C056072 (Civil)

05CS01530 (Superior Court)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

DAVID WOODS; GREGORY BOWMAN; AND RAY BLUMHORST

Petitioners and Appellants

vs.

STATE OF CALIFORNIA; SANDRA SHEWRY, in her official capacity as director of CALIFORNIA DEPARTMENT OF HEALTH SERVICES; HENRY RENTERI, in his official capacity as director of OFFICE OF ERMERGENCY SERVICES; CALIFORNIA OFFICE OF EMERGENCY SERVICES; CALIFORNIA DEPARTMENT OF CORRECTIONS; AND JEANNE S. WOODFORD, in her official capacity as director of CALIFORNIA DEPARTMENT OF CORRECTIONS,

Respondents and Appellees.

APPELLANTS' OPENING BRIEF

Service on Attorney General required by California Rule of Court 8.29(c)

APPEAL FROM SPERIOR COURT OF SACRAMENTO COUNTY

DEPARTMENT 33, LLOYD G. CONNELLY, JUDGE

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ISSUES PRESENTED

1. Whether the trial court erred in failing to apply strict scrutiny equal protection analysis to the explicit gender-based classifications and gender-based implementation of Health and Safety Code Section 124250 and Penal Code Sections 13823.15(f)(14)(A), which define "domestic violence" so only women, but not men, can be victims and only women's shelters, but not men's shelters, can receive taxpayer and public funds;
2. Whether the trial court erred in failing to apply strict scrutiny equal protection analysis to the explicit gender-based classifications and gender-based implementation of Penal Code Sections 13823.16, 1174-1174.9 and 3411-3424, which allow inmate mothers, but not inmate fathers, to be eligible for alternative sentencing, pediatric services and other statutory provisions;
3. Whether the trial court erred in finding Appellants failed to adequately raise a Proposition 209 challenge below; and,
4. Whether the trial court erred in holding *Blumhorst v. Jewish Family Services* (2005) 126 Cal.App.4th 933 precludes citizens and taxpayers from challenging the constitutional validity of the gender-based classification and gender-based implementation of Government Code Section 11139, which exempts lawful programs benefiting women, but not lawful programs benefiting men, from the statutory ban on sex discrimination in state-funded programs.

SUMMARY OF THE CASE

The trial court essentially held that people in the minority are not entitled to equal protection. The decision ignored the rule in *Connerly v. State Personnel Board* (3rd Dist. 2001) 92 Cal.App.4th 16 that equal protection protects *individuals*, not groups, and also ignored the strong public policy in California that "mandates the *equal* treatment of men and women." *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37. (Italics in original.) If upheld, the ruling would almost entirely vitiate the right of individuals to be treated equally under the law in California.

Appellants sued to challenge the constitutional validity of explicit statutory gender-based classifications that exclude men from domestic violence funding provisions and from eligibility for programs for incarcerated parents with children under six years of age, which the State of California admittedly implements in a gender-discriminatory manner. Appellants cited equal protection, Proposition 209, public policy and this Court's seminal ruling in *Connerly* that statutory gender-based classifications in California are immediately subject to strict scrutiny equal protection analysis and that equal protection protects individuals, not groups.

The trial court ignored *Connerly* and public policy altogether by ruling equal protection does not apply because "men and women" - as groups - are "not similarly situated" statistically regarding domestic violence and inmate parents. This ruling flatly contracts *Connerly* and California's strong public policy.

If the trial court's incorrect ruling were upheld, equal protection would also not apply to the statutory exclusion of women from job safety laws or veterans' benefits, because men are significantly more likely than women to be killed on the job or to be veterans. Equal protection would be subject to whimsical decisions and biases of various courts upon a simple finding that two groups, rather than individuals, are "not similarly situated" statistically. This is absolutely improper.

The proper similarly-situated query would be individual-based, not group based. It would ask whether the statutes equally protect a man and woman who are similarly situated as victims of domestic violence or as inmate parents. No finding or argument was made below that a man and woman cannot be similarly situated with regard to domestic violence or inmate parents. Such an argument would contradict reality, overwhelming evidence, and simple common sense.

