S270535

CALIFORNIA SUPREME COURT

TAKING OFFENSE, an unincorporated association, Plaintiff and Appellant, v. The STATE OF CALIFORNIA, and Does 1-100, inclusive, Defendant and Respondent	Case no. S270535 Third DCA case no. C088485 Superior Court case number: 34-2017-80002749-CU-WM-GDS

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO
THE HONORABLE STEVEN M. GEVERCER, JUDGE

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

The Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents' Bill of Rights, Senate Bill 219 (2017), invokes speech censorship and creates a speech crime for any staff member who willfully fails to use a resident's "preferred … pronouns" as mandated by Health and Safety Code §1439.51(a)(5), in any context, anywhere, at any time, forever. The Court of Appeal found that this provision is facially overbroad and unconstitutional under the First Amendment. The issues presented to this Court are whether the State can overcome the presumption that this content-based, viewpoint discriminatory, compulsory speech law that criminalizes speech on the basis of its content, is facially overbroad and unconstitutional, and whether the State can bear its burden of proof to satisfy the strict scrutiny First Amendment standard of review by showing a compelling state interest that has not already been rejected by this Court or the U.S. Supreme Court, a state interest that cannot be satisfied by any less restrictive means than censorship of speech enforced as a crime, by fines and imprisonment.

STATEMENT OF THE CASE

The issues raised in this action are strictly questions of law. Health and Safety Code §1439.51(a)(5), which requires certain employees to use language ("preferred … pronouns") demanded by the State and by favored residents of long-term care facilities, violates freedom of thought and speech, contrary to the First Amendment. This law is facially unconstitutional because it censors speech on the basis of its content and viewpoint, compels speech against the beliefs and consciences of employees, and is over-inclusive, under-inclusive and void for vagueness.

1. Health and Safety Code §1439.51(a)(5) censors the content of employees' speech and compels state-sponsored speech.

Health and Safety Code ("HS") §1439.51(a)(5) provides that:

> (a) Except as provided in subdivision (b), it shall be unlawful for a long-term care facility or facility staff to take any of the following actions 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: …
> (5) Willfully and repeatedly ***fail to use a resident's preferred*** name or ***pronouns*** after being clearly informed of the ***preferred*** name or ***pronouns***.…
> (b) This section shall not apply to the extent that it is incompatible with any professionally reasonable clinical judgment.

(Emphasis added.)

Taking Offense has not challenged the requirement that staff use residents' preferred names because names are neutral labels. Third-person pronouns in Standard English, however, express sex/gender content.

2. Health and Safety Code §1439.51(a)(5) is enforced by criminal prosecution with fines and imprisonment for violation.

HS §1439.51(a)(5) criminalizes speech by operation of HS §1439.54, also enacted in Senate Bill 219 (2017) ("SB219"), which provides that “A violation of this chapter shall be treated as a violation under … Chapter 3.2 (commencing with Section 1569).” HS §1569.40 provides that “Any person who violates this chapter … is guilty of a misdemeanor” punishable by fines and/or imprisonment.

3. Statement of Issues and Facts.

“[A]s a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing.” California Rules of Court, Rule 8.500(c)(2).

The Court of Appeal found HS §1439.51(a)(5) facially overbroad and unconstitutional.

ARGUMENT

Summary of Argument; Answer to State's Opening Brief

> By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences.

Cooper v. Aaron, 358 U.S. 1, 20 (1958), Justice Frankfurter, concurring.

Taking Offense does not favor misgendering people, so long as everyone remains free to choose for themselves what to say or not to say, but Taking Offense fervently opposes State censorship and criminalization of speech because the State wants to favor adherents of "woke" transgender ideology over the populist belief in objective reality and biological gender essentialism.[1]

The California Legislature chose to violate the First Amendment by penalizing, criminalizing and censoring speech content and mandating compulsory speech in the form of "preferred … pronouns" usage by employees

[1] For example, Will/Lia Thomas, the NCAA champion swimmer on the women's swim team at the University of Pennsylvania, is praised by the "woke" elite as a breakthrough transgender athlete because she identifies as "female" although he has a male body, which gives him an unfair athletic advantage over biological women. The elite are trying to coerce society to accept their transgender fiction that a person can be whatever sex/gender s/he thinks s/he is, or chooses to be, and there are no substantive differences between a biological woman and a trans-woman with a male body. This phenomenon has nothing to do with true gender dysphoria or hermaphroditism but rather is based on the psychological ideology of gender fluidity and gender constructivism (as opposed to the populist belief in biological gender essentialism). These opposing perspectives on human nature and reality are incompatible and irreconcilable. Principles of free speech and freedom of thought must protect both beliefs equally.

of long-term care facilities in Health and Safety Code §1439.51(a)(5) when speaking to or about residents, rather than to allow the State and private long-term care facilities to achieve elimination of misgendering by other, constitutional means.

The State has chosen to make misuse of "preferred … pronouns" a speech crime when employees speak to or about residents, enforced by state or local prosecutors seeking fines and/or imprisonment for violators despite the indisputable fact that "preferred … pronouns" are pure speech. Laws censoring speech content or viewpoint or imposing compulsory speech content are forms of state action that are presumptively unconstitutional. The burden of proof is on the State to show that the law satisfies strict constitutional scrutiny and serves a compelling state interest that cannot be achieved by a less restrictive alternative. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).

> The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."

Lawrence v. Texas, 539 U.S. 558, 571 (2003) (declaring unconstitutional state laws that criminalized homosexual identity and expression because the state found these views and practices immoral).

Reviewing the State's Opening Brief on the Merits (OBM), the State does not deny that HS §1439.51(a)(5) censors speech on the basis of its content. The

State nowhere acknowledges that HS §1439.51(a)(5) is presumptively unconstitutional or that the State bears the burden of proof to show its validity. The State offers no contention that HS §1439.51(a)(5) satisfies strict scrutiny. The State fails to assert any constitutional defense of the compulsory speech element of HS §1439.51(a)(5). The State admits but dismisses the problem of over-inclusiveness and ignores the issues of under-inclusiveness and void for vagueness. The State fails to consider the existence of less restrictive means for avoiding misgendering of residents than censoring, criminalizing and coercing speech.

The State wants to treat employees who use Standard English pronouns as if they were reprehensible bullies and willful tormentors, like employees who use racial or sexual epithets against other employees. E.g., *Aguilar v. Avis Rent A Car System, Inc.,* 21 Cal.4th 121 (1999). But Standard English pronouns are not like racial or sexual epithets. The people represented by Taking Offense use Standard English pronouns to express their worldview, their belief in, and practice of, gender essentialism. They do not target transgender residents or residents with other gender identities or expressions. They simply speak their minds. They treat everyone alike regarding pronouns.

As with all forms of free speech, listeners may object to what a speaker says (here, the use of pronouns) or the speaker's worldview. Everyone has freedom of thought, belief and speech to object to what others say. Both

speakers and listeners are equally free to agree or disagree as they choose.

More specifically, the State has acted to require certain people to address transgender people according to their subjective, psychological state of mind, gender expression and language preference, and to silence, censor and penalize people who refer to all people, including transgender people, according to their known or apparent biological, physical reality. However benign, empathetic or preferable the State believes its approach to be, there can be no rational dispute that this constitutes content-based censorship of speech.

The State cannot have a compelling state interest in censuring speech because of its offensive content, or mandating speech that the State prefers. The purpose for freedom of expression under the First Amendment is to protect offensive speech. Inoffensive speech does not need protection. The State claims that offensive speech can be censored if it is "discriminatory" (Opening Brief on the Merits, OBM, 18-22, 58-59). But that is not the law. E.g., *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (use of an anti-Asian epithet, "Slants," is protected speech); *Snyder v. Phelps*, 562 U.S. 443, 448 (2011) (anti-gay signs and speech, such as "God Hates Fags," are protected speech); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (expressive conduct, cross-burning, even outside a residence, cannot be criminalized on the basis of its discriminatory content). Indeed, the First Amendment protects racial, sexual and ethnic insults that virtually everyone finds offensive, not just the targeted group or sex. Specifying the reason speech

is offensive, because it is deemed “discriminatory,” does not remove protections from offensive speech.

Protecting personal dignity from the emotional effects of disparaging speech is not a compelling state interest justifying speech content censorship.

> A "dignity" standard, like the "outrageousness" standard that we rejected in *Hustler*, is so inherently subjective that it would be inconsistent with "our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience."

