

No. S270535

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Taking Offense

Plaintiff and Appellant,

v.

State of California

Defendant and Respondent.

Third Appellate District, Case No. C088485

Sacramento County Superior Court,
Case Number 34-2017-80002749-CU-WM-GDS
The Honorable Steven Gevercer, Judge

**APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS*
CURIAE;
BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSISTED LIVING
ASSOCIATION IN SUPPORT OF THE STATE OF CALIFORNIA**

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**APPLICATION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Assisted Living Association (“CALA” or “*amicus*”) respectfully requests permission to file an *amicus curiae* brief in support of Defendant-Respondents California Attorney General, Department of Social Services, and Department of Public Health. The proposed brief is attached to this application.

As the leading organization representing the interests of operators and administrators of Residential Care Facilities for the Elderly in the State of California, *amicus* has a professional interest in ensuring that this Court correct the decision of the Court of Appeal, which negatively impacts the ability of our constituent facilities to provide a safe and caring environment for all residents—including lesbian, gay, bisexual, and transgender (“LGBT”) residents.

Plaintiff-Appellant argues that the Health & Safety Code Section 1439.51(a)(5) prohibition of the intentional, repeated misgendering of residents of long-term care facilities (the “pronoun provision”) violates the First Amendment of the United States Constitution. CALA—which represents hundreds of these facilities—profoundly disagrees. In this *amicus curiae* brief, *amicus* will show how, in fact, that the pronoun provision prohibits intensely damaging and discriminatory conduct, that it is squarely in line with existing federal and state law, and that—for these

reasons—it enjoys widespread acceptance in the California long-term care world.

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

This application is timely. It is being submitted subject to the Court’s order dated July 27, 2022, extending the time to serve and file amicus briefs to August 24, 2022.

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

DATED: August 24, 2022

HANSON BRIDGETT LLP

By: /s/ Joel S. Goldman
JOEL S. GOLDMAN
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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Assisted Living Association represents the interests of the owners and operators of Residential Care Facilities for the Elderly in the State of California. Our facilities care for thousands of the most vulnerable residents of our State—both seniors and people with disabilities. The residents of these facilities include Californians of every background, including lesbian, gay, bisexual and transgender (“LGBT”) people. It is CALA’s unwavering commitment to ensure that all residents are treated with dignity, care, and respect. Facility employees are tasked with ensuring as comfortable and healthy an environment as possible for these vulnerable residents.

The “pronoun provision” of the LGBT Long-Term Care Facility Residents’ Bill of Rights prohibits the intentional, repeated misgendering of long-term care residents. Health & Safety Code Section 1439.51(a)(5). This provision is vital to preserving long-term facility residents’ dignity, safety, and health. It clarifies what is already the law under state and federal law. And the provision reflects the mainstream view of long-term care facilities in the State of California—that respect for residents’ gender identity is a non-negotiable aspect of the care that facilities provide.

II.

ARGUMENT

A. **RESPECTING A LONG-TERM CARE RESIDENT'S GENDER IDENTITY IS CRUCIAL FOR THE RESIDENT'S HEALTH AND SAFETY.**

Discrimination is a health hazard in a long-term care setting. For transgender and gender-nonconforming older adults, this is especially so after lifetimes of discrimination and mistreatment. CALA supports SB 219 and urges the Court to restore the “pronoun provision” for precisely this reason—to protect the health, safety and dignity of long-term care residents.

Many transgender people face discrimination in health care settings. Nationally, 40% of transgender seniors reported being denied health care or facing discrimination by health care providers.¹ This leads transgender people to avoid or delay seeking medical care.² As a result, even compared to lesbian, gay, and bisexual people, transgender people are more likely to

¹ Fredriksen-Goldsen *et al.*, The Aging and Health Report: Disparities and Resilience Among Lesbian, Gay, Bisexual, and Transgender Older Adults (2011) Institute for Multigenerational Health; Snow *et al.*, Barriers to Mental Health Care for Transgender and Gender-Nonconforming Adults: A Systematic Literature Review (2019) 44 Health & Social Work 149-155.

² Bradford *et al.*, Experiences of Transgender-Related Discrimination and Implications for Health: Results from the Virginia Transgender Health Initiative Study (2013) 103 American J. of Public Health 1820–1829; Fredriksen-Goldsen *et al.*, The Physical and Mental Health of Transgender Older Adults: An At-Risk and Underserved Population (2014) 54 The Gerontologist 488; James *et al.*, The Report of the 2015 U.S. Transgender Survey (2016) National Center for Transgender Equality.

report a greater incidence of health problems, such as vision, hearing, and dental impairments.³

When a transgender person is in a long-term care setting, discrimination can be even more psychologically devastating. When a person tasked with caring for long-term care residents misgenders them, it communicates to residents that they do not belong, that their dignity is of no value, and that they are individuals who are undeserving of help. Social science research demonstrates that discrimination in a long-term care setting—including being misgendered—and the related anxiety anticipating it are associated with negative health outcomes, including a significantly increased risk of suicide.⁴

This underscores the stakes of the “pronoun provision.” And, as we shall discuss in the next section, it ties strongly to the dignity-focused aim of state and federal laws protecting residents of long-term care facilities.

