No. S270535

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TAKING OFFENSE,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA,

Defendant and Respondent.

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

Application for Leave to File *Amici Curiae* Brief and Proposed Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc, National Center for Lesbian Rights, ACLU of Southern California, et al. In Support of Defendant-Respondent State of California

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Document received by the CA Supreme Court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 3

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF 9

BRIEF OF *AMICI CURIAE* 23

ISSUE PRESENTED 23

INTRODUCTION AND SUMMARY OF ARGUMENT 23

ARGUMENT 26

I. The Court of Appeal Erred in Treating the Statute as a Regulation of Protected Speech. 26

II. The Court of Appeal Failed to Understand that Misusing an LGBTQ Person's Name or Pronouns Is a Common and Harmful Form of Discrimination. 33

A. Discriminatory Misuse of a Transgender Person's Name or Pronouns Is Harmful and Occurs in Many Different Settings. 33

B. Those Who Are or Are Perceived as LGBQ Are Also Harmed by the Misuse of Their Name and Pronouns. 40

III. The Court of Appeal's Decision Ignores Key Principles of California and Federal Nondiscrimination Laws. 42

A. Intentional Misgendering Violates State and Federal Nondiscrimination Requirements Applicable to Long-Term Care Settings 43

B. Intentional Misgendering Constitutes Disparate Treatment. 49

C. Willful and Repeated Misgendering May Constitute Unlawful Harassment 52

IV. Conclusion 59

CERTIFICATE OF COMPLIANCE 61

PROOF OF SERVICE 62

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES

Page(s)

Cases

Aguilar v. Avis Rent a Car Sys., Inc.,
21 Cal.4th 121 (1999) 29, 30

Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.,
208 F. Supp. 3d 850 (S.D. Ohio 2016) 51

Beliveau v. Caras,
873 F. Supp. 1393 (C.D. Cal. 1995) 58

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140 S. Ct. 1731 (2020) 27, 46

Doe v. City of New York,
976 N.Y.S.2d 360 (Sup. Ct. N.Y. County 2013) 56

EEOC v. Sunbelt Rentals,
521 F.3d 306 (4th Cir. 2008) 54

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No. CV TDC-18-3649,
2022 WL 170792 (D. Md. Jan. 14, 2022) 38, 39, 53, 54

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2014 WL 1653484 (E.E.O.C. Apr. 16, 2014) 51

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Herriot v. Channing House,
No. 06-cv-6323-JF, 2008 WL 3929214 (N.D. Cal. Aug. 26, 2008) 48

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89 F.3d 1096 (3d Cir. 1996) 48

Document received by the CA Supreme Court.

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46 Cal.4th 1035 (2009) 45

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431 U.S. 324 (1977) 49

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40 Cal.3d 24 (1985) 44, 45

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2015 WL 1607756 (E.E.O.C. Apr. 1, 2015) ....*passim*

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7 Cal.5th 1019 (2019) 44

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42 C.F.R. § 483.10...46

42 U.S.C. § 1396r 46

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Cal. Code Regs., tit. 2, § 11034...50, 51

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Document received by the CA Supreme Court.

Civ. Code § 51 .... 43, 47

Civ. Code § 51.9 45

Gov't Code § 11135 47

Gov't Code § 12923 .... 52, 55, 56

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Document received by the CA Supreme Court.

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, *amici curiae* respectfully request permission to file the attached brief in support of Defendant-Respondent, State of California.

INTERESTS OF *AMICI CURIAE*

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of LGBTQ people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has served as counsel of record or *amicus curiae* in seminal cases in California and across the country regarding the rights of LGBTQ people and people living with HIV to equal opportunity in employment, housing, health care, public accommodations, and education. (*See, e.g., Bostock v. Clayton Cnty*., 140 S. Ct. 1731 (2020); *Wetzel v. Glen St. Andrew Living Cmty., LLC* 901 F.3d 856 (7th Cir. 2018); *Glenn v. Brumby* 663 F.3d 1312 (11th Cir. 2011); *North Coast Women's Care Medical Group, Inc. v. Superior Court* 44 Cal.4th 1145 (2008); *Koebke v. Bernardo Heights Country Club,* 36 Cal.4th 824 (2005)). Lambda Legal is committed to ensuring that nondiscrimination protections are properly understood and applied to comprehensively address the disparities experienced by the communities we serve in every facet and stage of life, including by LGBTQ older adults.

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

The **American Civil Liberties Union of Northern California (ACLU NorCal)** and the **American Civil Liberties Union of Southern California (ACLU SoCal)** are affiliates of the national American Civil Liberties Union (ACLU) with hundreds of thousands of members and supporters in California, working to protect and advance the civil rights and civil liberties of all Californians. ACLU NorCal and ACLU SoCal have a long history of vigorously safeguarding LGBTQ rights and specifically advocating for the rights of transgender and nonbinary people. ACLU NorCal and ACLU SoCal have served as counsel of record in numerous cases that have helped shape and define LGBTQ protections in California, on issues ranging from student privacy rights to health care access to safety and fair treatment in county jails.

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API Equality-LA is a grassroots community organization that builds power within the queer and trans Asian and Pacific Islander community in the Greater Los Angeles Area to achieve LGBTQ, racial, and social justice. Our mental health campaign, Transforming Community Care, aims to increase access to and availability of culturally competent and LGBTQ-affirming health care.

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

Bet Tzedek Legal Services was founded in 1974 by a small group of lawyers, rabbis, and community activists who sought to act upon a central tenet of Jewish law and tradition: "Tzedek, tzedek tirdof – Justice, justice you shall pursue." This doctrine establishes an obligation to advocate the just causes of the most vulnerable members of society. Consistent with this mandate, Bet Tzedek provides free legal services and counsel in a comprehensive range of practice areas to eligible Californians regardless of their racial, religious, or ethnic background. These services

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include civil litigation, legislative advocacy, and community education. In line with this mission, Bet Tzedek's Transgender Medical-Legal Partnership routinely advocates on behalf of transgender individuals in accessing the courts to legally change their name and gender marker; challenging transgender discrimination in public spaces, schools, and healthcare settings; and disputing medical claim denials for gender affirming care.

California Employment Lawyers Association (CELA) is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including discrimination and harassment actions enforcing California's Fair Employment and Housing Act on behalf of LGBTQI employees. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment and civil rights laws. The organization has taken a leading role in advancing and protecting the rights of California workers and opposing discrimination, including submitting *amicus* briefs and letters and appearing before the California Supreme Court, California Courts of Appeals, and Ninth Circuit Court of Appeal.