The trial court also erroneously found, without explanation, that Appellants failed to raise a Proposition 209 challenge. In reality, Appellants explicitly raised Proposition 209 challenges all throughout their pleadings below.

Finally, the trial court improperly ruled *Blumhorst v. Jewish Family Services* 2005) 126 Cal.App.4th 933 precludes citizens and taxpayers from raising challenges to the constitutional validity of Government Code Section 11139, even though *Blumhorst* never addressed citizen or taxpayer standing to challenge that statute, but only denied civil rights testers standing to sue under Government Code Section 11135. The trial court's decision was gross error and should be reversed.

STATEMENT OF FACTS

On June 13, 2006, Appellants David Woods ("Woods"), Ray Blumhorst ("Blumhorst") and Gregory Bowman ("Bowman") (together, "Appellants")[1] filed a Second Amended Verified Petition for Writ of Mandate ("Petition")[2] for mandamus, injunctive and declaratory relief against Respondents, State of California ("California"), California Department of Health Services and its current director ("CDHS"), California Office of Emergency Services and its current director ("COES"), and California Department of Corrections and its current director ("CDOC") (together, "Respondents"). The Petition challenged numerous statutory gender-based classifications and the gender-based discriminatory implementation thereof as violations of the California Constitution, Article I, Section 31 ("Proposition 209") (AA 6, 9, 11, 14, 15, 19, 22, 25, 27, 30-33), the California Constitution's equal protection clause (AA 2, 6, 7, 9, 10, 13, 14, 16, 19, 21, 22, 24, 26, 27, 30-33), and public policy (AA 7). Appellants emphasized that "under our state Constitution, strict scrutiny applies to gender classifications" (*Connerly,* at 28) and that "public policy in California mandates the *equal* treatment of men and women" (*id.,* at 40). (AA 1-39.) (Italics in original.)

The Petition further cited this Court's ruling that:

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[1] Petitioners Maegan Black, Patrick Neff and David Woods also sued taxpayer-funded programs, and Petitioner Bowman sued the County of Los Angeles, but they all settled with and dismissed these defendants. Maegan Black dismissed herself after moving out of the house. Patrick Neff passed away before the appeal.

[2] The Petition superseded the initial petition filed October 28, 2005 and the First Amended Petition filed December 15, 2005, omitted herein for judicial economy.

> Where a statutory scheme, on its face, employs a suspect classification, the scheme is, on its face, in conflict with the core prohibition of the equal protection clause. It is not entitled to a presumption of validity and is instead presumed invalid. And the express use of suspect classifications in a statutory scheme immediately triggers strict scrutiny review.

Connerly, at 44 (citations omitted).

Specifically, the Petition challenged the constitutional validity of the following gender-based classifications and gender-based implementation thereof:

Penal Code Section 13823.15(f)(14)(A)

Penal Code Section 13823.15(f)(14)(A) defines "domestic violence" as:

> the infliction or threat of physical harm against . . . female intimate partners, including physical, sexual, and psychological abuse against the woman, and is part of a pattern of assaultive, coercive, and controlling behaviors directed at achieving compliance from or control over that woman.

Health and Safety Code Section 124250

Health and Safety Code Section 124250 establishes counseling, legal and other services for domestic violence victims using the following definitions:

> "Domestic violence" means the infliction or threat of physical harm against past or present adult or adolescent female intimate partners, and shall include physical, sexual, and psychological abuse against the woman, and is a part of a pattern of assaultive, coercive, and controlling behaviors directed at achieving compliance from or control over, that woman. (2) "Shelter-based" means an established system of services where battered women and their children may be provided safe or confidential emergency housing on a 24-hour basis, including, but not limited to, hotel or motel arrangements, haven, and safe houses. (3) "Emergency shelter" means a confidential or safe location that provides emergency housing on a 24-hour basis for battered women and their children. (b) The Maternal and Child Health Branch of the State Department of Health Services shall

> administer a comprehensive shelter-based services grant program to battered women's shelters pursuant to this section. (c) The Maternal and Child Health Branch shall administer grants . . . to battered women's shelters . . . .

