will have on the mental health of trans people throughout the state of California and nation.

Founded in San Francisco in 2002, **Transgender Law Center (TLC)** is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming (“TGNC”) people alive, thriving, and fighting for liberation. TLC believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression.

The **TransLatin@ Coalition (TLC)** was founded in 2009 by a group of Transgender and Gender nonconforming and Intersex (TGI) immigrant women in Los Angeles, California, as a grassroots response to address the specific needs of TGI Latin@ immigrants who live in the United States. TLC’s primary focus is to change the landscape of access to services for TGI people and provide access to comprehensive resource and services that will improve the quality of life of TGI people.

CERTIFICATE OF SERVICE

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

I, the undersigned, declare that I am employed with National Center for Lesbian Rights, whose address is 870 Market Street, Suite 370, San Francisco, CA 94102. I am not a party to this case. I am over the age of 18 years. I further declare that, on this date, I served a copy of the foregoing **LETTER OF AMICI CURIAE** using TrueFiling to the following parties:

Attorney for Plaintiff and Appellant Taking Offense

David L. Llewellyn
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Fair Oaks, CA 95628

Attorney for Defendant and Respondent the State of California

Anna T. Ferrari
Office of the State Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Office of the Clerk
California Court of Appeal
Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

The superior court below has been served with this **LETTER OF AMICI CURIAE** by First-Class Mail sent to the following address:

Clerk of the Court
Sacramento County Superior Court, Department 27
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 14, 2021, in Oakland, California.

s/ Julie Wilensky
Julie Wilensky
NATIONAL CENTER FOR
LESBIAN RIGHTS