Boos v. Barry, 485 U.S. 312, 322 (1988), quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988). “Speech does not lose its protected character … simply because it may embarrass others.…” *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 910 (1982).

"[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.” *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-746 (1978).

The State tries to defend HS §1439.51(a)(5) on the grounds that it is justified as a “workplace” speech, employment law (OBM, 48-51, 56-58). But it is not. Employment laws affecting workplace speech are enacted to protect the right to work for employees by prohibiting employers and employees from discriminating against employees on the basis of protected personal characteristics of employees, including “sex, gender, gender identity, gender

expression, … sexual orientation." Government Code §12940(a); e.g., *Aguilar, supra.* But HS §1439.51(a)(5) says nothing whatsoever about sex, gender, gender identity, gender expression or sexual orientation of employees.

HS §1439.51(a)(5) does not protect the rights of employees to work; rather, it threatens employees with termination, fines and imprisonment for failing to conform their speech to the demands of facility residents (not to protect other employees). Furthermore, SB219 and HS §1439.51(a)(5) contain no procedures for employees to request accommodations for employees' freedom of thought or speech or rights of conscience.[2]

HS §1439.51(a)(5), moreover, does not involve epithets or a "hostile work environment," as in *Aguilar*. Rather, the State is demanding that employees conform their speech to the ideology and language of favored customers, transgender and other LGBT residents.

The State is demanding a virtual oath, an affirmation of belief in the State's newly adopted, official, non-binary gender creed,[3] as a condition of employment.

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[2] "It is an unlawful employment practice … For an employer … to refuse to hire or employ a person or … to discharge a person from employment … because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer … demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance" of the employee. Government Code §12940, (l)(1).

[3] E.g., "The Gender Recognition Act," Senate Bill 179 (2017), Sec. 2; e.g., Health and Safety Code §103425, §103426, §103430 (effective January 1, 2019).

That violates the First Amendment. The state of Maryland once required people who wanted to work as notary publics to declare that they believed in God. That was unconstitutional. *Torcaso v. Watkins*, 367 U.S. 488, 495-496 (1961). Employees cannot be required to take a patriotic loyalty oath. *Baggett v. Bullitt*, 377 U.S. 360, 366 (1964). Employees cannot be required to affirm that they are not members of the Communist Party. *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966). Ideological oaths as a condition of employment are unlawful, but that is what HS §1439.51(a)(5) demands, a test oath.

To treat the philosophical, psychological, ideological, cultural dispute over transgender pronouns as if traditional use of Standard English pronouns were equivalent to racial or sexual epithets would be for the State and this Court to take sides on a burgeoning issue of public concern and to silence and punish free speech by conscientious dissidents, in violation of the First Amendment. People with biological gender essentialist, empirical and moral worldviews have no desire to offend anyone. They simply want to be free to speak the truth as they understand it and not to be forced by the State to endorse and submit to a gender fluid, gender constructivist ideology that they personally reject.

The State again tries to circumvent the strict scrutiny standard of review applicable to speech content, viewpoint and compulsory speech by arguing that the “preferred … pronouns” mandate in HS §1439.51(a)(5) should be deemed

valid because it comes within a “captive audience” exception to free speech applicable to people’s homes (OBM 51-54). But the “captive audience” doctrine regarding homes and other locations is resolved in the cases by denying access for some speakers to certain locations, like a person’s home, not by regulating the content of their speech.

So, for example, the State can enact content-neutral time, place and manner regulations of speech that deny access for picketers to a home, as in *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988), but the State cannot censor content of conversations in the home to ban Standard English pronouns or require use of transgendered “preferred … pronouns.” The State can deny access to public transit for political advertising to protect a “captive audience” of riders from unwanted speech, as in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302, 304 (1974), but the State cannot require permitted advertising to exhibit transgendered people or to use transgendered pronouns when referring to them. The Supreme Court has held that even a law that "helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, ***including the right of such group members to live in peace where they wish" is not a compelling state interest*** justifying speech content censorship. *R.A.V. v. St. Paul*, 505 U.S. 377, 395-396 (1992) (emphasis added).[4]

[4] The only “captive audience” cases that permit content-based constraints on speech are locations like public schools and prisons where the state has

"[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Carey v. Brown*, 447 U.S. 455, 463 (1980).[5]

The State offers, as an alternative defense, that it should not be required to satisfy the strict scrutiny standard of review applicable to speech censorship and compulsory speech to enforce of the "preferred … pronouns" mandate in HS §1439.51(a)(5). The State argues that this anti-speech regulation should be enforced as it actually is enforced, that is, in the same manner as other long-term care facility regulations that, unlike speech regulations, are presumptively constitutional and must merely be legitimate and satisfy rational basis review:

> Violations of S.B. 219 are subject to both "civil and criminal penalties" under general Health and Safety Code remedial provisions that equally apply to all manner of abusive, unlawful actions by long-term care facilities and their staff members. (Sen. Rules Com., Off. of Sen. Floor Analyses, *supra*, p. 7.) In other words, S.B. 219 reflects the Legislature's judgment that violations of

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compelled people to be present against their will, by prison sentencing or compulsory education laws. So, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), student speech with offensive sexual elements could be censored applying standards applicable to minors in public schools, standards which do not apply to adults (transgendered or otherwise). "The First Amendment guarantees wide freedom in matters of adult public discourse." The State, however, in its Opening Brief on the Merits (at footnote 34) asks this Court to treat content-based censorship in long-term care facilities for adults according to the standards applicable to minors in public schools (and, presumably, prisons).

[5] Long-term care facilities that are privately owned are limited public forums for purposes of free speech and protection against viewpoint discrimination due to the fact that the State has chosen to regulate speech at these locations.

> the statute, including willful, repeated misgendering, should be treated the same as the many other forms of abuse and neglect of long-term care residents (such as failing to provide clean, sanitary facilities and bed linens, unjustifiably barring residents from hosting visitors or spending time with fellow residents, serving unhealthful or spoiled food, or neglecting a resident's healthcare needs). (See *ibid.*; see, e.g., Health & Saf. Code, §§ 1439.54, 1569.269; *ante*, pp. 24-25.)

OBM 55.

Similarly, the State argues also that the content, viewpoint and compulsory speech elements of HS §1439.51(a)(5) should be construed rather as if they were content-neutral time, place and manner regulations of speech (subject to intermediate scrutiny) (OBM 66-67). The State admits that HS §1439.51(a)(5) is content-based (not content-neutral) but asks this Court nevertheless to treat it as if it were "analogous to" time, place and manner regulations. This argument is outside First Amendment law and self-refuting. Even if HS §1439.51(a)(5) were facially content-neutral it would still be subject to strict scrutiny.

> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "'justified without reference to the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). ***Those laws, like those that are content based on their face, must also satisfy strict scrutiny***.

Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (emphasis added).

Exhausting its defenses, the State at last admits that HS §1439.51(a)(5) is

indeed facially overbroad but asks this Court to weigh in on its behalf anyway by finding that it is not sufficiently overinclusive (OBM 67-68). In fact, this law is substantially overinclusive in the limitless range of the times during which the threat of criminal speech enforcement persists (apparently now and forever, even beyond death), the contexts within which pronoun misuse can be prosecuted (not only in the presence of a resident, or in facility records or communications, but also in all forms of speech and expression of an employee or former employee, including but not limited to everything from political speech and advocacy, subpoenaed testimony in court, academic publications, personal memorabilia, and private, casual conversations) and in every form of recorded media.

HS §1439.51(a)(5) is also facially under-inclusive and void for vagueness (as discussed *infra*).

The State argues, finally, that it should be permitted to censor speech on the basis of its content and viewpoint and to compel State-favored LGBT speech because no lawful means exists to protect against misgendering that does not involve censoring speech content (OBM 67, footnote 35, "[I]t would be impossible as a practical matter for the government to craft a truly content-neutral law shielding LGBT long-term care residents from verbal discrimination"). Even if this were true it could not save SB219 and HS §1439.51(a)(5) whose criminal speech penalties are not the least restrictive means to accomplish any lawful purpose.

The State offers no evidence that the Legislature considered any other

means whatsoever than criminal penalties for what it considers to be offensive speech. Taking Offense offers other potential approaches to this issue, *infra*.

Standing. This action raises important issues in the public interest, for which there are few people or entities positioned to address without endangering their jobs, their social standing and their personal privacy. For Taking Offense, the principal issue in this action is the protection of free speech from criminalization by the State. No employee subject to HS §1439.51(a)(5) is ever likely to raise these issues because it would mean immediate dismissal from their employment and possible criminal prosecution.