The mission of **California Women's Law Center (CWLC)** is to break down barriers and advance the potential of women and girls through transformative litigation, policy advocacy, and education. Our priorities

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include gender discrimination, women's health and reproductive justice, violence against women, and economic justice. For over 30 years, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination based on sexual orientation and sexual identity. CWLC remains committed to supporting equal rights for LGBTQ people, and to eradicating discrimination in all forms.

The **Center for Constitutional Rights (CCR)** is a New York City-based national nonprofit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the U.S. Constitution and international law. Founded in 1966, in support of the Civil Rights Movement, CCR maintains a core mission to challenge state sponsored and private forms of racial discrimination while supporting, through litigation and advocacy, social justice movements challenging unlawful policing practices, government surveillance, racial and ethnic profiling and discrimination against LGBTQI+ communities.

Equal Rights Advocates (ERA) is a national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for people of all marginalized gender identities. Since its founding in 1974, ERA has led efforts to combat sex discrimination and advance gender equality by litigating high-impact cases, engaging in policy reform and legislative advocacy campaigns, conducting community education and outreach, and providing free legal assistance to

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individuals experiencing unfair treatment at work and in school through our national Advice & Counseling program. ERA has filed hundreds of suits and appeared as *amicus curiae* in numerous cases to defend and enforce gender equity civil rights in state and federal courts, including before the United States Supreme Court. ERA firmly believes that a core tenet of gender civil rights law in the United States is to eradicate all forms of harmful gender-based discrimination and harassment, including the willful and repeated misuse of an individual's name and pronouns.

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

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Founded in 1978, **GLBTQ Legal Advocates & Defenders (GLAD)** is New England's leading public interest legal organization dedicated to creating a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has successfully litigated many cases in the state and federal appellate courts, including as *amicus*, to secure constitutional rights and protections for LGBTQ people and people living with HIV, including *Obergefell v. Hodges*, 575 U.S. 994 (2015) and *Bragdon v. Abbott*, 524 U.S. 624 (1998). In representing people from their earliest years to their passing, GLAD has addressed many First Amendment issues as *amicus*, including how to define free expression and the scope of speech regulations on speech, including *Doe v. Reed*, 561 U.S. 186 (2010), *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), and state cases.

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

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Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

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

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to employees and students by this country's antidiscrimination laws is longstanding.

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

Founded in 1985, the **National Employment Lawyers Association (NELA)** is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment matters, including wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in a variety of cases actually play out on the ground. As such, NELA has a particular interest in ensuring that courts correctly apply nondiscrimination laws that protect LGBTQ individuals in the workplace.

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

The **National Women's Law Center (NWLC)** is a nonprofit organization that advocates for gender justice in the courts, in public policy, and in broader society to ensure that women and girls, and all people, can live free of sex discrimination. Since 1972, NWLC has focused on issues of key importance to women and girls, including economic security, reproductive rights and health, workplace justice, and education, with special attention to the needs of low-income women, women of color, and others who face multiple and intersecting forms of discrimination, including LGBTQ individuals. NWLC has participated as counsel or

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amicus curiae in a range of cases before federal and state courts to ensure equal treatment and opportunity in all aspects of society through enforcement of the Constitution and other laws prohibiting sex discrimination.

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

Trans Lifeline is a grassroots hotline and microgrants non-profit organization offering direct emotional and financial support to transgender people in crisis throughout the U.S. and Canada. By providing care, Trans Lifeline also has unique insights into how policy and legal precedent impact trans communities. Whenever legislation and court decisions that impact trans people are discussed, trans people turn to Trans Lifeline for

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emotional support. For example, in February 2022 we saw a 95% increase in calls when the governor of Texas announced changes to state policy that would make it harder for trans youth to access gender-affirming care. Trans Lifeline has a particular interest in this litigation due to the impact legally sanctioned discrimination will have on the mental health of trans people throughout the state of California and nation.

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

Transgender Legal Defense & Education Fund (TLDEF) is a national civil rights organization committed to ending discrimination based upon gender identity and expression and to achieving equality for the transgender community through public education, test-case litigation, direct

Document received by the CA Supreme Court.

legal services, and public policy efforts. TLDEF seeks to ensure that all state, federal, and local anti-discrimination laws are applied fairly, accurately, and correctly to transgender and nonbinary people.

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

Pursuant to Rule 8.520(f)(4), Applicants certify that no party or counsel for any party authored this brief, or participated in its preparation, or made any monetary contributions intended to fund the preparation or submission of the brief. No other person or entity other than the applicants and their counsel authored, prepared, or made monetary contributions intended to fund the preparation or submission of the brief.

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

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Dated: July 25, 2022

Respectfully submitted,

Amanda C. Goad
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
NATIONAL CENTER FOR LESBIAN RIGHTS

Attorneys for *Amici Curiae*

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BRIEF OF *AMICI CURIAE*

ISSUE PRESENTED

A provision of the Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents' Bill of Rights prohibits long-term care facilities' staff from "[w]illfully and repeatedly fail[ing] to use [the] resident's preferred name or pronouns after being clearly informed" of the resident's name or pronoun. Health & Saf. Code § 1439.51(a)(5).

The issue presented is whether the Court of Appeal, in a pre-enforcement, taxpayer standing-based challenge, erred in facially invalidating this nondiscrimination measure on First Amendment grounds.

INTRODUCTION AND SUMMARY OF ARGUMENT

In enacting the Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents' Bill of Rights, the Legislature sought to address a common form of discrimination and harassment experienced by lesbian, gay, bisexual, transgender, and queer (LGBTQ) older adults living in facilities providing medical and personal care for those who cannot live independently. Specifically, the statute bars facilities and staff from "[w]illfully and repeatedly" misusing a resident's name and pronouns—a practice known as "misgendering"—because of the resident's sexual orientation, gender identity, or gender expression.

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Like countless nondiscrimination protections in California and federal law, this provision targets conduct that deprives LGBTQ residents of equal opportunity and enjoyment by subjecting them to discriminatory treatment or creating a discriminatory hostile environment. Willful and repeated misgendering because of a person's LGBTQ identity, by the very staff responsible for a long-term care resident's physical and medical wellbeing, deprives those residents of security, dignity, and equal care in a setting in which they have no refuge from such mistreatment.

In invalidating this provision requiring equal treatment of residents, the Court of Appeal applied the wrong analysis. First, the Court of Appeal erred in treating the statute—which prohibits singling out LGBTQ people for disparate treatment—as a regulation of protected speech, rather than conduct.