Penal Code Section 13823.16

Penal Code Section 13823.16 requires a domestic violence advisory Council to be 50 percent "battered women service providers."

Penal Code Sections 1174-1174.9

Penal Code Sections 1174-1174.9 allocate funds "for the purpose of constructing facilities for pregnant and parenting women's alternative sentencing programs." Pen. Code § 1174.2(a).

Penal Code Sections 3411-3424

Penal Code Sections 3411-3424 create a program for "women inmates sentenced to state prison pursuant to Section 1168 or 1170 who have one or more children under the age of six years . . . ." Pen. Code § 3411.

Government Code Section 11139

Government Code Section 11139 exempts "lawful programs benefiting minorities and women" from the ban on discrimination in state-funded programs. (AA 1-39.) (Emphasis added.) (Together, "the challenged statutes.")

On October 4, 2006, Appellants filed an Opening Brief ("Opening Brief") challenging the gender-based classifications and gender-based implementation of the challenged statutes as violations of Proposition 209 (AA 68, 76, 92), equal protection

(AA 68, 73, 76, 92) and public policy (AA 68, 73, 89, 108). (AA 61-113.) The Opening Brief raised the same arguments that the Petition raised.

Appellants submitted discovery responses from California and CDHS in which said Respondents admitted:

(1) They "implement Health and Safety Code Sections 124250, et seq., according to the gender classifications therein" (AA 331);

(2) "A program serving only women, which meets the criteria under Health and Safety Code Sections 124250, et seq., can qualify to receive funds under said statutes" (AA 333-334);

(3) "A program serving only men cannot qualify to receive funding under Health and Safety Code Sections 124250, et seq." (AA 333-334);

(4) They implement Penal Code Sections 1174-1174.9 and 3411-3424 in a gender-based discriminatory manner by excluding inmate fathers from eligibility based on gender (AA 16-18, 602-603, 614, 627, 634-644); and,

(5) They do not know how many of the California taxpayer-funded domestic violence programs offer emergency residential services to male victims (AA 315).

California and CDHS claimed they implement Penal Code Sections 13823.15(f)14 and 13823.16 in a gender-neutral manner by requiring the funded domestic violence programs to help male and female victims. (AA 344, 574.) California and CDHS never asserted these programs actually do help male victims.

Appellants submitted verifications asserting Woods, Bowman and Patrick Neff ("Neff") were repeatedly physically assaulted by their intimate partners and sought services from California taxpayer-funded domestic violence programs, which denied counseling, hotel arrangements and other services because they were men, based solely on their sex. (AA 71, 87, 1168-1230.)

Woods' declaration was backed by sworn declarations from his formerly-abusive wife (who received counseling), their daughter Maegan Black ("Black"), and Black's former boyfriend, all of whom witnessed the violence and witnessed how Woods was denied services based on his sex by a taxpayer-funded domestic violence program in Sacramento formerly called "Women Escaping A Violence Environment" ("WEAVE"),[3] which took down no information. (AA 1171-1189.) Black's declaration included a heartfelt statement describing how her mother's violence affected her life, and how on one occasion her mother aimed a shotgun at her and pulled the trigger but the safety switch saved her. (AA 183-185.)

Bowman, who was assaulted while wheelchair-bound, submitted an uncontroverted declaration from his attorney, Marc E. Angelucci ("Angelucci"), stating Angelucci requested services for Bowman from a Los Angeles taxpayer-funded domestic violence program called Haven Hills and from a Los Angeles domestic violence hotline

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[3] To WEAVE's credit, after the settlement and dismissal of WEAVE from this action, WEAVE removed "women" from its name and changed its website to be gender-neutral. See http://www.weaveinc.org/. Appellants have also learned that other post-settlement gender-inclusive policy changes occurred as well, such as WEAVE's providing group counseling for male victims for the first time ever.