Although Taking Offense promotes biological gender essentialism and opposes transgenderism (except in cases of hermaphroditism or true gender dysphoria) on empirical, scientific, linguistic, moral, religious and free speech grounds (not because of hatred toward transgendered people or people of any gender identity or expression nor a desire to do them harm), Taking Offense does not dispute the political authority of the state Legislature to adopt, as it has, the nonbinary gender paradigm represented by transgenderism for government speech. Taking Offense utterly opposes, however, the rising “cancel culture” and all efforts of the Legislature, the courts or the private sector to silence public debate in opposition to the official, progressive nonbinary gender paradigm and transgenderism.

Taking Offense represents an empirical approach to sex and gender still

common among the general populace but increasingly displaced by a “woke” preference for defining reality as each individual’s psychological view of self and gender identity -- personal, psychological reality trumping objective, physical reality -- among Progressives and their institutions (universities, media, social media, and now the California Legislature).

Although Taking Offense represents an apparently increasingly minority worldview on sex and gender that is being driven from the field of public debate by the cancel culture and the implacable opposition of advocacy media and woke entities, Taking Offense’s natural law worldview cannot be utterly quashed by this opposition. The natural law perspective regarding sex, gender identity, gender expression and transgenderism cannot be suppressed successfully by laws or the courts, just as *Roe v. Wade* and its progeny could not silence public debate over abortion.

Silencing opposition speech and expression is not a valid legislative or judicial power. The U.S. Supreme Court engaged in jurisprudential self-delusion when it pronounced that it could impose a pro-abortion viewpoint on the American people through judicial fiat (disguised as a value-neutral judgment).

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever ***the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division*** by

accepting a common mandate rooted in the Constitution.

Planned Parenthood v. Casey, 505 U.S. 833, 866-67 (1992) (emphasis added).

Constitutionally, no legislatures or courts can ever lawfully compel the general populace and other believers in natural, moral law and gender essentialism to endorse transgenderism and gender fluidity any more than it can compel public support for abortion.

Taking Offense accepts and respects transgendered people, despite our incompatible and irreconcilable worldviews. Taking Offense tolerates people who theatrically flaunt transgenderism in public to express their opposition toward traditional, natural law and Christian morality. The general populace will obey laws that protect transgenderism despite their ideological or moral objections when circumstances require their conformity, but the objective, empirical, natural law worldview will continue to be espoused (perhaps, albeit, as a minority perspective) due to matters of conscience protected by First Amendment guarantees of freedom of thought and expression.

Pronouns are just the tip of the linguistic spear that seeks to thrust transgender ideology and language conformity on the American populace. A consortium of public universities has issued language codes for their IT communications which ban use of third person singular pronouns altogether. One such university speech code bans: “he/she as an inclusive combined subject pronoun; also: s/he, he or she, he and she, his and her, his or her” because

"Using the binary pronoun and possessive pronoun is no longer considered accurate due to greater understanding and acceptance that gender and sexual orientation are not binary or limited to male and female or he/she and his/her." Also banned are "male or female connectors and fasteners"; "man" as a verb; "manpower," "mankind," "ladies/gals" and similar terminology. Even the phrases "preferred pronouns," "sexual preference" and "gay" are banned as being insufficiently ideologically conforming.[6]

The mandatory "preferred … pronouns" dispute in this action should be resolved for people with gender identity, gender expression and transgender issues in the same manner that the U.S. Supreme Court resolved the similar cultural and legal debate concerning same-sex marriage in *Obergefell v. Hodges*, that is, by recognizing the rights of transgender and gender-fluid people to live their lives as they choose while at the same time respecting the First Amendment rights to freedom of thought and freedom of expression of dissenters to continue to disagree with both the ideology and language of transgenderism and to voice their disagreement without government compulsion or censorship.

> Finally, it must be emphasized that ***religions, and those who adhere to religious doctrines, may continue to advocate with***

[6] "IT Connect," itconnect.wu.edu, the University of Washington. See also University of California Irvine, "Inclusive IT Language Guide, https://www.oit.uci.edu/inclusive-language-guide/ (March 2022). When "male/man" and "female/woman" have totally lost their biological references, new biological terms will have to be created to convey their original meanings (such as, perhaps "penins") and "vagins").

> ***utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned***. ***The First Amendment ensures that religious organizations and persons are given proper protection*** as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. ***The same is true of those who oppose same-sex marriage for other reasons.*** In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may ***engage those who disagree with their view in an open and searching debate.***

Obergefell v. Hodges, 576 U.S.644, 679-680 (2015) (emphasis added).

"Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct." *Lawrence v. Texas*, 539 U.S. 558, 662 (2003). Just as Fourteenth Amendment liberty protects "intimate conduct" in the forms of gender identity and expression and transgenderism for the residents of long-term care facilities, Fourteenth Amendment "liberty," incorporating First Amendment freedom of speech, equally protects the "thought, belief and expression" of any dissenters on the facility staff.

In *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), a state university professor objected on free speech, compulsory speech, religious liberty and due process grounds to a school mandate that teachers refer to employees, students, visitors, agents and volunteers by their "preferred pronouns" reflecting their "self-asserted gender identity" because "his sincerely held religious beliefs prevented him from communicating messages about gender identity that he believes are false" (992 F.3d at 498-499). "The [school] officials justified the university's

refusal to accommodate Meriwether's religious beliefs by equating his views to those of a hypothetical racist or sexist," but the Court of Appeal rejected that defense and denied the school's motion to dismiss. "Since Meriwether has plausibly alleged that Shawnee State violated his First Amendment rights by compelling his speech or silence and casting a pall of orthodoxy over the classroom, his free-speech claim may proceed." 992 F.3d 502, 503.

> Start with the basics. The First Amendment protects "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Thus, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.* 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). When the government tries to do so anyway, it violates this "cardinal constitutional command." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, —— U.S. ——, 138 S. Ct. 2448, 2463, 201 L.Ed.2d 924 (2018).

Meriwether v. Hartop, 992 F.3d at 503.

"Pronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Id.,* 992 F.3d at 508 (introducing a brief legal history of pronoun disputes, 508-509). Caution: If the State could control speech content, then the State, or a later legislative majority, also could *prohibit* people to refer to others by their preferred pronouns. "[T]he state cannot wield its authority to categorically silence dissenting viewpoints." *Id.*, 992 F.3d at 507. Free speech for some requires free speech for all.

I. PLAINTIFF HAS STANDING IN THE PUBLIC INTEREST TO PURSUE THE IMPORTANT FREE SPEECH ISSUES PRESENTED IN THIS ACTION.

This Court has jurisdiction over this action pursuant to Code of Civil Procedure §526a, construed by the courts of the State to include taxpayer and citizen actions pursued in the public interest against the State and its officials.

Taking Offense, Plaintiff, a California registered unincorporated association which includes at least one California citizen and taxpayer who has paid taxes to the state within the past year, is a proper plaintiff to bring this action to defend and promote public justice and the rights of the people, citizens and taxpayers of California.

The State of California and its chief law enforcement and public health officials, Defendants, are the representatives of the government and people of the State, under the California Constitution, who govern the people, citizens and taxpayers of the State and who are responsible through State officers and agents to enforce SB219 and HS §1439.51(a)(5).

SB219 is an act of the State itself, through the state Legislature, and on its face the provisions of SB219 and HS §1439.51(a)(5) impose enforcement duties on a myriad of identified and unidentified state agencies and officials. The trial Court granted Petitioner's motion to add as Doe Defendants 1-3 the California Attorney General, the Department of Social Services and the Department of Public Health (JA 189).

A. PLAINTIFF HAS PUBLIC INTEREST STANDING UNDER CODE OF CIVIL PROCEDURE §526a.

Code of Civil Procedure §526a authorizes taxpayer actions against public officials to enjoin illegal expenditures or waste of public funds.

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a local agency, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax that funds the defendant local agency….

CCP §526a(a).

Plaintiff has public interest standing for declaratory and injunctive relief pursuant to Code of Civil Procedure §526a.

> Section 526a provides a mechanism for controlling illegal, injurious, or wasteful actions by those [public] officials. That mechanism, moreover, remains available even where the injury is insufficient to satisfy general standing requirements under section 367. (See, e.g., *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268 …) [describing the "primary purpose" of section 526a to be "'enabl[ing] a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement' "].