Second, the Court of Appeal failed to appreciate the full scope of the harm caused by the intentional misuse of names and pronouns, which occurs in many settings. This form of discrimination is harmful not only to transgender people who experience it, but also to people who are (or are perceived as) lesbian, gay, bisexual, or gender non-conforming.

Finally, the Court of Appeal's assumption that such conduct is not "actionable harassment or discrimination" ignores key principles of California and federal nondiscrimination laws. In various other contexts,

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

Document received by the CA Supreme Court.

ARGUMENT

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

Health and Safety Code section 1439.51(a) prohibits disparate treatment in long-term care facilities "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." The statute, which is intended to target discrimination against LGBTQ people in long-term care settings, sought in part to address a common form of such discrimination: the practice of "[w]illfully and repeatedly" misusing a resident's name and pronouns. In facially invalidating this key protection, the Court of Appeal erred by treating the statute as a content-based regulation of protected speech rather than a regulation of discriminatory conduct, which triggers no special constitutional scrutiny.

On its face, section 1439.51(a)(5) prohibits discriminatory treatment of residents with respect to their names and pronouns based on the resident's sexual orientation, gender identity, or gender expression. For example, the law prohibits singling out a transgender woman for disparate treatment because of her transgender status by intentionally referring to her as male, while referring to non-transgender women as female. It also prohibits intentionally calling lesbians "he," while referring to heterosexual

Document received by the CA Supreme Court.

women as "she." Such conduct intentionally treats a person differently than others based on their actual or perceived sexual orientation, gender identity, or gender expression. As explained more thoroughly below, such conduct can also constitute unlawful harassment, especially if done "[w]illfully and repeatedly" as specified in section 1439.51(a)(5). *See infra* § III.

Prohibition of negative treatment based on protected personal characteristics is a central element of virtually all laws prohibiting discrimination and is critical to the central purpose of such laws: ensuring that all people can obtain and benefit from employment, education, health care, housing, and other essential features of social life without being subjected to adverse treatment because of who they are. As the Court of Appeal correctly recognized, the governmental interest in eradicating such discrimination is compelling. *Taking Offense v. State*, 281 Cal. Rptr. 3d 298, 317 (Ct. App. 2021); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984) (recognizing state's compelling interest "of the highest order" in eradicating sex discrimination); *See also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731(2020) (holding that discrimination against gay and transgender people constitutes sex discrimination).

The Court of Appeal's decision incorrectly assumed, however, that because the discriminatory conduct prohibited by section 1439.51(a)(5) involves verbal communication, the provision must be analyzed as a

Document received by the CA Supreme Court.

content-based restriction of protected expression and requires heightened First Amendment scrutiny. Both the U.S. Supreme Court's and this Court's precedent expressly reject that erroneous assumption. "[W]ords . . . may produce a violation of [an anti-discrimination law's] general prohibition against sexual discrimination" without being "shielded from regulation merely because they express a discriminatory idea." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992).

As the U.S. Supreme Court has long held, "it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). The Court has observed that "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id.*; *see also Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.*, 413 U.S. 376 (1973) (holding that a newspaper's printed, commercial advertisement practices that are

Document received by the CA Supreme Court.

themselves illegally discriminatory do not receive constitutional protection).

Here, the challenged provision simply requires that staff refrain from discriminatory conduct when referring to, interacting with, or otherwise providing services, housing, and care for residents. The fact that providing services to residents requires the use of language—as do the vast majority of human interactions—does not convert discriminatory treatment into protected speech. *Roberts*, 468 U.S. at 628 ("[P]otentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."). When staff address or refer to residents in the course of their employment, they are doing so in order to perform their job duties as service and care providers. The requirement that staff members engaged in these activities address and refer to residents without singling them out for negative treatment based on their sexual orientation or gender identity is a prohibition of discriminatory conduct, not protected expression. It is not designed to silence a particular viewpoint or message, but rather to ensure that every resident is treated equally and can receive the same services provided to others.

The Court of Appeal's holding that the challenged provision is facially unlawful is inconsistent with this Court's decision in *Aguilar v. Avis Rent a Car Sys., Inc.*, 21 Cal.4th 121 (1999). As the plurality opinion

Document received by the CA Supreme Court.

in that case observed, "[a] statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity." *Id.* at 134. The plurality opinion noted that "[t]his reasoning applies equally when spoken words, either alone or in conjunction with conduct, amount to employment discrimination." *Id.* The parties in *Aguilar* did not dispute that the First Amendment permits liability under the Fair Employment and Housing Act for the creation of a hostile work environment, which the Court found unsurprising given that U.S. Supreme Court case law "leave[s] little room for doubt on this score." *Id.* at 135–36. Appellants attempt to distinguish *Aguilar* by proclaiming that "pronouns are not like racial or sexual epithets." Answer Brief on the Merits, 15. But the *Aguilar* plurality did not hold that only epithets are unprotected; rather, it noted that the First Amendment permits regulation of any "speech that violates the FEHA." *Aguilar,* 21 Cal.4th at 143.[1] As the U.S. Supreme Court noted, "words can in some circumstances violate laws directed not against speech but against conduct." *R.A.V.,* 505 U.S. at 389.

[1] As explained more thoroughly below, *infra* § III, the intentional misuse of a person's name and pronouns because of their sexual orientation, gender identity, or gender expression can constitute speech that violates the FEHA whether or not a plaintiff demonstrates that they experienced harassment or the equivalent of a hostile work environment.

Document received by the CA Supreme Court.

Section 1439.51(a)(5), which prohibits disparate treatment and harassment, is no different for freedom of speech purposes from other nondiscrimination statutes that can be violated using words. Just as states may prohibit employers from hanging out signs saying "White Applicants Only" or impose liability when racial or gender-based slurs in the workplace are sufficiently pervasive to create a hostile work environment, the state may prohibit long-term care facilities from subjecting residents to differential treatment based on sexual orientation, gender identity, or other characteristics by willfully and repeatedly refusing to refer to them using the correct names and pronouns, when other residents are not subjected to such treatment. *See Rumsfeld,* 547 U.S. at 62.

By prohibiting disparate treatment in how staff address and refer to residents, section 1439.51(a)(5) is similar to the statute's prohibition of disparate treatment with respect to the right to wear clothing permitted for any other resident, or to use restrooms consistent with a resident's gender identity. Health & Safety Code, § 1439.51, subds. (a)(6), (a)(4). Each of these provisions requires equal treatment of LGBTQ residents. That the law may be violated by using words—whether by telling a lesbian "you cannot wear a tie," or a transgender woman "you cannot use the women's restroom," or by repeatedly referring to either as "he"—does not transform such conduct into "speech" for First Amendment purposes. In each case,

Document received by the CA Supreme Court.

the law's sole purpose is to ensure equal treatment, not to regulate expressive speech.