B. MISGENDERING LONG-TERM CARE RESIDENTS IS PROHIBITED UNDER STATE AND FEDERAL LAW. SB 219 SIMPLY CLARIFIED THIS POINT.

CALA proudly supported SB 219 when it was proposed because of the vital purpose it serves: to clarify and codify the fundamental principle

³ Fredriksen-Goldsen (2011), *supra*.

⁴ Nåden *et al.*, Aspects of Indignity in Nursing Home Residences as Experienced by Family Caregivers (2013) 20 Nursing Ethics 748–761; Fredriksen-Goldsen *et al.* (2014), *supra*; White Hughto & Reisner, Social Context of Depressive Distress in Aging Transgender Adults (2018) 37 J. of Applied Gerontology 1517

that lesbian, gay, bisexual, and transgender residents must be accorded full respect and dignity in long-term care facilities. This dignified, respectful, and nondiscriminatory care necessarily requires respecting a resident's gender identity and using the correct pronouns for that resident. But SB 219 is not the only source for the requirement that facility staff must not “willfully and repeatedly” disregard a resident's gender—state and federal law clearly articulate this rule, as well.

The federal laws and regulations discussed below govern Skilled Nursing Facilities. CALA represents Residential Care Facilities for the Elderly, which are not subject to these provisions. However, CALA shares these federal laws below to demonstrate the broad consensus across state and federal law on the importance of the dignity, autonomy, privacy, safety, emotional well-being, and equal treatment of long-term care residents.

Dignity and autonomy. The preservation of residents' dignity and autonomy is the focus of several state and federal laws. To disregard something as fundamental as a resident's gender identity is a violation of their dignity. Residents must be “accorded dignity in their personal relationships with staff, residents, and other persons.” Health & Safety Code Section 1569.269(a)(1); *see also* 22 Cal. Code Regs. Section 87468.1.

Similarly, federal law states that a resident has a “right to a dignified existence [and] self-determination,” and a “right to be treated with respect and dignity.” 42 CFR 483.10(a); 42 CFR 483.10(e). And that facility staff

must “treat each resident with respect and dignity, and care for each resident in a manner and in an environment that promotes maintenance or enhancement of his or her quality of life.” 42 CFR 483.10(a)(1). Furthermore, facility staff must focus on “support[ing] the resident[s] in making their own choices and having control over their daily lives.” 42 CFR 483.5.

Privacy. When facility staff who have access to a resident’s medical and personal information use a pronoun or gender marker not in line with a resident’s gender identity in the presence of other staff or residents, the resident’s privacy may be violated by revealing personal information against his or her will. California law mandates that residents are “granted a reasonable level of personal privacy in...medical treatment [and] personal care” Health & Safety Code Section 1569.269(a)(2). Furthermore, the law requires “confidential treatment of ... personal information.” Health & Safety Code Section 1569.269(a)(3).

Safety. To have one’s gender identity—a fundamental aspect of someone’s sense of self—disregarded, mocked, or ignored profoundly violates a resident’s sense of safety or comfort. Health & Safety Code Section 1569.269(a)(5) mandates “safe ... and comfortable accommodations” for residents and prohibits these actions.

Emotional well-being. Many transgender people—especially transgender older adults—have experienced a lifetime of discrimination,

mistreatment, abuse, and violence because of their identity. They have lost family and friends, jobs, housing, and been denied care for simply being themselves. A transgender person in a long-term care setting is likely reliant on professionals for extremely personal care. For a person with control over a transgender resident's most intimate care to misgender him or her is to communicate that they view that history of discrimination and abuse as justified, that the transgender person's identity is of no value, and that for the resident to demand respect is to risk harm.

For this reason, federal law mandates that staff must design a care plan that “encompass[es] a resident’s whole emotional and mental well-being” with the aim of “attain[ing] or maintain[ing] the highest practical physical, mental, and psychosocial well-being.” 42 CFR 483.40.

California law echoes this and recognizes that residents are medically and personally vulnerable. The law prohibits “... humiliation, intimidation, and verbal [and] mental abuse.” Health & Safety Code Section 1569.269(a)(10). It is humiliating, intimidating, and abusive for staff members to disregard, ignore, or mock a transgender person’s gender identity by refusing to use the correct pronoun.