("Hotline"), that Haven Hills said its services were "only for women," and that Haven Hills and the Hotline both said the only shelter helping men in Los Angeles County is Valley Oasis in far-away Lancaster. (AA 88, 303-304, 569(A), 1106.) Angelucci's Declaration attached an uncontroverted cassette tape ("Tape") that (consensually) recorded said conversations and also contained a voice message from the Hotline on Angelucci's voice machine stating:

> Good morning this call is for Marc. This is Ruth from the hotline. If you are the person I spoke with on Monday regarding a shelter for a friend, a male friend, I called my office . . . and they told me that the one in Lancaster that you know about is the only one that we know that accepts men and women that we know of, or maybe a hotel or motel or a homeless shelter for the night.

(AA 269(A).)

Neff's verification asserted he needed and requested group counseling from a taxpayer-funded domestic violence program in Grass Valley called Domestic Violence and Sexual Assault Coalition ("DVSAC"), which said it had no services for males but instead referred Neff to a batterers' program called PATH (Positive Alternatives to Hurting). (AA 11, 87, 1106-1107, 1191-1195, 1312.) The Family Treatment Center, which helped Neff, backed Neff's statement. (AA 1196-1198.)

Appellants submitted uncontroverted declarations from both the former and current directors of Valley Oasis domestic violence shelter in Lancaster, Patricia Shanley-Overberg and Carol Crabson, respectively, stating Valley Oasis is the only shelter in Los Angeles County that serves male victims, who travel hundreds of miles for its gender-

inclusive shelter-based services because no other shelters or programs will help a male. (AA 195-196, 1121-1124, 1164-1165.)

Appellants submitted an uncontroverted declaration from Matthew Zelasko-Barrett of the domestic violence unit of the San Diego Volunteer Lawyer Program stating he has difficultly finding shelter for male victims because most programs only help women, and that he called numerous taxpayer-funded programs in San Diego County who said they only help women. (AA 1125-1129.)

Appellants submitted an uncontroverted declaration from the national Domestic Abuse Helpline for Men and Women stating it receives numerous calls from male domestic violence victims in California who need but are denied services due to their sex, and attaching peer-reviewed research based on the Helpline's services showing this is a serious problem nationwide but is culturally hidden from the media and society for numerous reasons. (AA 1131-1162.)

Appellants submitted uncontroverted declarations from numerous published and peer-reviewed domestic violence experts from the Universities of California, British Columbia, New Hampshire, Massachusetts Lowell, and other experts. (AA 113-186.)

Together, the uncontroverted experts asserted, among other things, that:

(1) Virtually all sociological survey data confirms women initiate domestic violence as often as men and men sustain about one-third of the injuries;

(2) Crime data is unreliable because men underreport more than women;

(3) Children are damaged by witnessing any level of this violence;

(4) Male victims have been significantly ignored and neglected; and,

(5) There is no justifiable basis for excluding male victims of domestic violence from Health and Safety Code Section 124250, and the gender-based exclusion of men from said statute is based on ideology. (AA 113-186.)

Appellants submitted an uncontroverted declaration from Professor Xavier J. Caro of the University of California, Los Angeles, School of Medicine, whose wife is currently on death row in California for murdering their children at gunpoint in a high-profile case, in which Dr. Caro stated his wife physically abused him for years before murdering their children and that he now realizes this could have been prevented had he sought and obtained services. (AA 187-194.)

Appellants requested judicial notice of:

(1) A Centers for Disease Control fact sheet citing data stating: "In the United States every year, about 1.5 million women and more than 800,000 men are raped or physically assaulted by an intimate partner," and that men underreport the violence more than women do when they are victimized (AA 660);

(2) A County of San Diego Office of Violence Prevention report stating 26 percent of domestic violence calls to police are from men (AA 678);

(3) A San Bernardino Sheriff fact sheet stating "37% of domestic violence is against men" and "when all serious forms of domestic assault were added together, as many assaulted men as women were seriously assaulted" (AA 672);

(4) A California Research Bureau report stating nine percent of victims who sought domestic violence shelter in 2000 were men and a shelter in a gay and lesbian area had more men than women seeking services (AA 430, 728-802);