Weatherford v. City of San Rafael, 2 Cal.5th 1241, 1249 (2017).

"[A]n injunction may be obtained in a taxpayer's action without any showing of special damage to the particular plaintiff." *Van Atta v. Scott*, 27 Cal.3d 424, 449 n.24 (1980).

> ***Past cases make clear that under section 526a "no showing of special damage to the particular taxpayer [is] necessary"*** (e.g.,

> *Crowe v. Boyle* (1920) 184 Cal. 117, 152 [193 P. 111]); indeed, as we recently stated in *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206], "[t]he primary purpose of [section 526a] . . . is to `enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.' [Citation.]"

White v. Davis, 13 Cal.3d 757, 764-65 (1975) (emphasis added).

HS §1439.51(a)(5), a state law criminalizing free speech and demanding compulsory speech of employees (without any of the administrative or procedural protections of employee rights typically available under state law), raises important issues in the public interest within the scope of CCP §526a.

The State argues, erroneously, that accepting jurisdiction over a matter of public interest pursuant to CCP §526a is discretionary, and that this Court should decline jurisdiction for various prudential reasons (OBM), 35-43). But the cases cited by the State to support this proposition actually discuss the admittedly discretionary public interest standing for a writ of mandate under Code of Civil Procedure §1086,[7] not CCP §526a. This action raises matters of public interest

[7] *Green v. Obledo*, 29 Cal.3d 126, 144 (1981) (OBM 37), mandate, public interest standing granted; *Weiss v. City of L.A*., 2 Cal.App.5th 194, 205-206 (2016) (OBM 37), mandate, public interest standing granted; *Environmental Protection and Information Center v. California Department of Forestry and Fire Protection*, 44 Cal.4th 459, 479-480 (2008) (OBM 38), mandate, public interest standing granted; *Board of Social Welfare v. County of L. A*., 27 Cal.2d 98, 100-101 (1945) (OBM 38), mandate, public interest standing granted; *People ex rel. Becerra v. Superior Court*, 29 Cal.App.5th 486, 496 (2018) (OBM 38), mandate, public interest standing denied (but the Court of Appeal acknowledged that the petitioner would have standing under CCP §526a); *Driving Sch. Assn. of*

within CCP §526a, and Plaintiff has public interest standing.

Although the text of CCP §526a specifies actions against a "local agency," judicial construction of the statute has expanded its application to include state officials. The State complains that taxpayer standing under CCP §526a is limited to actions against "*local* government actors" (emphasis in original) only (OBM 32; 43-47), but that is not the law. This Court has said:

> Although plaintiff parents bring this action against state, as well as county officials, it has been held that ***state officers too may be sued under section 526a*** (*Blair v. Pitchess*, *ante*, p. 258, at p. 267; *California State Employees' Assn. v. Williams* (1970) 7 Cal.App.3d 390, 395 [86 Cal.Rptr. 305]; *Ahlgren v. Carr* (1962) 209 Cal.App.2d 248, 252-254 [25 Cal.Rptr. 887].)

Serrano v. Priest, 5 Cal.3d 584, 618 n.38 (1971). "Indeed, it has been held that taxpayers may sue state officials to enjoin such officials from illegally expending state funds." *Blair v. Pitchess*, 5 Cal.3d 258, 268 (1971). "[S]tate officers too may be sued under section 526a." *Los Altos Property Owners Assn. v. Hutcheon*, 69 Cal.App.3d 22, 28 (1977).

In its Opening Brief, the State argues that the Court should use this case to

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California v. San Mateo Union High Sch. Dist., 11 Cal.App.4th 1513, 1518-1519 (1992) (OBM 38), mandate, public interest standing denied; *Reynolds v. City of Calistoga*, 223 Cal.App.4th 865, 875 (2014), mandate, public interest standing denied (but the Court specifically noted that it was not ruling on standing under CCP §526a), 223 Cal.App.4th at 873; *Madera Community Hospital v. County of Madera*, 155 Cal.App.3d 136, 142-146 (1984) (OBM 38), mandate, public interest standing denied; *McDonald v. Stockton Met. Transit Dist*, 36 Cal.App.3d 436 (1973) (OBM 38), mandate, public interest standing issue not raised.

rescind its prior holdings that actions can be brought against the State and State officials under 526a (OBM 43-46), contending that these cases are outdated and reflect a flawed view of jurisprudence and public policy. Taking Offense replies that accepting taxpayer actions against the State has brought before the Court important matters of public interest that otherwise would have evaded state-wide judicial review, such as in *Serrano v. Priest*.

"[T]he Legislature amended Code of Civil Procedure section 526a (effective January 1, 2019), to specify what types of tax payments are sufficient to establish taxpayer standing, by adding the language "that funds the defendant local agency." *A.J. Fistes Corp. v. GDL Best Contractors, Inc.,* 38 Cal.App.5th 677, 681 (2019). But in adopting this amendment, the State Legislature did not disturb the judicial holdings that expanded application of CCP §526a against state officials.

In *A.J. Fistes Corp.,* the Court held that a taxpayer who paid only state income taxes had standing to sue a local agency partially funded by the state. 38 Cal.App.5th at 682. Enforcement of SB219 and HS §1439.51(a)(5), at issue in this action, is funded by the State and enforced by State officials or by local prosecutors who receive state funding.

The State next raises a red herring -- a non-issue -- contending inaccurately that Taking Offense is relying on "non-statutory common law taxpayer standing" (OBM 45-47). Not so. Taking Offense is relying on CCP

§526a. As already noted, "*state officers too may be sued **under section 526a.***" *Serrano v. Priest*, 5 Cal.3d 584, 618 n.38 (1971) (emphasis added), citing *Blair v. Pitchess*; *California State Employees' Assn. v. Williams* (1970); *Ahlgren v. Carr* (1962) 209 Cal.App.2d 248, 252-254; *Los Altos Property Owners Assn. v. Hutcheon; supra*. Accord: *Stanson v. Mott*, 17 Cal.3d 206 (1976).

The State argues against standing, finally, that it is "entirely speculative" that enforcement of SB219 and HS §1439.51(a)(5) "will make any material difference to government spending levels" (OBM 46). To the contrary, criminal law enforcement is inherently costly. Moreover, taxpayer suits can restrain illegal government activity regardless of the expenditures directly curtailed.

> Code of Civil Procedure section 526a permits a taxpayer to bring an action to restrain or prevent an illegal expenditure of public money. No showing of special damage to a particular taxpayer is required as a requisite for bringing a taxpayer suit. (*White v. Davis, supra*, 13 Cal.3d at p. 764.) Rather, ***taxpayer suits provide a general citizen remedy for controlling illegal governmental activity***. (*Id.* at p. 763.)
>
> Citizen suits may be brought without the necessity of showing a legal or special interest in the result where the issue is one of public right and the object is to procure the enforcement of a public duty. (*Green v. Obledo* (1981) 29 Cal.3d 126, 144.) ***Citizen suits promote the policy of guaranteeing citizens the opportunity to ensure that governmental bodies do not impair or defeat public rights.*** (*Ibid*.)
>
> ***Taxpayer suits and citizen suits are closely related concepts of standing.*** (See *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439.) The chief difference is a taxpayer suit seeks preventative relief, to restrain an illegal expenditure, while a citizen suit seeks affirmative relief, to compel the performance of a public duty. (*Ibid*.) ***Where standing appears under either rule, the action may proceed regardless of the***

label applied by the plaintiff. (*Ibid*.)

Connerly v. State Personnel Board, 92 Cal.App.4th 16, 29 (2001) (emphasis added).

B. PLAINTIFF HAS DISCRETIONARY STANDING UNDER CCP §1086 TO SEEK A WRIT OF MANDATE.

"The writ [of mandate] must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested." Code of Civil Procedure §1086. The requirement that Petitioner be "beneficially interested" in the relief sought is satisfied under the public interest standard for beneficial interest under CCP §1086 as enunciated by this Court:

> While a plaintiff is generally required to have a direct and substantial beneficial interest in order to seek a writ of mandate under section 1086, for example, ***we have long allowed petitioners to seek relief where "'"the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty***."'" (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166.… [S]ee also *Bd. of Soc. Welfare v. County of Los Angeles* (1945) 27 Cal.2d 98, 101, [concluding that ***a party's interest " 'in having the laws executed and the duty in question enforced' " is sufficient*** even absent a "'legal or special interest'"].) This ***exception to the beneficial interest requirement*** protects citizens' opportunity to "ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Green v. Obledo* (1981) 29 Cal.3d 126, 144).