The law requires staff to treat LGBTQ residents equally, regardless of any message or viewpoint a staff member may hold or wish to convey by treating them differently. The purpose of the law is to prevent such unequal treatment, not to silence a viewpoint or message. No matter what message a staff member may wish to convey by referring to a transgender woman or a lesbian as "he," the law prohibits such conduct because it subjects the resident to disparate treatment based on sexual orientation or gender identity and frustrates the statutory goal of ensuring equal access to care. Any impact on expressive speech is incidental to the accomplishment of that compelling interest in preventing discriminatory conduct, and the statute therefore is not subject to heightened First Amendment scrutiny. *Rumsfeld*, 547 U.S. at 62. To hold otherwise would cast into doubt a vast array of existing anti-discrimination protections, which routinely have at least some incidental impact on speech.

Document received by the CA Supreme Court.

II. The Court of Appeal Failed to Understand that Misusing an LGBTQ Person's Name or Pronouns Is a Common and Harmful Form of Discrimination.

A. Discriminatory Misuse of a Transgender Person's Name or Pronouns Is Harmful and Occurs in Many Different Settings.

The Court of Appeal failed to appreciate the pervasiveness of the prohibited conduct and the serious harms it may cause. Deliberate misuse of a transgender person's name or pronouns is a widespread form of discrimination that threatens to exclude transgender people from public life across a wide variety of different settings.

This type of discrimination occurs frequently in health care settings. A 2020 study from the Center for American Progress found that 32 percent of transgender respondents—and 46 percent of transgender respondents of color—reported that in the last year, a doctor or health care provider intentionally used the wrong name or pronouns when addressing or referring to them.[2] Research has confirmed that being referred to by the

[2] Carolina Medina et al., Ctr. for Am. Progress, *Protecting and Advancing Health Care for Transgender Adult Communities* fig. 13 (Aug. 18, 2021), https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/ [https://perma.cc/7N5V-AZ4S].

Document received by the CA Supreme Court.

wrong name and pronouns results in psychological distress, including "anxiety- and depression-related symptoms [and] stress . . . ."[3]

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

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[3] Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering* 3 Stigma & Health 53, 59 (2016); *see* Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals* 14 Self & Identity 51, 60 (2014) (finding a correlation between frequency of misgendering and negative views of self); *see also Hampton v. Baldwin*, No. 3:18-CV-550, 2018 WL 5830730, at *2 (S.D. Ill. Nov. 7, 2018) (describing expert testimony at evidentiary hearing "explain[ing] that misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating").

Document received by the CA Supreme Court.

early from the hold at [the hospital] because of the staff's conduct," which was traumatic for Kyler. *Id.*

The intentional misuse of transgender people's names and pronouns is also a significant problem in schools and subjects transgender youth to significant harms. GLSEN's 2019 National School Climate Survey found that in California, 1 in 3 transgender students were prevented from using their chosen name or pronouns in school.[4] Treating transgender youth consistent with their gender identity is a fundamental aspect of treating them equally and avoiding the serious negative health impacts of being singled out for disrespectful treatment. In particular, research demonstrates that "[t]ransgender and nonbinary youth who report having their pronouns respected by all or most of the people in their lives attempted suicide at half the rate of those who did not have their pronouns respected."[5]

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[4] GLSEN, *School Climate for LGBTQ Students in California (2019 State Snapshot*) (2021), https://www.glsen.org/sites/default/files/2021-01/California-Snapshot-2019.pdf [https://perma.cc/QQ4E-J4J6].

[5] The Trevor Project, *2020 National Survey on LGBTQ Youth Mental Health* 9 (2020), https://www.thetrevorproject.org/wp-content/uploads/2020/07/The-Trevor-Project-National-Survey-Results-2020.pdf [https://perma.cc/MYV9-R696]; *accord* The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health* 20 (2022), https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf ("LGBTQ youth who live in a community that is accepting of LGBTQ people reported significantly lower rates of attempting suicide compared to those who do not."); *see also*

Document received by the CA Supreme Court.

Deliberate misgendering of transgender people occurs in other contexts as well. Two recent studies on the prevalence of housing discrimination against transgender people found that intentional misgendering was one of the ways in which they experienced discriminatory treatment.[6]

In the workplace, this type of mistreatment harms transgender workers and interferes with their ability to do their jobs. The National Transgender Discrimination Survey found that more than half of transgender respondents had been referred to by the wrong pronoun at

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Stephen T. Russell et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. Adolescent Health 503 (2018) (concluding that transgender youth who were able to use names and pronouns that affirmed their gender identities experienced a 29 percent decrease in reported thoughts of suicide and a 56 percent decrease in suicidal behavior).

[6] *See* Jamie Langowski et al., *Transcending Prejudice: Gender Identity and Expression-Based Discrimination in the Metro Boston Rental Housing Market*, 29 Yale J.L. & Feminism 321, 345 (2018) (giving example of housing provider that "improperly and repeatedly referred to tester by their legal first name, not the name by which tester had initially introduced themselves and asked the housing provider to use"); *see also* Caitlin Rooney et al., Center for American Progress, *Fact Sheet: Discrimination Against Transgender Women Seeking Access to Homeless Shelters* (Jan. 7, 2016), https://www.americanprogress.org/article/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/ (noting that deliberate misgendering was one of the most commonly observed types of discriminatory treatment against transgender women seeking access to homeless shelters).

Document received by the CA Supreme Court.

work, "repeatedly and on purpose."[7] When an employer refers to a transgender worker in a way that negates their gender, that employer compromises the employee's privacy and safety by publicly disclosing their transgender status without the employee's consent, and at the same time, singles the person out in a negative way that prevents them from being able to do their jobs. For example, after Tamara Lusardi, a civilian employee of the U.S. Army, notified her colleagues of her gender transition, her supervisor "repeatedly referred" to her "by her former male name, by male pronouns, and as 'sir.'" *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *4 (E.E.O.C. Apr. 1, 2015). Ms. Lusardi testified that her supervisor "seemed to especially call her male names when in the presence of other employees as a way to reveal that [she] is transgender . . . ." *Id.* at *15. The Equal Employment Opportunity Commission concluded the supervisor's "actions and demeanor made clear" that his "use of a male name and male pronouns in referring to [Ms. Lusardi] was not accidental" and that his "repeated and intentional conduct was offensive and demeaning

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[7] Jaime M. Grant et al., Nat. Ctr. for Transgender Equal. & Nat. Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011) 57, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

Document received by the CA Supreme Court.