(5) A California Attorney General report stating female arrests for domestic violence rose 318.7% between 1988 to 1998 (AA 493, 498, 704-726);

(6) New York Consolidated statutes Section 459(a), which allocates funds for domestic violence programs in a gender-inclusive manner (AA 879); and,

(7) A 2002 California Research Bureau report showing 176,400 children had a father in prison and 15,600 children had a mother in prison; 30,200 homes had a custodial inmate father and 3,300 homes had a custodial inmate mother (pp 7-11); one-third of inmate fathers and one-half of inmate mothers lived with their minor children in the month prior to incarceration; children of 85 percent of fathers and 29 percent of mothers in prison are cared for by another parent; and 57 percent of male and 64 percent of female inmates are parents. (AA 881-916.)

Appellants submitted uncontroverted declarations from Professor Gordon E. Finley and Ken Druck, Ph.D. explaining the importance of maintaining relations between children and their incarcerated mother or father and stating there is no basis for excluding fathers from inmate parent programs. (AA 197-223.)

Appellants submitted an uncontroverted declaration from the Bexar County Adult Detention Center in San Antonio, New Mexico, Aida Camero, describing the success and importance of their parenting programs for fathers. (AA 225-230.)

Appellants submitted an uncontroverted declaration by Deputy Jodi M. Mendonca, a program developer for the Sacramento Sheriff, stating her funding request for inmate male programs was denied based on gender. (AA 1247-1250.)

Respondents did not dispute the Tape nor the above declarations or evidence. Nor did they deny: (1) Appellants were severely victimized by domestic violence; (2) Haven Hills is a state-funded program and denied Bowman services because he is male; and (3) the only shelter offering services to male victims in Los Angeles County is Valley Oasis in Lancaster. Respondents' only factual disputes were their assertions that WEAVE and DVSAC did not exclude Woods and Neff and other males from services, and they submitted statements from WEAVE and DVSAC to that effect. (AA 976-986, 1000-1011.)

On June 15, 2007, the trial court denied the Petition and ruled as follows:

(1) Although it would be beneficial to include male victims in the domestic violence statutes, "Appellants don't show that male domestic violence victims are sufficiently similarly situated to female domestic violence victims with respect to the purpose of the grant programs to trigger strict scrutiny review and a determination of whether or not disparate treatment of male victims is justified";

(3) Appellants did not adequately raise a Proposition 209 challenge;

(4) Appellants did not show "that services for male domestic violence victims are nonexistent or unfunded so as to require focused public funding";

(4) "Appellants do not show that prison fathers of young children are similarly situated to prison mothers of young children with respect to the purposes of the programs so as to trigger strict scrutiny review and a determination of whether or not the lack of comparable programs for prison fathers is justified";

(5) "Appellants fail to establish a similarly severe unmet need by male domestic violence victims for focused public funding to maintain and expand existing domestic violence services for male victims";

(6) Government Code Section 11139 cannot be constitutionally challenged by a citizen or taxpayer lawsuit because *Blumhorst* precludes such challenges.

(AA 1316-1326.)

The order became a judgment on July 3, 2007 and a notice of entry issued on July 9, 2007. (AA 1328.) Appellants appealed. (AB 1334.)

STATEMENT OF APPEALABILITY

The final judgment is appealable. Code Civ. Proc. § 904.1(a)(1).

ARGUMENT

I.

THE TRIAL COURT'S FAILURE TO APPLY EQUAL PROTECTION ANALYSIS TO EXPLICIT STATUTORY GENDER-BASED CLASSIFICATIONS WAS GROSS ERROR.

The California Constitution, Article I, Section 7(a) states: "A person may not be . . . denied equal protection of the laws." Proposition 209 provides additional bans on sex discrimination. Public policy in California mandates the *equal* treatment of men and women." *Koire, supra,* at 37 (emphasis in original).