Weatherford v. City of San Rafael, 2 Cal.5th 1241, 1248 (2017) (citations omitted; emphasis added).

Again, the State is a proper defendant. In *James v. State*, 229 Cal.App.4th

130, 134-35 (2014), a mandamus action, the defendants were the "State of California, Office of the Attorney General of the State of California, and Kamala Harris, in her official capacity as Attorney General of the State of California (collectively, the State)."

The State admits that public interest standing under CCP §1086 is supported in the law (e.g., *Green v. Obledo*, 29 Cal.3d 126, 144, the public interest standing doctrine "protects citizens' opportunity to ensure that no governmental body impairs or defeats … a public right") (internal quotation marks removed) (OBM 37), but the State argues that Taking Offense should be denied public interest standing nevertheless, because eventually someone else directly affected might bring a similar action against the State (OBM 31-32, 37-43). That is an evasion, not a legal proposition. In reality, Taking Offense is better situated than a staff member, union or trade association, because all of those individuals and entities must overcome substantial risk-aversion to bring an action, whereas Taking Offense acting in the public interest can litigate this matter (as it has done to date) without putting any staff member or other person subject to SB 219 and HS §1439.51(a)(5) at risk.

The State argues that Taking Offense should be denied public interest standing under CCP §1086 (OBM 35-43), citing *Weiss v. City of Los Angeles*, 2 Cal.App.5th 194 (2016) (OBM 37-38) for a limiting principle that public interest standing is acknowledged only when otherwise an issue would be "effectively

insulated from judicial review" (OBM 37). That overstates the holding in *Weiss*.

> "The exercise of jurisdiction in mandamus rests to a considerable extent in the wise discretion of the court." Under the doctrine of public interest standing, "'"where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced."' … In determining whether a petitioner has public interest standing, the court also considers the burden on those who have a beneficial interest, and would have general standing, but who may be disinclined or ill-equipped to seek review.

Weiss, 2 Cal.App.5th at 205 (citations omitted). The actual mandamus issue weighs whether a potential plaintiff with a direct interest may find it a "burden" to litigate or be "disinclined or ill-equipped" to undertake a lawsuit. The Court in *Weiss* granted mandamus standing in consideration for the burdens of time and expense that a later plaintiff would be unlikely to choose to bear. The present action has taken over four years to reach this Court, a substantial investment of time and expense that should not be imposed on a directly injured future plaintiff when Taking Offense has already made that investment in the public interest.

Most of the mandamus cases cited by the State actually granted public interest mandamus standing.[8] E.g., in *Environmental Protection and Information Center* (OBM 38), this Court granted public interest standing because the petitioner "had shown a continuing interest in and commitment to issues related

[8] *Ibid.*

to this case." 44 Cal.4th at 480. In *Board of Social Welfare* (OBM 38), this Court granted public interest standing because the petitioner was providing needed "assistance" to people the writ of mandate would benefit. 27 Cal.2d at 100-101.

Taking Offense qualifies for discretionary mandamus standing in this action.

II. THE "PREFERRED … PRONOUNS" MANDATE OF HS §1439.51(a)(5) IS FACIALLY UNCONSTITUTIONAL BECAUSE IT CENSORS AND PENALIZES SPEECH ON THE BASIS OF ITS CONTENT.

Apart from the few fixed categories of speech content that are unprotected by the First Amendment,[9] laws like SB219 and HS §1439.51(a)(5) that censor and penalize speech on the basis of its content and/or viewpoint are facially unconstitutional.

In *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), the Supreme Court ruled that a state law that criminalized speech likely to "arouse anger, alarm or resentment" on the basis of its content relating to "race, color, creed, religion or gender" was

[9] "[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few "'historic and traditional categories [of expression] long familiar to the bar." "… Among these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called "fighting words"; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent.… These categories have a historical foundation in the Court's free speech tradition." *United States v. Alvarez*, 567 U.S. 709, 716-18 (2012) (citations omitted).

unconstitutional on its face. “[T]he ordinance is ***facially unconstitutional*** in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.” *R.A.V.*, 505 U.S. at 381 (emphasis added). “[T]he government may not regulate use based on hostility — or favoritism — towards the underlying message expressed.” *R.A.V*, 505 U.S. at 386. The California Supreme Court concurred in the *R.A.V.* free speech principles in *In re M.S*, 10 Cal.4th 698, 720-722 (1995).

A. THE CONTENT-BASED CENSORSHIP OF HS §1439.51(a)(5) VIOLATES FREEDOM OF SPEECH.

. The purpose for HS §1439.51(a)(5) is expressly to censor speech content of speakers to conform to the preferences of favored listeners. Freedom of speech and equal protection of the law cannot coerce mental and verbal submission of one private person to another.

“But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

> At the heart of the First Amendment lies the principle that ***each person should decide for himself or herself the ideas and beliefs deserving of expression***…. Government action that … ***requires the utterance of a particular message favored by the Government***, contravenes this essential right. Laws of this sort pose the inherent risk that the ***Government seeks*** not to advance a legitimate regulatory goal, but ***to suppress unpopular ideas or information or manipulate the public debate through coercion*** rather than persuasion.

Turner Broadcasting, 512 U.S. at 641-642 (citations omitted; emphasis added). Accord: *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978).

The Constitution "demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality." *Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 660 (2004); *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 817 (2000); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

> Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.

Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

> ***A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive***.… In other words, ***an innocuous justification cannot transform a facially content-based law into one that is content neutral.***

Reed v. Town of Gilbert, 576 U.S. at 165 (emphasis added).

> [S]peaker-based laws demand ***strict scrutiny*** when they reflect the ***Government's preference for the substance of what the favored speakers have to say*** (or aversion to what the disfavored speakers have to say).… [L]aws ***favoring some speakers over others demand strict scrutiny.…***

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 658 (1994) (emphasis added). Accord: *Fashion Valley Mall v. N.L.R.B.*, 42 Cal.4th 850, 865-66 (2007); *DVD Copy Control Association, Inc. v. Bunner* (2003) 31 Cal.4th 864, 865-66, 877; *Kasky v. Nike, Inc*., 27 Cal.4th 939, 952 (2002), citing *United States v.*

Playboy Entertainment Group, Inc. (2000) 529 U.S. 803, 813

Moreover, even laws that are "facially content neutral, will be considered content-based regulations of speech." Laws that cannot be "justified without reference to the content of the regulated speech … must also satisfy *strict scrutiny*." *Reed v. Town of Gilbert*, 576 U.S. at 164 (citations omitted).

B. CRIMINALIZING SPEECH CONTENT IS AN ESPECIALLY SERIOUS FORM OF CENSORSHIP.

> ***[A] law imposing criminal penalties on protected speech is a stark example of speech suppression.***… While even minor punishments can chill protected speech, see *Wooley v. Maynard,* 430 U.S. 705 (1977), ***this case provides a textbook example of why we permit facial challenges to statutes that burden expression***.

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002) (emphasis added).

> Content-based prohibitions, enforced by severe ***criminal penalties,*** have the constant potential to be a repressive force in the lives and thoughts of a free people.

Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 659-60 (2004) (citations omitted; emphasis added). "Where a prosecution is a likely possibility … speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech." 542 U.S. at 670-71.

Principles of free speech "do not … permit the Government to ***imprison any speaker*** so long as his speech is deemed valueless."

Our decisions … cannot be taken as establishing a freewheeling

> authority to declare new categories of speech outside the scope of the First Amendment.

U.S. v. Stevens, 559 U.S. 460, 470-472 (2010). "Criminal prohibition" is an invalid form of speech content regulation. *United States v. Alvarez*, 567 U.S. 709, 715 (2012). Although civil sanctions may be worse than criminal sanctions, both civil and criminal sanctions on speech are subject to First Amendment strict scrutiny and cannot be used to suppress speech on the basis of its content.

C. THE COMPULSORY SPEECH "PREFERRED … PRONOUNS" MANDATE OF HS §1439.51(a)(5) ALSO SUBJECTS THE LAW TO STRICT FIRST AMENDMENT SCRUTINY.

As noted, the State has tried to characterize HS §1439.51(a)(5) as an employment ("workplace") speech law, whereas HS §1439.51(a)(5) does not involve speech among employers and employees but rather speech between employees and non-employees, i.e., customers, facility residents. As such, the demand of the State that employees speak to residents using language mandated by the State violates freedom from compulsory speech guaranteed by the First Amendment.

