

No. S270535

**In the Supreme Court of  
the State of California**

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TAKING OFFENSE,

*Plaintiff and Appellant,*

v.

STATE OF CALIFORNIA

*Defendant and Respondent.*

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Third Appellate District, Case No. C088485  
Sacramento County Superior Court,  
Case No. 34-2017-80002749-CU-WM-GDS  
The Honorable Steven Gevercer, Judge

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**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE*  
BRIEF IN SUPPORT OF DEFENDANT/RESPONDENT STATE  
OF CALIFORNIA, BY CALIFORNIA COMMISSION ON  
AGING, SAGE, JUSTICE IN AGING, CALIFORNIA  
ADVOCATES FOR NURSING HOME REFORM,  
AND OPENHOUSE; PROPOSED BRIEF**

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## **APPLICATION FOR LEAVE TO FILE**

### **AMICUS CURIAE BRIEF**

Proposed *amici* respectfully request leave to file the accompanying *amicus curiae* brief in support of Defendant/Respondent State of California.

No party to this action or counsel to any party has provided any form of support with regard to the authorship, preparation, or filing of this brief. No person or entity, including any party or party's counsel, made a monetary contribution with the intent to fund the preparation or submission of this brief.

#### **Interests of Proposed Amici Curiae**

The California Commission on Aging is an independent state advisory body created in state law to serve as the principal advocate for older Californians and their families. The Commission's mandate is to ensure that all Californians can age with dignity and respect in the setting of their choice. With members appointed by the Governor and both houses of the Legislature, Commissioners represent the racial and ethnic diversity of the state, as well as the state's cultural and geographic diversity. The Commission's work is guided by the values of equity and inclusion, promotion of autonomy and choice, a

system that serves older adults with respect, and collaboration to build a unified voice to support California’s aging population.

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

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

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

Openhouse, founded in 1998, enables San Francisco Bay Area LGBT seniors to overcome the unique challenges they face as they age by providing housing, direct services, transformational training and community programs. Openhouse centers the voices and experiences of LGBT older adults offering a comprehensive suite of services including housing and mental health support.

### **How the Proposed *Amicus Curiae* Brief Will Assist the Court**

This appeal concerns the constitutionality of requiring long-term care facility staff members to address transgender residents with the resident’s chosen pronouns. Under the law, a violation occurs only when a facility staff member has been “clearly informed of the preferred . . . pronouns,” and has “[w]illfully and repeatedly”

addressed the resident with wrong pronouns. Cal. Health & Safety Code § 1439.51(a)(5).

Defendant/Respondent State of California draws parallels between the “pronoun provision” and the various laws that prohibit verbal discrimination in the workplace. Opening Br. on the Merits of Def./Resp’t at 48-58. In response, Plaintiff/Appellant Taking Offense argues that the First Amendment prohibits the State from proscribing speech on the basis of that speech being discriminatory, or failing to “convey proper respect or dignity towards others.” Answer Br. on the Merits of Pl./Appellant at 48-49.

In two ways, the proposed *amicus* brief puts these arguments in context. First, the proposed brief describes how LGBT residents of long-term care facilities are particularly vulnerable. Many LGBT older adults have experienced discrimination throughout their lives, and the risk is only heightened in long-term care facilities, where the LGBT residents live in close quarters with sometimes dozens or hundreds of other persons. The resident may share a room with a randomly-assigned person, and will receive hands-on assistance from multiple facility staff members. This assistance can include extremely

personal activities such as assistance with using the toilet or taking a bath.

Second, the proposed brief demonstrates how preexisting federal and state long-term care facility laws routinely require that residents be treated with respect. Indeed, federal nursing facility guidelines include an explicit statement that facility staff should address residents with the resident's chosen pronouns. These routine, generally long-standing, requirements of respect and dignity demonstrate that Plaintiff Taking Offense is mistaken in analogizing this case to (for example) burning the American flag, or wearing a jacket with printed vulgar language in a courthouse. *See Answer Br. on the Merits of Pl./Appellant at 50 (citing Texas v. Johnson, 491 U.S. 397 (1989) and Cohen v. California, 403 U.S. 15 (1971))*. Given the vulnerable position of long-term care facility residents — dependent on the facility for assistance with many daily necessities, and often physically present in the facility 24 hours a day — federal and state laws understandably require that staff treat residents respectfully. Furthermore, particularly for transgender residents, respect can be expressed through addressing residents with their chosen pronouns.