In California, statutory gender-based classifications are to be presumed invalid and subject to strict scrutiny equal protection analysis. *Connerly,* at 28, 44. A plaintiff who challenges a gender-based classification meets his or her initial burden by merely pointing out the classification, and the burden then shifts to the government to prove, with specificity and precision, that strict scrutiny is met. *Id.,* at 44-45. Equal protection protects individuals, not groups. *Id.,* at 35, 44, 51.

Many men are similarly situated with women as victims of domestic violence. And many children who witness their fathers being victimized by domestic violence are similarly situated with children who witness their mothers being victimized by domestic violence. Many men are also similarly situated with women as incarcerated caretaker parents. In any event, no matter what the percentages and statistics are, these men, as individuals, are entitled to equal protection. Therefore, the trial court's decision that

equal protection does not apply to the challenged statutes was gross error and should be reversed.

A. Statutory gender-based classifications are subject to strict scrutiny.

The goal of equal protection is to "completely eliminate" all forms of suspect classifications. *Connerly,* at 44. Statutory suspect classifications are presumed invalid and subject to strict scrutiny review. As this Court has held:

> Where a statutory scheme, on its face, employs a suspect classification, the scheme is, on its face, in conflict with the core prohibition of the equal protection clause**.** It is not entitled to a presumption of validity and is instead presumed invalid. And the express use of suspect classifications in a statutory scheme **immediately triggers strict scrutiny review.**

Id., at 44 (citations omitted) (emphasis added).

In California, this applies to gender as well. "Under our state Constitution, strict scrutiny applies to gender classifications." *Id.,* at 28.

This Court has aptly stated:

> We cannot establish different levels of equal protection for men and women out of gender prejudice and/or gender paternalism. No justification for a two-level, gender-based standard of review has been offered, and we perceive none.

Connerly, at 40.

Gender-based classifications are subject to strict scrutiny even if they are not implemented. *Connerly*, at 44, 49. In fact, there exists a legal presumption that state officials will follow the law. *Environmental Prot. Info. Center, Inc. v. Maxxam Corp.*

(1992) 4 Cal.App.4th 1373, 1382. Accordingly, the very existence of a suspect classification in and of itself *threatens* its illegal implementation.

A plaintiff who challenges a suspect classification meets its initial burden by merely pointing it out, and the burden shifts to the government to prove strict scrutiny is met. *Connerly,* at 44-45. Specificity and precision are required. *Ibid.*

Strict scrutiny involves two steps. First, there must be a compelling government interest. *Id.,* at 36-38. Second, the suspect classification must be *necessary* to that interest. *Id.* at 37. If the suspect classification "is not necessary to the statutory scheme, it may not be employed." *Ibid.* As this Court has held:

> Once a compelling interest is shown, the inquiry focuses on the means chosen to address the interest. It is not enough that the means chosen to accomplish the purpose are reasonable or efficient. Only the most exact connection between justification and classification will suffice. The classification must appear necessary rather than convenient, and the availability of nonracial alternatives - or the failure of the legislative body to consider such alternatives – will be fatal to the classification.

Id., at 37.

Strict scrutiny applies regardless of whether a law is benign or remedial. *Id.,* at 35-36. Courts can reform invalid statutes to maintain a clearly-articulated purpose. *Kopp v. Fair Political Practices Comm'n* (1995) 11 Cal.4th 607.

In 1975, the Fifth District Court of Appeal incorrectly used rational basis analysis to uphold a statute that penalized husband-on-wife violence, using terms such as "rational distinctions or classifications" and "so long as its judgments are rational." *People v. Cameron* (1975) 53 Cal.App.3d 786, 793, 794, 796. The court cited 1970s crime data

showing 93.3 percent of (reported) marital assaults were husband-on-wife, and compared domestic violence to a "prize fight," saying, "women are physically less able to defend themselves against their husbands than vice versa." *Id.,* at 791-792**.** The court did not rule that Equal protection does not apply because men and women are not similarly situated, as in the instant case. Rather, the court simply (improperly) applied rational basis review. The court also nudged the legislature into reality by advising it to recognize the "modern trend of greater independence and assertiveness on the part of the female." *Id.,* at 794.