The State does not have plenary power under First Amendment freedom of speech to mandate the content of employee communications with clients or non-employees. *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

The free speech provisions of the California Constitution likewise protect

against content regulation and involuntary, state-mandated speech.

> Article I, section 2 of the California Constitution provides: "(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Article I's free speech clause enjoys existence and force independent of the First Amendment to the federal Constitution.…
>
> "Because speech results from what a speaker chooses to say and what he chooses not to say, the right in question comprises both a right to speak freely and also a right to refrain from doing so at all, and is therefore put at risk both by prohibiting a speaker from saying what he otherwise would say and also by compelling him to say what he otherwise would not say." (*Gerawan I*, [*Gerawan Farming v. Lyons*,] *supra*, 24 Cal.4th 468, 491.

ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc., 135 Cal.App.4th 841, 846-47 (2006).

HS §1439.51(a)(5) mandating pronoun preferences requires private actors to conform their use of language to the thought processes and lifestyle choices of another person with whom the mandated-speaker may disagree on personal, legally protected grounds, including medical, psychological, moral, sexual (such as the mandated-speaker's own gender identity choices and gender expression preferences), religious or scientific opinion. "Men and women of good conscience can disagree" about words and actions with "profound moral and spiritual implications," the Supreme Court has observed, and in consequence, "[W]e have ruled that ***a State may not compel or enforce one view or the other***." *Planned Parenthood v. Casey*, 505 U.S. 833, 850, 851 (1992) (emphasis added). Accord: *Torcaso v. Watkins*, 367 U.S. 488 (1961) (state-mandated religious oath invalid).

"[F]reedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U.S. 47, 61 (2006). People cannot be compelled to recite the pledge allegiance to their country if they disagree with its words or message, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), yet HS §1439.51(a)(5) compels people to recite words endorsing a gender constructivist worldview with which they may fundamentally disagree. People cannot be compelled to display their state motto, *Wooley v. Maynard*, 430 U.S. 705 (1977) ("Live Free or Die"), yet HS §1439.51(a)(5) compels people to endorse verbally the ideology and lifestyle of another private individual. A private newspaper cannot be compelled to publish the words of another private individual even to serve the important public interest of airing both sides of a disputed political issue, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), yet HS §1439.51(a)(5) compels people to proclaim words that promote only one side of a controversial moral and cultural issue of public concern. Pro-life pregnancy clinics cannot be compelled to post notices promoting the availability of state-funded abortions despite the strict constitutional protections afforded to abortion and its respect for personal autonomy, *National Institute of Family & Life Advocates v. Becerra,* 138 S. Ct. 2361 (2018), yet HS §1439.51(a)(5) compels people to speak words that endorse another person's sense of personal autonomy, gender expression and self-respect at the expense of disparaging the

right of the facility staff speaker to be faithful to his own conscience, personal sense of autonomy and gender expression, to speak honestly, and to retain self-respect.

> The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all."

Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448, 2463 (2018) (citations omitted) (union workers cannot be forced to espouse or support speech they find objectionable).

> When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning.…

Janus, 138 S. Ct. at 2464.

D. CENSORING PRONOUNS BECAUSE OF THEIR GENDER ESSENTIALIST ORIENTATION CONSTITUTES VIEWPOINT DISCRIMINATION SUBJECT TO STRICT SCRUTINY.

HS §1439.51(a)(5) imposes viewpoint discrimination by mandating that only favored (“preferred”) language (“pronouns”) specifying State and LGBT-endorsed viewpoints about gender identify and gender expression must be voiced and pronouns expressing disfavored viewpoints (“misgendered” pronouns) that must be silenced.

"A regulation of speech that is motivated by nothing more than a desire to

curtail expression of a particular point of view … is the purest example of a law … abridging the freedom of speech.…" *FCC v. League of Women Voters,* 468 U.S. 364, 383-384 (1984) (citation and quotation marks omitted; emphasis added). "Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. University of Virginia*, 515 U.S. 819, 828, 829 (1995).

> The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience.….
>
> … The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive***.***

Matal v. Tam, 137 S. Ct. 1744, 1766-67 (2017), Justice Kennedy, concurring.

III. THE STATE HAS NO VALID COMPELLING INTEREST TO CENSOR PRONOUNS ON THE BASIS OF THEIR SEX/GENDER CONTENT AS REQUIRED BY HS §1439.51(a)(5).

Censoring pronouns because the State prefers different sex/gender speech content violates freedom of speech. Labeling disfavored pronoun usage as "misgendering" is simply stating a preference for the transgender ideology that gender is a social construct divorced from biological sex as opposed to the gender essentialist perspective that biological sex and psychological gender are closely related and virtually always identical. In terms of constitutional freedom of thought and expression, both the gender constructivist

and the gender essentialist ideologies are equally protected forms of speech. The State cannot legally favor one and censure the other.

"[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

Censoring speech because it is offensive to others violates freedom of speech. The "preferred …pronouns" mandate of HS §1439.51(a)(5) relies on a false assertion that "The Government has an interest in preventing speech expressing ideas that offend". To the contrary,

> we protect the freedom to express "the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 655, 49 S.Ct. 448, 73 L.Ed. 889 (1929) (Holmes, J., dissenting).

Matal v. Tam, 137 S. Ct. 1744, 1764 (2017).

> The … First Amendment … protects the speech we detest as well as the speech we embrace.

United States v. Alvarez, 567 U.S. 709, 729-30 (2012).

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive.…

Texas v. Johnson, 491 U.S. 397, 414 (1989) (citations omitted).

Censoring speech because it is deemed discriminatory violates freedom of speech. The State claims that offensive speech can be censored if it is "discriminatory" (OBM 18-22, 51-55, 58-59). But that is not the law. E.g., *Matal*

v. Tam, 137 S. Ct. 1744, 1751 (2017) (use of an anti-Asian epithet, “Slants,” is protected speech); *Snyder v. Phelps*, 562 U.S. 443, 448 (2011) (anti-gay signs and speech, such as “God Hates Fags,” are protected speech); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-396 (1992) (an ordinance that "helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination” is not a compelling state interest justifying speech censorship).

Censoring speech because it causes emotional reactions violates freedom of speech. Supreme Court free speech jurisprudence refuses to penalize speech “because the speech in question may have an adverse emotional impact on the audience.” *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988). “[F]ree speech under our system … may indeed best serve its high purpose when it … stirs people to anger.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

Censoring speech because it fails to convey proper respect or dignity toward others violates freedom of speech. Language does not exist to promote respect. Language expresses facts, ideas and opinions for purposes of disclosure, analysis, persuasion, opposition, correction or other functions or combinations of functions. Reducing speech to social etiquette, expression of respect or disrespect, is reductionism, *reductio ad absurdum*, isolating one tangential element of speech and treating it as if it were the whole reason for speech and the single determinative factor concerning its legality and

constitutionality. Words of “respect” enforced by legal coercion generate not harmony and acceptance but rather revulsion and disdain, confuting the purported justification for the law. The First Amendment does not teach that everyone is entitled to respect for his basic human dignity.[10]

Free people cannot lawfully be compelled to accord respect for the dead or the grieving at private funerals*, Snyder v. Phelps*, 562 U.S. 443 (2011); or respect for the sacrifices and patriotism represented in the American flag, *Texas v. Johnson*, 491 U.S. 397 (1989); or respect for the ideology enshrined in a state motto (“Live Free or Die”), *Wooley v. Maynard*, 430 U.S. 705 (1977); or even respect for the courts, *Cohen v. California,* 403 U.S. 15 (1971). Indeed, as already noted, speech is most protected when it is most offensive, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (the Defendant “attacked the religion and church of the two men, who were Catholics. Both were incensed.…”).

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

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[10] Politically correct pronoun usage would say "their" in this sentence, but Standard English language and grammar use the masculine singular to include all humanity of both sexes, and this also is the legal standard. "Masculine pronouns include the feminine," Probate Code §6207; Welfare and Institutions Code §1703(e). "His" matches the singular pronoun to the singular noun subject of the clause ("everyone"). "Their" mismatches the singular subject with a plural pronoun. Everyone is entitled to use pronouns as he/they/zir wish, subject only to social opprobrium and the ire of grammarians, not fines and jail time.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

Proverbially, “A man convinced against his will is of the same opinion still.” Respect and dignity manifestly cannot be compelled by threats or punishments. Resentful, robotic conformity may perhaps be coerced in the conduct of some craven or intimidated or vulnerable people, but not true respect, not true dignity.