. . . and would have been so to a reasonable person in [Ms. Lusardi's] position." *Id.*

Similarly, when Alyx Tinker informed his coworkers and management that he was undergoing a gender transition and asked to be called by his new name and male pronouns, his supervisor "refused to comply with his request and regularly referred to or addressed" him as "she" or used a nickname for his former female name. *Mass. Comm'n Against Discrimination v. Securitas Sec. Servs. USA, Inc.* (*Tinker*), No. 13-BEM-01906, 2016 WL 4426971, at *1–2 (M.C.A.D. Aug. 9, 2016). The supervisor "continued to refer to [Mr. Tinker] as female and a 'girl,' in situations where the reference could no longer be deemed accidental or unintentional." *Id*. at *14. As the hearing officer noted, Mr. Tinker "merely wanted to be treated respectfully . . . ." *Id*.

In another case, Jennifer Eller, a middle school teacher, was subjected to relentless harassment after disclosing her transgender identity to her principal. Over the next six years, Ms. Eller endured "frequent misgendering — being referred to with names, pronouns, or terms associated with a different gender identity" by her students, their parents, and her fellow teachers, staff, and supervisors at three different schools. *Eller v. Prince George's Cty. Pub. Sch.*, No. CV TDC-18-3649, 2022 WL 170792, at *1 (D. Md. Jan. 14, 2022). At one school, another teacher

Document received by the CA Supreme Court.

repeatedly and deliberately used Ms. Eller's former name in front of their co-workers at staff meetings even after being corrected. *Id.* at *2. After transferring to another school, she continued to face repeated and deliberate misgendering, including from the assistant principal who oversaw her department, despite Ms. Eller having corrected her. Other staff followed the assistant principal's lead. *Id.* Ms. Eller had been "deliberately referred to as 'he,' 'it,' 'sir,' 'mister,' 'guy in a dress,' and her former name," along with other forms of harassment, and the "abusive atmosphere" Ms. Eller endured resulted in chronic, complex post-traumatic stress disorder and made it so "that she could no longer work effectively." *Id.* at *10.

Being singled out for negative treatment based on a protected characteristic is harmful, no matter if the context is school, work, healthcare, or in one's home or other living facility. Persistent misgendering is no exception. As a respondent to a study from the Anti-Violence Project explained, "constantly having to . . . advocate for people to use my pronouns, and correct people when they make offensive comments is exhausting and is a distraction from my ability to do my job."[8] Like other types of discrimination, repeated and intentional misgendering

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

Document received by the CA Supreme Court.

impairs targeted individuals' ability to do their jobs, succeed at school, or feel safe and supported in long-term care facilities.

B. Those Who Are or Are Perceived as LGBQ Are Also Harmed by the Misuse of Their Name and Pronouns.

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

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

Deliberate misgendering is a particularly common, and particularly offensive, problem for Black women, who sometimes endure mockery

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

Document received by the CA Supreme Court.

when their appearance or demeanor is perceived as discordant with stereotypes of white femininity.[10]

In the employment context, the Ninth Circuit in *Nichols v. Azteca Restaurant Enterprises, Inc.* described a "relentless campaign of insults, name-calling, and vulgarities" against a male restaurant worker, including "coworkers and a supervisor repeatedly refer[ring] to [the plaintiff] in Spanish and English as 'she' and 'her'" and mocking him for "walking and carrying his serving tray 'like a woman.'" 256 F.3d 864, 870 (9th Cir. 2001). Such harassment has long been recognized by federal courts to be harmful and unlawful.

This type of mistreatment is common and harmful in many settings, but it is particularly devastating in the long-term care setting. Residents often depend on staff for intimate care and assistance, such that the harm to a resident when a staff member intentionally and repeatedly refers to them by the wrong name and gender cannot be overstated. *Cf. Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *26 (D. Minn. Mar. 16, 2015) (noting that the nature of the relationship between a doctor and a patient against whom the doctor has discriminated

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[10] *See, e.g.,* L. Song Richardson and Philip Akiba Goff, From Interraciality to Racial Realism, 92 Tex. L. Rev. 669, 684 (referencing study by Goff in which "[B]lack women were rated as more masculine than their white counterparts [and a]s a result were…miscategorized as [B]lack men between 9% and 13% of the time).

Document received by the CA Supreme Court.

"necessarily affects the extent to which the misconduct breaches [the law's] guarantee of equal access to medical benefits and care" and causes harm). The Court of Appeal's failure to grasp the prevalence and severity of the harm caused by this type of discrimination underscores the need for this Court to reverse.

III. The Court of Appeal's Decision Ignores Key Principles of California and Federal Nondiscrimination Laws.

The Court of Appeal based its decision, in part, on the incorrect assumption that, apart from the challenged provision, intentionally using the wrong name or pronoun for transgender people does not otherwise "amount[] to actionable harassment or discrimination as those terms are legally defined . . . ." *Taking Offense v. State*, 281 Cal. Rptr. 3d 298, 320 (Ct. App. 2021). That assumption is incorrect for three reasons. First, in looking solely to Title VII, the Court of Appeal ignored that the intentional misuse of names or pronouns independently violates California and federal laws applicable to long-term care facilities, such as the Unruh Civil Rights Act. As set forth in the LGBT Long-Term Care Facilities Residents' Bill of Rights' findings, this provision was not written on a blank slate. Rather, it incorporates the nondiscrimination principles of existing laws applicable to long-term care settings, spelling out with greater specificity the types of "prohibited discriminatory acts in the long-term care setting." Stats. 2018, ch. 483, § 1, subd. (e). Second, the Court of Appeal erred in assuming that

Document received by the CA Supreme Court.

employment law does not prohibit such discriminatory conduct in the workplace. In fact, the intentional misuse of a person's name or pronouns because of their sexual orientation, gender identity, or other protected characteristic is a straightforward form of prohibited disparate treatment under both state and federal employment law. Third, to the extent the standards for discriminatory harassment may be relevant, the Court of Appeal erred in concluding that the prohibited conduct would not be actionable, especially if done "[w]illfully and repeatedly" because of the resident's LGBTQ identity as specified in the challenged provision.

A. Intentional Misgendering Violates State and Federal Nondiscrimination Requirements Applicable to Long-Term Care Settings.

In addressing whether the conduct prohibited by section 1439.51(a)(5) is otherwise unlawful, the Court of Appeal focused solely on employment and failed to consider that such conduct violates the Unruh Civil Rights Act, which prohibits discrimination in business establishments, including public accommodations, health care facilities, and housing providers. The Unruh Act provides that "[a]ll persons" in the State, regardless of sex, sexual orientation, gender identity, gender expression, and other characteristics, are "entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Civ. Code, § 51, subds. (b), (e). Courts must construe the Act liberally to effectuate its "broad

Document received by the CA Supreme Court.

preventive and remedial purposes." *White v. Square, Inc.*, 7 Cal.5th 1019, 1025 (2019).

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

The Court of Appeal's focus on whether the conduct prohibited by section 1439.51(a)(5) would be considered "severe or pervasive" ignores that the Unruh Act's requirement of equal treatment does not require

Document received by the CA Supreme Court.

discriminatory conduct to be "severe or pervasive."[11] In *Koire*, for example, this Court rejected the argument that a "Ladies' Day" discount at a car wash did not injure anyone. *Koire*, 40 Cal.3d at 33. Rather, "by passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is *per se* injurious[,]" and "Section 51 provides that all patrons are entitled to *equal* treatment." *Id.* This is why the statute provides for minimum statutory damages for "*every* violation of section 51, *regardless* of the plaintiff's actual damages." *Id.* Willful and repeated misgendering because of sexual orientation, gender identity, or gender expression deprives LGBTQ long-term care residents of equal treatment, denying them the dignity and quality of care received by non-LGBTQ residents and is similarly *per se* injurious.

In addition to violating the Unruh Act, the intentional misuse of a person's names or pronouns based on sexual orientation, gender identity, or gender expression also violates other state and federal nondiscrimination laws. California's civil rights laws explicitly prohibit discrimination based on sex, sexual orientation, gender identity, and gender expression. Federal

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

Document received by the CA Supreme Court.

sex discrimination laws also prohibit discrimination because a person is LGBTQ. As the U.S. Supreme Court unequivocally held in *Bostock v. Clayton County*, it is "impossible to discriminate against a person" for being LGBTQ "without discriminating against that individual based on sex." 140 S. Ct. 1731, 1741 (2020).

These state and federal nondiscrimination laws collectively protect residents of long-term care facilities from being singled out for disparate treatment because of their sex, sexual orientation, or gender identity. For example, the Residential Care Facilities for the Elderly Residents' Bill of Rights, which "shall be in addition to any other rights provided by law," states that "[a] licensed residential care facility for the elderly shall not discriminate against a person seeking admission or a resident based on sex, actual or perceived sexual orientation, or actual or perceived gender identity." Health & Safety Code, § 1569.269, subds. (e), (b). Additionally, every nursing home that participates in Medicare and Medicaid programs must meet federal requirements set forth under the Nursing Home Reform Act, including those regarding residents' rights to individual dignity, respect, and self-determination. 42 U.S.C. § 1396r (2021); 42 C.F.R. § 483.10 (2022). Health programs and activities receiving federal financial assistance, including Medicare and Medicaid, are also subject to Section 1557 of the federal Affordable Care Act, which prohibits sex

Document received by the CA Supreme Court.

discrimination, including discrimination against LGBTQ people.[12] 42 U.S.C. § 18116(a). In *Prescott*, discussed above, the court found an actionable claim under Section 1557 against a children's hospital based on the staff's "continuous" misgendering of Kyler, a teenage boy.[13] *Prescott*, 265 F. Supp. 3d at 1099–100.

Additionally, entities that receive financial assistance from the State are subject to section 11135 of the Government Code, which prohibits discrimination based on sex, sexual orientation, gender identity, and gender expression and guarantees "full and equal access" to the benefits of the program or activity at issue. Gov't Code, § 11135, subds. (a), (c). The protections in the Fair Employment and Housing Act (FEHA) and the federal Fair Housing Act from housing discrimination based on sex, sexual

[12] In the wake of the Supreme Court's decision in *Bostock,* the U.S. Department of Health and Human Services announced that it would interpret and enforce Section 1557 to "encompass[] discrimination based on sexual orientation and gender identity." *See* Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27984-02 (May 25, 2021).

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

Document received by the CA Supreme Court.

orientation, gender identity, and gender expression may also apply.[14] Gov't Code, § 12955, subds. (a), (d); Cal. Code Regs., tit. 2, § 12005(o) (defining "housing accommodation" or "dwelling"); 42 U.S.C. § 3604(b). HUD has recognized the "refus[al] to address [a] transgender woman as female, misgender[ing] her, and ma[king] other statements to discredit her gender identity" as an example of illegal discrimination. *See* HUD, *Housing Discrimination and Persons Identifying as Lesbian, Gay, Bisexual, Transgender and/or Queer/Questioning (LGBTQ)* (Feb. 1, 2022), https://www.hud.gov/program_offices/fair_housing_equal_opp/housing_discrimination_and_persons_identifying_lgbtq.

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[14] Courts have applied the FEHA and the Fair Housing Act to continuing care retirement communities and skilled nursing facilities. *See Herriot v. Channing House*, No. 06-cv-6323-JF, 2008 WL 3929214 (N.D. Cal. Aug. 26, 2008) (evaluating discrimination claims under the FEHA and Fair Housing Act brought against continuing care retirement community); *see also Montano v. Bonnie Brae Convalescent Hosp.*, 79 F. Supp. 3d 1120, 1125 (C.D. Cal. 2015) (concluding that skilled nursing facility was a covered entity under the FEHA and Fair Housing Act because "[t]o the handicapped elderly persons who would reside there, [the nursing home] would be their home, very often for the rest of their lives." (quoting *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996))).

Additionally, the U.S. Department of Housing and Urban Development has announced that, in keeping with the *Bostock* decision, it will interpret the sex discrimination protections of the Fair Housing Act to apply fully to housing discrimination based on sexual orientation and gender identity. *See* HUD, Memorandum, *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act* (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf.

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The Court of Appeal erroneously ignored this wide array of applicable nondiscrimination protections. Whether because a long-term care facility receives government funding or because it constitutes housing, health care, or a place of public accommodation, residents are protected from discrimination based on sex, sexual orientation, gender identity, or gender expression, including when that discrimination takes the form of intentional misgendering.