Furthermore, federal law requires that “all activities and interactions with residents by any staff, temporary agency staff, or volunteers must focus on enhancing his or her self-esteem and self-worth and incorporating the resident’s goals, preferences, and choices.” CMS State Operations

Manual App. PP – Guidance to Surveyors for Long Term Care Facilities F-Tag F550 (Nov 22, 2017). To that end, the Guidance states specifically: “staff should address residents with the name or pronoun of the resident’s choice.” *Id.*

Equal treatment. The Unruh Civil Rights Act provides that residents of long-term care facilities are “entitled to ... full and equal accommodations, advantages, facilities, privileges, or services” regardless of sex, sexual orientation, gender identity, and gender expression, among other characteristics. Civ. Code Section 51(b), (e). Willful and repeated misgendering of a resident necessarily denies them full and equal treatment for all the reasons discussed above.

This demonstrates that the “pronoun provision” is well-embedded in both state and federal law, and that sensitivity and respect for residents’ gender identity is a fundamental aspect of long-term care law. In the next section, *amicus* will demonstrate that it is also a fundamental and mainstream value of the long-term care community in California.

C. SB 219’S PRINCIPLES ARE MAINSTREAM VALUES IN THE ASSISTED LIVING COMMUNITY OF CALIFORNIA.

It is CALA’s job to represent the consensus and the mainstream of the assisted living community in California. It is the only association in the State of California solely representing the state’s Residential Care Facilities for the Elderly. This includes Assisted Living, Memory Care, and Continuing Care Retirement Communities—a network of over 660

providers and more than 150 associated businesses. These member facilities serve tens of thousands of vulnerable seniors and people with disabilities, and they employ tens of thousands of personnel: administrators, medical providers, and staff. Members range from small, independently operated communities to large, multi-national organizations.⁵ CALA's mission is 1) to advocate for these members before state decision-making bodies; 2) to educate the leadership and workforce of these facilities; and 3) to put on conferences and events that facilitate education and networking.

CALA is the leading voice for assisted living facilities before the California Legislature, Department of Social Services (DSS) Community Care Licensing Division, and other state entities involved in the development of senior living policy.⁶ Its library of legal information for members includes overviews of dozens of topics, model policies, and briefings for members.⁷ CALA's Conference and Trade Show is attended by over 900 care providers and top decision makers, including: CEOs, CFOs, COOs, executive directors, clinical staff, marketing professionals.⁸

CALA supported passage of SB 219 and celebrated its enactment. SB 219 is squarely in the California mainstream. In an announcement

⁵ <https://caassistedliving.org/about-cala/>

⁶ <https://caassistedliving.org/advocacy/>

⁷ <https://caassistedliving.org/provider-resources/>

⁸ <https://caassistedliving.org/conference-home/>

noting its passage, CALA stated that it “has long supported warm, welcoming environments for all our seniors and is pleased to have been able to work with Senator Scott Wiener (D-SF) and Equality California on this bill to clarify LGBT resident rights.” CALA’s support extended to urging its constituent members—representing hundreds of facilities and business—to write letters of support. In its announcement, CALA thanked “the many CALA members who wrote letters in support of SB 219 ... your voice was heard!” CALA prepared detailed compliance information for its members and led discussions of the law at their well-attended Conference & Trade Show.

Well over 100,000 individuals across the State of California assist and provide for seniors.⁹ It demonstrates the extreme nature of Petitioner-Appellant’s position that not one of these administrators, medical providers, or facility staff could be found to serve as a plaintiff in this matter. Taking Offense has no connection whatsoever to the long-term care community in the State of California.

CALA represents the mainstream of the assisted living advocacy world, and its support for SB 219—both prior to passage and today with this *amicus curiae* brief—demonstrates the deep and abiding acceptance of SB 219’s principles—including the “pronoun provision”—by long-term care facility operators and administrators in the State of California.

⁹ <https://caassistedliving.org/workforce/>

III.
CONCLUSION

The “pronoun provision” is vital for protecting the safety and health of vulnerable long-term care facility residents. While SB 219 effectively clarified the law on this issue, state and federal law also repeatedly prohibit the type of discriminatory, disrespectful, and harassing behavior that is barred by the “pronoun provision.” CALA—which represents hundreds of long-term care facilities and businesses across the state that employ tens of thousands of providers, administrators, and staff—supported SB 219, and maintains that SB 219’s values are the mainstream values of the long-term care community in California.

For all of these reasons, SB 219’s principles are now the baseline expectation for treatment of LGBT residents across the state in long-term care facilities, and to uphold the Court of Appeal’s ruling would lead to significant harm to our vulnerable residents. We urge the Court to reverse.

DATED: August 24, 2022

HANSON BRIDGETT LLP

By: /s/ Joel S. Goldman

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CERTIFICATE OF WORD COUNT

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DATED: August 24, 2022

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TAKING OFFENSE v. STATE OF CALIFORNIA

Supreme Court Case No. S270535

Court of Appeal No. C088485

Sacramento County Superior Court No. 34-2017-80002749-CU-WM-GDS

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

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Supreme Court of California

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8/24/2022

Date

/s/Joel Goldman

Signature

Goldman, Joel (95437)

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