Thereafter, the Legislature amended the statute to be gender-neutral. Then a man challenged the same statute because it did not equally protect people in same-sex relationships. *People v. Silva* (1994) 27 Cal.App.4th 1160. The same appellate court again applied rational basis and held that, although same-sex couples face a high risk of domestic violence, excluding them is not "so irrational" as to be invalid. *Id.,* at 1170-71. Again, the court did not rule that Equal protection does not apply because men and women are "not similarly situated," but simply because rational basis review was met (though improperly applied).

Now, however, *Connerly* makes it clear that "strict scrutiny applies to gender classifications.**"** *Connerly,* at 28. Once a plaintiff points the classification out, the burden is on the government to prove strict scrutiny is met. *Ibid.*

In the instant case, Respondents not only pointed out the gender-based classifications, but also submitted discovery responses in which Respondents admit they

implement most of the challenged statutes in a discriminatory, gender-based manner. Therefore, both the gender-based classifications and gender-based implementation thereof are subject to strict scrutiny, and Respondents have the burden of proving strict scrutiny is met. The trial court's failure to apply *Connerly's* fundamental rule of equal protection analysis was gross error.

B. Equal protection protects individuals, not groups.

The California Constitution states: "**A person** may not be ... denied equal protection of the laws." Cal. Const., art. I, § 7(a) (emphasis added). Accordingly, this Court has held "[t]he guarantee of equal protection is an **individual right**" and "for purposes of equal protection analysis, **we must view the law from the standpoint of the individual.**" *Connerly,* at 45, 51 (emphasis added).

This Court also held:

> it must be remembered that the rights created by the equal protection clause are **not group rights; they are personal rights which are guaranteed to the individual."**

Id., at 35 (emphasis added), citing federal case law.

Equal protection *itself* must be applied equally. As this Court has held:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to [another] . . .If both are not accorded the same protection, then it is not equal.

Id., at 40.

The California Supreme Court has quite beautifully stated:

> Men and women alike suffer from the stereotypes perpetrated by sex-based differential treatment. When the law emphasizes irrelevant differences between men and women, it cannot help influencing the content and the tone of the social, as well as the legal, relations between the sexes. ... As long as organized legal systems . . . differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote. When men and women are prevented from recognizing one another's essential humanity by sexual prejudices, nourished by legal as well as social institutions, society as a whole remains less than it could otherwise become.

Koire, at 34-35.

Therefore, it is clear that equal protection protects individuals, not groups.

C. Many men and women are similarly situated as domestic violence victims, and no finding was made to the contrary.

The trial court in this case ignored *Connerly* by comparing groups rather than individuals in determining "similarly situated." A proper analysis would have asked whether the statutes equally treat a man and woman who are similarly situated as domestic violence victims. There has been no argument or finding that a man and woman cannot be similarly situated as domestic violence victims. Nor can such an argument be seriously made, especially in light of the statistics.

The Centers for Disease Control and Prevention cites data saying:

> In the United States every year, about 1.5 million women and more than 800,000 men are raped or physically assaulted by an intimate partner. This translates into about 47 intimate partner violence

> assaults per 1,000 women and 32 assaults per 1,000 men. (Tjaden and Thoennes 2000a).

(AA 660; Appellants' Request for Judicial Notice ("RFJN"), Exh. "A.")

The Centers for Disease Control cites data showing health care costs for domestic violence associated with (reported) intimate partner violence on average were "$948 in cases where women were the victims and $387 in cases where men were the victims," and concluded, [w]e need to continue our efforts to prevent this type of violence, including **broadening our focus to also address the needs of men who are victims**." (RFJN, Exh. "B.") (Emphasis added.)

The San Bernardino County Sheriff states "37 percent of domestic violence is against men" and "when all serious forms of domestic assault were added together, as many assaulted men as women were seriously assaulted." (AA 672.)

In fact, "[o]ver the past 25 years, leading sociologists have repeatedly found that men and women commit domestic violence at similar rates." Kelly, