

Court Strikes Down 'Preferred' Pronoun Law

The California 3rd District Court of Appeals ruled 3-0 that a 2017 state law requiring employees at long-term care facilities to use patients' "preferred" pronouns violates First Amendment free speech rights.

Taking Offense, an unincorporated association, filed the lawsuit challenging part of California's Health and Safety Code that requires health facility employees to deny a person's biological sex and acknowledge a "chosen" gender or pronoun of a patient. Employees who refused to do so would have faced criminal charges for "misgendering" a resident. Violations could be prosecuted as misdemeanors, and violators could face 180 days in jail and a \$2,500 fine.

In 2017, the California legislature passed SB 219, which added the "Lesbian, Gay, Bisexual and Transgender (LGBT) Long-Term Care Facility Residents' Bill of Rights" to its Health and Safety Code. A key stipulation of the bill prohibited "staff members of long-term care facilities from willfully and repeatedly referring to a facility resident by other than the resident's preferred name or pronoun when clearly informed of the name and pronoun."

In *Taking Offense v. California*, the California Court of Appeals rejected the pronoun provision, saying it "restricts more speech than is necessary" and "the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."

Judge Elena J. Duarte wrote the opinion and stated, "The free speech clause protects a wide variety of speech a listener may find offensive, including insulting speech based on race, national origin or religious beliefs."

Justice Ronald Robie concurred that the state legislature “chose a prophylactic remedy to eliminate misuse of pronouns that just went too far.”

The court also wrote, “We conclude the pronoun provision—whether enforced through criminal or civil penalties—is overinclusive in that it restricts more speech than is necessary to achieve the government’s compelling interest in eliminating discrimination, including harassment, on the basis of sex. Rather than prohibiting conduct and speech amounting to actionable harassment or discrimination as those terms are legally defined, the law criminalizes even occasional, isolated, off-hand instances of willful misgendering—provided there has been at least one prior instance—without requiring that such occasional instances of misgendering amount to harassing or discriminatory conduct.”

Liberty Counsel founder and Chairman Mat Staver said, “No person should ever be forced to speak a message prescribed by the government, especially when the purpose is to support an ideology that conflicts with reality. The First Amendment guarantees the right to speak and the right not to speak.”
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