“Dignitary” interests are not protected categories of speech.

> A "dignity" standard … is so inherently subjective that it would be inconsistent with "our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience."

Boos v. Barry, 485 U.S. 312, 322 (1988) (citations omitted).

Censoring speech content to protect a “captive audience” violates freedom of speech. Captive audience speech principles govern rights of access to locations to engage in speech, so *Frisby v. Schultz*, 487 U.S. 474 (1988), held that a content-neutral time, place and manner ordinance barring picketing that focused directly on the residence of a targeted person was constitutionally valid, finding that protestors did not have a right of access to the person's home.

> [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is ***an ability to avoid intrusions***.…
>
> … We have "never intimated that the ***visitor could insert a foot in the door and insist on a hearing***." There simply is ***no right to force speech into the home*** of an unwilling listener [or] … ***intrude upon the targeted resident***.…

Frisby v. Schultz, 487 U.S. 474, 484-86 (1988) (citations omitted) (emphasis added).

> [W]e have upheld a statute allowing a homeowner to ***restrict the delivery*** of offensive mail to his home, see *Rowan v. Post Office Dept.,* 397 U.S. 728, 736–738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), and an ordinance ***prohibiting picketing*** "before or about" any individual's residence, *Frisby* [*v. Shultz*]*,* 487 U.S., at 484–485, 108 S.Ct. 2495.

Snyder v. Phelps, 562 U.S. 443, 459-60 (2011).

The "captive audience" cases cited by Justice Werdegar in her concurring opinion in *Aguilar v. Avis Rent A Car System, Inc.,* 21 Cal.4th 121, 159-162 (1999) likewise dealt with rights of access for speech, not justification of content-based censorship of speech, as in HS §1439.51(a)(5). Outside the special context of public schools and prisons, captive audience issues are resolved by limiting access by use of content-neutral time, place and manner constraints.[11]

Censoring speech unless a listener gives permission to a speaker violates freedom of speech. A law permitting speakers to talk to listeners only if the listener has first given consent was declared unconstitutional in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994). Even protection of the

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[11] "Clearly, for example, the use of noise amplification devices, such as bullhorns and loudspeakers, can be sharply curtailed on the campus if such regulation is necessary to prevent substantial interference with the work of ***captive audiences*** in classrooms and research facilities." *Braxton v. Municipal Court*, 10 Cal.3d 138, 149 (1973) (emphasis added). Accord: *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352, 379 (2000).

important privacy right of access to a medical facility did not justify a law that gave one person a right to censor and silence the speech of another on a topic (abortion) that a party to the conversation might find intrusive or offensive. The "preferred … pronouns" mandate in HS §1439.51(a)(5) is a form of the unconstitutional "You may speak to me only if I first consent" censorship paradigm rejected in *Madsen v. Women's Health Center, Inc.* (despite the fact that women entering an abortion clinic are arguably a "captive audience").

A federal law barring delivery of materials through the U.S. mail system unless specifically requested and approved by the recipient was held to be unconstitutional in *Lamont v. Postmaster General*, 381 U.S. 301, 302-303 (1965).

IV. CENSORING AND CRIMINALIZING PRONOUNS DOES NOT REPRESENT THE LEAST RESTRICTIVE MEANS TO ACCOMPLISH ANY VALID STATE INTEREST.

The State has failed to satisfy its burden of proof to specify a compelling state interest to justify its “preferred … pronouns” mandate that has not already been rejected by the courts (*supra*). Nor has the State attempted to show that criminalizing and compelling speech content as in SB219 and HS §1439.51(a)(5) are the least restrictive means to accomplish any allegedly compelling purpose it may belatedly propose.

Even when serving a valid compelling state interest, speech content restrictions must utilize "the least restrictive means." *United States v. Playboy*

Entertainment Group, Inc. (2000) 529 U.S. 803, 813; *Kasky v. Nike, Inc*., 27 Cal.4th 939, 952 (2002).

Assuming for purposes of argument that "misgendering" could somehow satisfy First Amendment constraints against speech content and viewpoint censorship and compulsory speech, less restrictive means of addressing misuse of pronouns than those imposed under SB219 and HS §1439.51(a)(5) abound.

First, the application of the law could be restricted to in-person oral conversations between facility staff and residents, or at least to facility-related communications, oral and written, rather than including all forms of speech in all contexts whatsoever for all time.

Second, the enforcement of HS §1439.51(a)(5) could be placed within standard employment law policies and processes with their administrative and judicial procedures, resulting in cautions, injunctions and possible termination, rather than criminal law enforcement by state or local prosecutors, resulting in fines and imprisonment.

Third, rather than resorting to censorship and coercion, long-term care facility owners could be directed or encouraged to survey their employees for their willingness to voluntarily to abide by the HS §1439.51(a)(5) "preferred … pronouns" mandate and to assign only willing employees to positions involving resident contact or communications.

Fourth, by law or employment regulation the State should enable long-term

care facilities to hire employee who have no linguistic, moral or other objections to abiding by the HS §1439.51(a)(5) “preferred … pronouns” mandate without being subject to claims of employment discrimination, perhaps by enacting laws or regulations identifying an employee’s voluntary willingness to abide by the “preferred … pronouns” mandate of HS §1439.51(a)(5) as a “bona fide occupational qualification” (BFOQ) for employment at a long-term care facility housing LGBT residents in California.

> Under § 703(e)(1) of Title VII, an employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1).

United Auto Workers v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991). “The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ.” *Id.* Employment discrimination on the basis of sex (here on the basis of employee speech concerning sex/gender) can be permitted when it enables the employee to do his/her job or is needed for the benefit of people with whom the employee interacts (*United Auto Workers*, 499 U.S. at 202-203).

V. HS §1439.51(a)(5) IS FACIALLY UNCONSTITUTIONAL.

In addition to being facially unconstitutional due to its content-based censorship of speech, *R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992) (Section II, *supra*), HS §1439.51(a)(5) is facially unconstitutional also for being overbroad (over-inclusive), under-inclusive and void for vagueness.

A. HS §1439.51(a)(5) IS FACIALLY UNCONSTITUTIONAL FOR BEING OVERBROAD, OVER-INCLUSIVE.

Statutes that chill free speech are subject to challenge for due process overbreadth, over-inclusiveness, even by people whose personal rights have not been affected. "In the First Amendment context … a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional.…'" *U.S. v. Stevens*, 559 U.S. 460, 473 (2010).

"Criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Houston v. Hill*, 482 U.S. 451, 459 (1987) (citation omitted; emphasis added).

"***The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement***. The crime "must be defined with appropriate definiteness." *Cantwell v. Connecticut*, 310 U.S. 296; *Pierce v. United States*, 314 U.S. 306, 311." *Winters v. New York*, 333 U.S. 507, 515 (1948) (emphasis added).

> Although constitutional rights are generally said to be personal, a well-established exception is found in the ***overbreadth doctrine*** associated with ***First Amendment jurisprudence***. Under this doctrine, litigants may challenge a statute not because their own rights of free expression are violated, but because ***the very existence of an overbroad statute may cause others not before the court to refrain from constitutionally protected expression***

In Re MS, 10 Cal.4th 698, 709 (1995) (emphasis added), citing *Broadrick* v. *Oklahoma,* 413 U.S. 601, 612 (1973).

As found by the Court of Appeal, HS §1439.51(a)(5) and SB219 are facially unconstitutionally for being over-inclusive, in that they make it a crime for facility staff to "[w]illfully and repeatedly fail to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns," without any restriction on the times, places or manners in which misuse of names or pronouns can be prosecuted as a crime. HS §1439.51(a)(5) fails to clarify when, where, for how long or in what forms the failure to use a resident's "preferred … pronouns" can be criminally or civilly enforced, that is, (1) whether this prohibition applies only when conversing with the resident; or (2) when speaking in the presence of the resident; or (3) when speaking about the resident in all times and places (whether at the licensed facility or elsewhere); or (4) when speaking during work hours of the staff member at the facility as opposed to (5) speaking at all times (all day, every day and forever); or (6) applies also when writing to, (7) in the presence of, or (8) about the resident; or (9) when writing only official records or business records concerning the resident as opposed to

(10) personal, advocacy, academic, political, ideological, polemic, educational and/or other writings that mention the resident; or (11) when writing about the resident after the death of the resident; or (12) when engaging in forms of expression, including, but not limited to, speaking, writing, art, music, videos and other expressive media that are indisputably protected under state and/or federal constitutional principles of freedom of thought, press, expression, conscience, religion and other legal guarantees or exemptions. (See Petition, ¶19, Joint Appendix, 010-011.)