## INTRODUCTION

A transgender man should be addressed as “he” and “him,” and a transgender woman as “she” and “her.” This is simple respect, and the type of respect that reasonably can be expected from California’s long-term care facilities and their employees.

This brief explains the discrimination faced by LGBT (lesbian, gay, bi-sexual, transgender) older adults, and how this discrimination can be particularly oppressive for an LGBT older adult living in a long-term care facility (either nursing facility or assisted living facility). The “pronoun provision” of California law is a reasonable and necessary step to ensure that transgender residents are treated with respect and dignity. Notably, the pronoun provision is entirely consistent with federal nursing facility law, which requires that residents be treated with respect and dignity and which, in regulatory guidelines, requires that nursing facility staff use a resident’s chosen pronouns. It also is consistent with long-standing state law that similarly requires that residents be treated with respect by the staff members of nursing facilities and assisted living facilities.

## ARGUMENT

### **I. LGBT Older Adults Experience Discrimination and Poor Treatment in Health Care, with Heightened Risk and Greater Negative Consequences in Long-Term Care Facilities.**

LGBT individuals frequently experience discrimination when they seek health care. One survey found that 56 percent of lesbian, gay, or bisexual people reported incidents of discrimination in health care due to sexual orientation. These incidents included refusals of care, harsh language, and physical abuse. Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV* 5 (2010), [https://www.lambdalegal.org/sites/default/files/publications/download/s/whcic-report\\_when-health-care-isnt-caring.pdf](https://www.lambdalegal.org/sites/default/files/publications/download/s/whcic-report_when-health-care-isnt-caring.pdf).

Transgender individuals are particularly at risk. In a 2017 survey, 29 percent of transgender respondents reported that a health care provider had refused to see them because of their sexual orientation or gender identity in the preceding year. Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, Center for American Progress (Jan. 18, 2018), <https://www.americanprogress.org/article/discrimination->

[prevents-lgbtq-people-accessing-health-care/](#). Furthermore, such discrimination and mistreatment often results in necessary care not being received. In one survey, 23 percent of transgender respondents did not seek care that they needed, due to concern about mistreatment based on gender identity. Sandy E. James, et al., National Center for Transgender Equality, *The Report of the 2015 National Transgender Survey 5* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

Many of these problems multiply when an LGBT older adult needs facility-based long-term care. In the community, LGBT older adults can take steps to live and socialize with people they trust. That is not the case in a long-term care facility. In the words of one report, “[f]or LGBT elders, entering long-term care may be a foreboding concept: to live for the first time in many years among people who may not accept you for who you are or whom you love.” Movement Advancement Project & SAGE, *Understanding Issues Facing LGBT Older Adults* 17 (2017), <https://www.lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf> [hereafter *Understanding Issues*]. A recent AARP report found that 58 percent of surveyed LGBT adults

feared being forced to hide their LGBT identify in order to obtain housing. AARP Research, *Dignity 2022: The Experience of LGBTQ Older Adults* 34 (June 2022), [https://www.aarp.org/content/dam/aarp/research/surveys\\_statistics/life-leisure/2022/lgbtq-community-dignity-2022-report.doi.10.26419-2Fres.00549.001.pdf](https://www.aarp.org/content/dam/aarp/research/surveys_statistics/life-leisure/2022/lgbtq-community-dignity-2022-report.doi.10.26419-2Fres.00549.001.pdf).

Unfortunately, these fears are often supported by fact: in a recent report, nearly half of surveyed LGBT older adults reported mistreatment of themselves or a loved one in a long-term care facility. Movement Advancement Project & SAGE, *Understanding Issues at 17*. Another report noted high levels of harassment of LGBT nursing facility residents. SAGE, *The Need for LGBT-Inclusive Housing*, (April 2014), <http://www.lgbtagingcenter.org/resources/resource.cfm?r=399>. In one example, a California nursing facility prevented a transgender resident from eating or socializing with other residents. Daniel Redman, *Fear, Discrimination and Abuse: Transgender Elders and the Perils of Long-Term Care*, *AgingToday* (March 2011), <https://www.lgbtagingcenter.org/resources/resource.cfm?r=508>. In another case, multiple nursing facilities in the Chicago area rejected

one older adult because she is transgender. *Id.* Doctors consequently refused to perform necessary emergency brain surgery, because she had no place in which to recover. *Id.*

In a 2011 study cited by the California Legislature as support for the LGBT Long-Term Facility Residents' Bill of Rights, 81 percent of survey respondents believed that other residents would discriminate against an LGBT resident, while 89 percent believed that staff would discriminate against LGBT residents. Justice in Aging et al., *LGBT Older Adults in Long Term Care Settings: Stories from the Field* 8, (2011, re-released in 2015), <https://justiceinaging.org/wp-content/uploads/2015/06/Stories-from-the-Field.pdf> (cited in LGBT Long-Term Facility Residents' Bill of Rights, SB 219 (Sept. 8, 2017)). Furthermore, 53 percent of respondents feared that staff discrimination would rise to the level of abuse or neglect. *Id.* Indeed, 43 percent of respondents reported that they had personally witnessed or experienced mistreatment of LGBT older adults in a long-term care facility. *Id.* These instances of mistreatment included refusal of admission, abrupt discharges, verbal or physical harassment, discriminatory restrictions on visitation, and staff refusing to use a resident's chosen name or pronoun. *Id.* at 9.

## **II. Federal Nursing Facility Law Emphasizes Residents’ Right to Respect and Dignity, and Federal Guidance Explicitly Directs Staff to Use a Resident’s Chosen Pronouns.**

In enacting the LGBT Long-Term Care Facility Resident’s Bill of Rights, the California Legislature recognized the harm caused to LGBT older adults by discrimination in long-term care facilities. The “pronoun provision” at issue in this appeal requires that a resident be addressed with the resident’s chosen pronouns. Notably, a violation can be assessed only after a facility staff member has been “clearly informed of the preferred ... pronouns,” and has “[w]illfully and repeatedly” addressed the resident with the wrong pronouns. Cal. Health & Safety Code § 1439.51(a)(5).

In essence, refusing to use the resident’s chosen pronoun, under the carefully defined circumstances described in the statute, is a form of harassment. *See* Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA Law Review Discourse 40, 43, 63-67 (May 11, 2020), available at <https://www.uclalawreview.org/misgendering-as-misconduct/>. The pronoun provision sends a clear message to facility staff that LGBT residents deserve the respect of being addressed with the correct pronouns, and should not be harassed through willful use of the wrong pronouns.

The pronoun provision is consistent with federal nursing facility law, with the through-line being the respect and dignity that all residents deserve. In short, nursing facility care should be focused on caring for residents as individual people. It is not enough that each resident have adequate food and sleep, along with enough services to avoid illness: residents in addition require respect and individualized attention.

Federal nursing facility law plays a large role in setting standards for nursing facility care across the country. The law applies to all nursing facilities that accept Medicare or Medicaid and, because most residents pay for nursing facility care through Medicare or Medicaid, almost all facilities have obtained federal certification and thus are subject to the federal standards. 42 U.S.C. § 1395i-3(a) (Medicare certification), 42 U.S.C. §1396r(a) (Medicaid certification); L. Harris-Kojetin, et al., *Long-term Care Providers and Services Users in the United States, 2015-2016* 9-10, U.S. Dep’t of Health and Hum. Servs., (Feb. 2019), [https://www.cdc.gov/nchs/data/series/sr\\_03/sr03\\_43-508.pdf](https://www.cdc.gov/nchs/data/series/sr_03/sr03_43-508.pdf).

Under federal law, a nursing facility “must care for its residents in such a manner and in such an environment as will promote

maintenance or enhancement of the quality of life of each resident.” 42 U.S.C. §§ 1395i-3(b)(1)(A), 1396r(b)(1)(A). The implementing regulations emphasize this requirement, declaring that “[q]uality of life is a fundamental principle that applies to all care and services provided to facility residents.” 42 C.F.R. § 483.24.

The same philosophy is expressed in resident rights established in the federal regulations. The very first sentence of the resident rights regulation declares a resident’s “right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility.” 42 C.F.R. § 483.10(a).

Accordingly, each nursing facility “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 C.F.R. § 483.10(a)(1); *see also* 42 C.F.R.

§ 483.10(e) (stating again that a resident has “right to be treated with respect and dignity”).

The regulations define “person-centered care” as “focus[ing] on the resident as the locus of control and support[ing] the resident in making their own choices and having control over their daily lives.” 42 C.F.R. § 483.5. To ensure that residents truly are treated in a

person-centered manner, the regulations require that each resident’s care be coordinated through a “comprehensive person-centered care plan” that is developed “[i]n consultation with the resident and the resident’s representative.” 42 C.F.R. § 483.21(b)(iv); *see also* 42 U.S.C. §§ 1395i-3(b)(2), 1396r(b)(2) (statutory requirement for care planning). This care plan must set forth services to meet the “resident’s medical, nursing, and mental and psychosocial needs that are identified in [a] comprehensive assessment.” 42 C.F.R. § 483.21(b)(1); *see also* 42 U.S.C. §§ 1395i-3(b)(2)(A), 1396r(b)(2)(A) (statutory requirement that care plan describes how medical, nursing, and psychosocial needs will be met).

Consistent with the concept of a person-centered plan, federal law requires that the resident have significant control in care planning. The plan is developed through an interdisciplinary team that includes the resident and resident’s representative, along with the resident’s physician and facility staff, and including any staff or other professionals requested by the resident. 42 C.F.R. §§ 483.10(c)(2), 483.21(b)(2)(ii); *see also* 42 U.S.C. §§ 1395i-3(b)(2)(B), 1395i-3(c)(1)(A)(i), 1396r(b)(2)(B), 1396r(c)(1)(A)(i) (statutory requirement that care planning include resident or resident’s representative).

Furthermore, in planning and providing services, the facility has an obligation to make “reasonable accommodation of resident needs and preferences” except in the very rare circumstance when accommodation would “endanger the health or safety of the resident or other residents.” 42 C.F.R. § 483.10(e)(3); *see also* 42 U.S.C. §§ 1395i-3(c)(1)(A)(v)(I), 1396r(c)(1)(A)(v)(I) (similar statutory language).

The regulations specify multiple services coordinated through the care plan, including nursing services, food and nutrition services, and specialized rehabilitative services. *See* 42 C.F.R. §§ 483.35, 483.60(a), 483.65(a). Of particular relevance to the issue before this Court is the requirement that a care plan address behavioral health, which “encompasses a resident’s whole emotional and mental well-being.” 42 C.F.R. § 483.40. The facility’s behavioral health services must be designed for the resident to “attain or maintain the highest practical physical, mental, and psychosocial well-being.” 42 C.F.R. § 483.40.

Each of these regulatory requirements are explained and amplified in Surveyors’ Guidelines prepared by the federal Centers for Medicare & Medicaid Services (“CMS”), often through fact-

specific examples. The Guidelines emphasize a facility's broad obligation to promote a resident's right to dignity and respect:

Each resident has the right to be treated with dignity and respect. All activities and interactions with residents by any staff, temporary agency staff or volunteers must focus on assisting the resident in maintaining and enhancing his or her self-esteem and self-worth and incorporating the resident's, goals, preferences, and choices. When providing care and services, staff must respect each resident's individuality, as well as honor and value their input.

CMS, State Operations Manual App. PP - Guidance to Surveyors for Long Term Care Facilities F-Tag F550 (Nov. 22, 2017),

<https://www.cms.gov/medicare/provider-enrollment-and-certification/guidanceforlawsandregulations/downloads/appendix-pp-state-operations-manual.pdf> (guideline to 42 C.F.R. § 483.10(a) -

(b)(1) & (2)). Furthermore, in language directly relevant to the issue before this Court, the Guidance directs that “[s]taff should address residents with the name or pronoun of the resident’s choice.” *Id.*

In accord, in addressing the behavioral health services regulation, the Guidance calls for “[i]ndividualized approaches to care (including direct care and activities . . . as part of a supportive physical, mental and psychosocial environment.” *Id.* at F-Tag F740 (guideline to 42 C.F.R. § 483.40). Staff must “interact and

communicate in a manner that promotes mental and psychosocial well-being”; likewise, the facility must provide “an environment and atmosphere that is conducive” to the same. *Id.*

Thus, the federal law and regulatory guidance provide additional support for California’s requirement that residents be addressed with their chosen pronoun. The pronoun provision is consistent with person-centered care and with the common-sense proposition that residents be treated with respect.

### **III. California Laws for Nursing Facilities and Assisted Living Facilities Require that Residents Be Treated with Respect and Dignity.**

California law for long-term care facilities also emphasizes that staff members must treat residents with respect. The nursing facility resident rights include the right “[t]o be treated with consideration, respect and full recognition of dignity and individuality . . . .” 22 Cal. Code Regs. § 72527(a)(12). Likewise, the nursing service regulation for nursing facilities states that each resident “shall be treated as [an] individual with dignity and respect and shall not be subjected to verbal or physical abuse of any kind.” 22 Cal. Code Regs. § 72315(b).

Similar requirements apply to assisted living facilities, which are licensed as Residential Care Facilities for the Elderly in California

(“RCFEs”). *See* Cal. Health & Safety Code § 1569.1. In the RCFE regulations, the first “personal right” of a resident is “[t]o be accorded dignity in their personal relationships with staff, residents, and other persons.” 22 Cal. Code Regs. § 87468.1.

Thus, for both nursing facilities and assisted living facilities, California law requires that facility staff members treat residents with respect. This is common practice in long-term care facilities, and entirely consistent with a requirement that facility staff members address transgender residents with the resident’s chosen pronouns.

### CONCLUSION

Residents of long-term care facilities deserve respect and dignity. For transgender residents, this includes the simple courtesy of addressing the resident with the resident’s chosen pronoun. *Amici* urge this Court to affirm the constitutionality of the pronoun provision and reverse the ruling of the Court of Appeal.

Dated: July 22, 2022

JUSTICE IN AGING

By: /s/ Eric M. Carlson  
Eric M. Carlson  
Attorney for Proposed  
*Amici Curiae*

## CERTIFICATE OF COMPLIANCE

I certify that this brief contains 2265 words, excluding the Tables of Contents and Authorities, and the Application. The brief uses Times New Roman 14-point font. In making this word-count certification, I have relied on the Microsoft Word program used to prepare the brief.

Dated: July 22, 2022

JUSTICE IN AGING

By: /s/ Eric M. Carlson  
Eric M. Carlson  
Attorney for Proposed  
*Amici Curiae*

Document received by the CA Supreme Court.

## PROOF OF SERVICE

I am employed in the County of Los Angeles, California by Justice in Aging. I am over the age of eighteen years and not a party to the within action; my business address is 3660 Wilshire Boulevard, Suite 718, Los Angeles, California 90010.

On July 22, 2022, I served the following document:

APPLICATION FOR LEAVE TO FILE AMICUS  
CURIAE BRIEF IN SUPPORT OF  
DEFENDANT/RESPONDENT STATE OF  
CALIFORNIA, BY CALIFORNIA COMMISSION ON  
AGING, SAGE, JUSTICE IN AGING, CALIFORNIA  
ADVOCATES FOR NURSING HOME REFORM,  
AND OPENHOUSE; PROPOSED BRIEF

on the parties, through their attorneys of record, by filing and e-serving via the TrueFiling system. In addition, I served a copy of the document on the trial court through first-class mail addressed to Clerk of Court, Sacramento County Superior Court, Steven M. Gevercer, Judge, 720 Ninth Street, Sacramento, California 95814.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 22, 2022, in Minneapolis, Minnesota.

/s/ Eric M. Carlson  
Eric M. Carlson

Document received by the CA Supreme Court.