B. Intentional Misgendering Constitutes Disparate Treatment.

The Court of Appeal incorrectly assumed that employment law does not prohibit intentional misgendering unless it constitutes harassment or the equivalent of a hostile work environment. In fact, California law makes clear that the intentional misuse of names and pronouns is disparate treatment and, as such, is prohibited by the FEHA. The FEHA prohibits "discriminat[ion] . . . in terms, conditions or privileges of employment." Gov't Code, § 12940, subd. (a). This prohibited discrimination includes "[d]isparate treatment," which occurs when an "employer . . . treats some people less favorably than others because of their [protected characteristic]." *Mixon v. Fair Emp. & Hous. Comm'n*, 192 Cal. App. 3d 1306, 1317 890 (Ct. App. 1987) (quoting *Intl'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n. 15 (1977)). To constitute prohibited discrimination, such disparate treatment must involve "some official action

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taken by the employer." *Roby v. McKesson Corp.*, 47 Cal.4th 686, 706 (2009) (emphasis omitted). An employer's intentional misuse of an employee's name or pronouns based on the employee's sex, sexual orientation, gender identity, or gender expression is unlawful disparate treatment.[15]

The FEHA regulations specify ways that an employer must treat workers equally in the "Terms, Conditions, and Privileges of Employment." *See* Cal. Code Regs., tit. 2, § 11034. The regulations contain several provisions requiring employers to treat all employees consistent with their gender identity. For example, employers "shall permit employees to use facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth." *Id.* § 11034, subd. (e)(2)(A). The regulations also require that "[i]f an employee requests to be identified with a preferred gender, name, and/or pronoun, including gender-neutral pronouns, an employer or other covered entity who fails to abide by the employee's stated preference may be liable under the Act . . .

[15] The misuse of a transgender employee's name or pronouns may also be unlawful disability discrimination, as gender dysphoria can be a disability under the FEHA. *See* Gov't Code, § 12926.1, subd. (c); *see also, e.g., Tay v. Dennison*, No. 19-cv-00501-NJR, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020) (denying motion to dismiss federal disability discrimination claim brought by transgender incarcerated person challenging prison's housing assignment policy).

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."[16] *Id.* § 11034, subd. (h)(3). An employer's intentional misuse of an employee's name or pronouns because the employee is transgender (or has any other protected characteristic), constitutes explicit disparate treatment in the terms, conditions, and privileges of employment.

In multiple contexts, courts and civil rights enforcement agencies have recognized that the intentional misattribution of a person's name or pronouns is a form of unlawful discrimination based on sex and/or gender identity. *See, e.g., Prescott*, 265 F. Supp. 3d at 1099-1-100; *Rumble*, 2015 WL 1197415 at *26 (concluding that hospital's purposeful and deliberate misgendering of patient by giving him a hospital bracelet identifying him as female "could be considered objectively offensive behavior" in violation of § 1557); *Eric S. v. Shinseki*, EEOC DOC 0120133123, 2014 WL 1653484, at *2 (E.E.O.C. Apr. 16, 2014) (reversing dismissal of transgender employee's sex discrimination claim based on employer's refusal to change the employee's name in the employer's records); *see also Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 879 (S.D. Ohio 2016) (entering preliminary injunction ordering school district to "treat Jane Doe as the girl she is, including referring to her by

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

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female pronouns and her female name," as well as permitting her to use the girls' restrooms). The Court of Appeal's failure to recognize intentional misgendering as disparate treatment was plain error.

C. Willful and Repeated Misgendering May Constitute Unlawful Harassment.

As noted above, a claim of discrimination under the Unruh Act does not require a plaintiff to demonstrate they experienced harassment or the equivalent of a hostile work environment. But to the extent the standards for workplace harassment may be relevant, the Court of Appeal erred in assuming that the conduct prohibited by section 1439.51(a)(5) would not be actionable harassment. While harassment is fact-specific, and a single incident of harassing conduct can be actionable under the FEHA (Gov't Code, § 12923, subd. (b)), "[w]illfully and repeatedly fail[ing] to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns," as section 1439.51(a)(5) requires, would satisfy the criteria for unlawful harassment under federal and state law if such conduct occurred in the workplace.

Civil rights enforcement agencies and courts have recognized that the intentional and repeated misuse of a transgender person's name or pronouns is actionable harassment. In *Lusardi*, for example, the EEOC found that the supervisor's "repeated and intentional" use of a male name and pronouns in referring to Ms. Lusardi, a transgender woman, was

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"offensive and demeaning to Complainant and would have been so to a reasonable person in Complainant's position." *Lusardi*, 2015 WL 1607756, at *11. The agency concluded that Ms. Lusardi proved her claim of hostile work environment based on sex and that the employer was liable for the supervisor's harassment. *Id.* at *13. The EEOC explicitly pointed to *Lusardi* in a Technical Assistance Document on the implications of *Bostock*, explaining that "intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment." *See* Equal Emp. Opportunity Comm'n *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, NVTA-2021-1 (June 15, 2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender.

More recently, in *Eller v. Prince George's County Public Schools*, a federal court pointed to repeated intentional misgendering as part of the harassment giving rise to a hostile work environment claim. No. TDC-18-3649, 2022 WL 170792, at *10 (D. Md. Jan. 14, 2022). The court held that a reasonable jury could find that the treatment Ms. Eller experienced was objectively severe or pervasive and constituted a hostile work environment. *Id.* The court specifically acknowledged that verbal harassment alone can

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be sufficiently severe or pervasive for purposes of a Title VII claim. *Id.* (citing *EEOC v. Sunbelt Rentals*, 521 F.3d 306, 318 (4th Cir. 2008)).

Other enforcement agencies and courts have also found actionable hostile work environment or harassment claims where the evidence or allegations included the intentional and repeated misuse of a transgender person's name or pronouns. *See, e.g., Tinker*, 2016 WL 4426971 (enforcement agency finding employer liable on transgender man's hostile work environment claim where evidence included the supervisor's intentional and repeated misuse of the employee's name and pronouns); *see also Tay*, 2020 WL 2100761, at *2 (denying motion to dismiss incarcerated plaintiff's equal protection claim of harassment based on gender identity, where allegations included that "correctional and medical staff constantly misgender Plaintiff, referring to her as 'mister' and using male pronouns even though they are aware that she is a transgender woman").

Such conduct can also constitute actionable harassment when directed at a person who is not transgender. In *Nichols*, for example, the Ninth Circuit reversed the trial court's judgment in favor of the defendant on hostile work environment claims under Title VII and state law. *See Nichols*, 256 F.3d at 874. The Ninth Circuit concluded that the plaintiff, a restaurant worker, was harassed "because of sex" because he did not "act as man should act," noting that the plaintiff's "co-workers and one of his

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supervisors repeatedly reminded [the plaintiff] that he did not conform to their gender-based stereotypes, referring to him as 'she' and 'her.'" *Id.* at 875.

The Court of Appeal also ignored the Legislature's recent clarification on the application of the FEHA's harassment standards, including what kind of conduct is sufficiently severe or pervasive to be actionable. Gov't Code, § 12923. Harassment creates a hostile work environment "when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being." *Id.* at subd. (a). The Legislature also confirmed that a single incident of harassing conduct can be sufficient to create a triable issue of hostile work environment, and it rejected the "stray remarks doctrine." *Id.* at subds. (b), (c).

"Willfully and repeatedly" misusing a person's name or pronouns "after being clearly informed of the preferred name or pronouns," and doing so because of a person's sexual orientation, gender identity, or gender expression, as section 1439.51(a)(5) requires, easily meets the criteria for unlawful harassment in the workplace under the FEHA and Title VII. Being subjected to such treatment is degrading and humiliating and

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likely to cause serious psychological harm and emotional distress.[17] It would be highly likely to "disrupt the victim's emotional tranquility" by calling unwanted attention to a person's transgender identity in a demeaning and stigmatizing manner, and it would be similarly likely to "undermine the victim's personal sense of well-being" by negating a core aspect of personal identity. Gov't Code, § 12923, subd. (a); *see also Lusardi*, 2015 WL 1607756, at *13 (concluding that "repeated and intentional" misuse of transgender employee's name and pronouns violated Title VII).

In addition, while the Court of Appeal focused solely on employment, the conduct prohibited by section 1439.51(a)(5) would also constitute unlawful harassment in housing. Gov't Code, § 12955, subds. (a), (d); *Id.* § 12955.7; 42 U.S.C. § 3604(b), 3617. The housing regulations under the FEHA define "hostile environment harassment" as "unwelcome conduct that is sufficiently severe or pervasive as to interfere with . . .[the] use or enjoyment of a dwelling . . . the provision or enjoyment of services

[17] Courts have rejected the argument that treating a transgender person inconsistent with their gender identity is only a "perceived slight[]." *Rumble*, 2015 WL 1197415, at *25; *see also Doe v. City of New York*, 976 N.Y.S.2d 360, 364 (Sup. Ct. N.Y. County 2013) (noting purposeful misgendering is "not a light matter, but one which is laden with discriminatory intent"]); *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *2 (S.D. Ill. Nov. 7, 2018) (quoting expert medical testimony that "misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating").

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or facilities in connection therewith . . . or constitute any kind of adverse action." Cal. Code Regs., tit. 2, § 12120, subd. (a)(2). Cases that analyze hostile housing environment claims under the federal Fair Housing Act have similar definitions. *See Salisbury v. Hickman*, 974 F. Supp. 2d 1282, 1292–93 (E.D. Cal. 2013) (holding that, for purposes of the FHA, harassment consisting of only two incidents can amount to a hostile housing environment when it takes place in one's own home); *see also Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 861–62 (7th Cir. 2018) (holding that allegations of senior living community's failure to put a stop to harassment of lesbian resident by other residents set forth a hostile housing environment claim under the FHA and noting that "[t]here is no magic number of instances that must be endured before an environment becomes so hostile that the occupant's right to enjoyment of her home has been violated.") (quotation omitted).

Harassment can include "revealing private information to a third party about a person, without their consent," such as revealing a long-term care resident's transgender status to other residents by intentionally misconstruing their name or pronouns. Cal. Code Regs., tit. 2, § 12120, subd. (a)(c)(7). Hostile environment harassment does not require "a change in the terms, conditions, or privileges of the dwelling . . . or housing-related services or facilities" or showing "psychological []or physical harm," and a

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single instance of harassing conduct may be sufficient. *Id.* at § 12120, subds. (a)(2), (a)(2)(A)(ii), (d).

The housing context may even provide a more apt parallel for assessing what constitutes severe or pervasive harassment in a long-term care setting than the employment context, as long-term care facilities are their residents' homes. Courts have recognized that the threshold for finding harassment severe or pervasive in the housing context may be lower because of the particularly grievous nature of the invasion. *See, e.g., Salisbury*, 974 F. Supp. 2d at 1292 (noting, in a case under the FHA, FEHA, and Civil Code section 51.9, that "[c]ourts have recognized that harassment in one's own home is particularly egregious and is a factor that must be considered in determining the seriousness of the alleged harassment"). In the long-term care setting, just as in other housing contexts,

> harassment in the home is in some respects more oppressive: "When [] harassment occurs at work, at that moment or at the end of the work day, the [worker] may remove herself from the offensive environment. . . . In contrast, when the harassment occurs in a [person]'s home, it is a complete invasion in her life. Ideally, home is the haven from the troubles of the day. When home is not a safe place, a [person] may feel distressed and, often, immobile."

Beliveau v. Caras, 873 F. Supp. 1393, 1397 n.1 (C.D. Cal. 1995) (quoting Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual*

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Harassment in Housing, 1987 Wis.L.Rev. 1061, 1073 (Dec.1987)); *see also Quigley v. Winter*, 598 F.3d 938, 947 (8th Cir. 2010) (harassment in plaintiff's home deemed "even more egregious" because home is "a place where [she] was entitled to feel safe and secure and need not flee").

In sum, whether viewed through the lens of a hostile work environment or a hostile housing environment, willful and repeated misgendering may constitute unlawful harassment. The Court of Appeal's conclusion to the contrary was wrong.

IV. Conclusion

The prohibition on misgendering in the Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents' Bill of Rights seeks to ensure that LGBTQ people in long-term care facilities receive the same care and respect that non-LGBTQ residents already enjoy: being addressed by the correct name and pronouns by the staff responsible for their care and wellbeing. In doing so, the provision targets a pervasive and harmful form of discriminatory conduct against LGBTQ people in a manner that comports with the First Amendment, and explicitly bars discriminatory conduct in long-term care facilities that is already unlawful in a wide variety of other contexts. This Court should reverse.

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Dated: July 25, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520 (c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Amici Curiae Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point Times New Roman font and contains 8204 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File Amici Curiae Brief required under Rule 8.200(c)(1-3), this certificate, and the signature blocks. *See* Cal. Rule of Court, Rule 8.204(c)(3).

Dated: July 25, 2022

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1313 West Eighth Street, Los Angeles, California 90017. I am employed in the office of a member of the bar of this court at whose direction the service was made. On July 25, 2022, I served the attached document by electronically transmitting a true copy via this Court's TrueFiling system to the recipients listed on the below service list.

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

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Executed on July 25, 2022, at Los Angeles, California.

Angelica Lujan

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