All of these forms of expression are protected free speech that cannot constitutionally be criminalized simply to affirm perpetually certain individuals' pronoun preferences.

B. HS §1439.51(a)(5) IS FACIALLY UNCONSTITUTIONAL FOR BEING UNDER-INCLUSIVE.

A law is facially under-inclusive when, without justification, it does not apply to individuals or actions substantially similar to those to which the law applies. *South Dakota v. Dole*, 483 U.S. 203, 214-215 (1987). When the subject matter of a law is the content of speech, under-inclusiveness represents grounds for facial violation of the First Amendment. E.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214-216 (1975).

First, HS §1439.51(a)(5) and SB219 make it a crime only for facility staff to "fail to use a resident's preferred name or pronouns" but say nothing about

pronoun usage by others who are present at the facility, e.g., other residents, family members, guests, visitors, vendors, owners or other non-staff people. If there is a compelling state interest in preventing misgendering of LGBT residents, criminalizing staff misuse of pronouns but not others' misgendering is under-inclusive.

Second, HS §1439.51(a)(5) and SB219 make it a crime for facility staff to "[w]illfully and repeatedly fail to use a resident's preferred name or pronouns," "***Except as provided in subdivision (b)"*** (emphasis added). HS §1439.51(a)(5) and SB219 compound their under-inclusiveness problems by incorporating a vague exemption for favored speakers who do not conform to the "preferred … pronouns" mandate. HS §1439.51(b) states that "This section shall not apply to the extent that it is incompatible with any professionally reasonable clinical judgment." Nothing in SB219 specifies what "professionals" are exempted from this criminal speech law, nor what kinds of "clinical judgment" qualifies them for exemption, nor who decides whether an exemption is "professionally reasonable," nor by what standards. These exemptions are arbitrary and capricious and calculated to shield favored speakers ('professionals" of whatever stripe) from criminal prosecution.

C. HS §1439.51(a)(5) IS FACIALLY UNCONSTITUTIONAL FOR BEING VOID FOR VAGUENESS.

Due process of law requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1095-1096 (1995).

HS §1439.51(a)(5) is unconstitutionally void for vagueness in several respects. First, the law is unconstitutionally vague because it cannot be determined from its text whether a staff member who always uses Standard English pronouns to refer to the biological sex of another person could be prosecuted. The statute makes it "unlawful for a long-term care facility or facility staff to take any of the following actions 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: … (5) Willfully and repeatedly fail to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns.…" The *mens rea* of the defendant in this scenario would turn on the speaker's perception of the objective sex of the resident addressed, not on his/her/their/zir "sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status." Such a staff member fails to use a resident's "preferred … pronouns" not because of any

animus against the resident but because of the speaker's own language preferences, to use Standard English pronouns, which refer to biological sex, irrespective of the person addressed or referenced. Can a person be prosecuted simply for willful failure to use a resident's "preferred … pronouns" if the person is not doing so with intent to discriminate but rather with intent to follow the rules of Standard English language usage?

Second, the range of mandatory pronouns that residents may demand is not defined, whether limited to the English language, or other languages, and/or LGBT pronoun neologisms. (See Joint Appendix 23-41 for examples.)

> It oversimplifies matters to say that gender dysphoric people merely prefer pronouns opposite from their birth sex — "her" instead of "his," or "his" instead of "her." In reality, a dysphoric person's "[e]xperienced gender may include alternative gender identities beyond binary stereotypes." DSM-5, at 453; see also, e.g., Dylan Vade, Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People, 11 Mich. J. Gender & L. 253, 261 (2005) (positing that gender is not binary but rather a three-dimensional "galaxy"). Given that, one university has created this widely-circulated pronoun usage guide for gender-dysphoric persons:
>
> 1 2 3 4 5 (f)ae (f)aer (f)aer (f)aers (f)aerself e/ey em eir eirs eirself he him his his himself per per pers pers perself she her her hers herself they them their theirs themself ve ver vis vis verself xe xem xyr xyrs xemself ze/zie hir hir hirs hirself
>
> Pronouns – A How To Guide, LGBTQ+ Resource Center, University of Wisconsin-Milwaukee, https://uwm.edu/lgbtrc/support/gender-pronouns /; see also Jessica A. Clark, They, Them, and Theirs, 132 Harv. L. Rev. 894, 957 (2019) (explaining "[s]ome transgender people may request ... more unfamiliar pronouns, such as ze

> (pronounced ‘zee’) and hir (pronounced ‘hear’))." If a court orders one litigant referred to as "her" (instead of "him"), then the court can hardly refuse when the next litigant moves to be referred to as "xemself" (instead of "himself"). Deploying such neologisms could hinder communication among the parties and the court.

United States v. Varner, 948 F.3d 250, 256-57 (5th Cir. 2020).

Third, English language pronouns are binary and sex-linked, but gender identities and expressions are nonbinary and not linked to sex; hence, transgender ideology and the English language do not mesh linguistically, numerically or legally. California law explicitly recognizes that gender may be identified or expressed as male, female, nonbinary, intersex or transgender.[12] The "nonbinary" category incorporates scores of additional gender identities and expressions which by definition cannot be expressed in the binary male/female classifications of Standard English. Forcing nonbinary usage of pronouns into the gender binary male/female options available in Standard English language usage is both irrational and impossible, but may be required by HS §1439.51(a)(5).

Fourth, as noted, HS §1439.51(a)(5) and SB219 make it a crime for facility staff to “[w]illfully and repeatedly fail to use a resident’s preferred name or pronouns,” “Except as provided in subdivision (b).” The exception states that “(b) This section shall not apply to the extent that it is incompatible with any professionally reasonable clinical judgment.” The law is vague as to which facility

[12] See footnote 3, *supra*.

staff may be exempted from the “preferred … pronouns” mandate if in their “clinical judgment” they should be free to speak otherwise. SB219 provides no definitions or references to determine what “professions” may declare themselves exempt (medical, psychological, linguistic, institutional, other?), or what standards should be applied, and by whom, to determine how “reasonable” a staff member’s judgment must be to avoid prosecution for failing to obey the pronouns mandate.

CONCLUSION

In praise of censorship! If HS §1439.51(a)(5) does not violate free speech, it is because the enlightened California Legislature has rediscovered the time-honored axioms that censors are always virtuous[13] and censorship reliably promotes goodness and truth! Those who criticize censorship as all about aggrandizing power should be censored. The Church was absolutely right to censor Galileo to protect its truth. The early American colonies were right to reject truth as a defense to defamation of government officials, as in the John Peter Zenger trial (1734) which irresponsibly promoted free speech. The Supreme Court followed cutting-edge science when it promoted eugenics and censored people physically through sterilization in *Buck v. Bell*, 274 U.S. 200, 207 (1927). “Three generations of imbeciles are enough.” Five millennia of biological gender essentialism are enough. We now know better.

A cartoonist penned: “If you can get someone fired for expressing their opinion, you’re not the oppressed. You’re the oppressor!” No! The political elite in this one-party State are virtue incarnate. They would never censor dissidents for political power. Admit, as Winston finally did in *1984*, that the Big Brother State is always right. The *hoi polloi* masses know nothing. Free speech is the real oppressor. Compulsory pronouns are just the first step to save our world.

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[13] (in their own eyes)

The actual conclusion. However well-intentioned, the interests of LGBT residents of long-term care facilities cannot be advanced in the unconstitutional manner mandated by SB219 and HS §1439.51(a)(5). Plaintiff seeks a judicial declaration that HS §1439.51(a)(5) is facially unconstitutional and injunctive relief and/or mandamus barring or constraining its enforcement.

Respectfully submitted,

/s/ David L. Llewellyn, Jr.

_____

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Pursuant to California Rules of Court, Rule 8.200(c)(1), I certify that this Answer Brief on the Merits was produced on a computer using 13-point Ariel type, double-spaced (except headings, quotations and footnotes). The brief contains 13,807 words, based on the word count feature of the Microsoft Word program used to prepare this brief.

April 6, 2022

/s/ David L. Llewellyn, Jr.

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Supreme Court of California

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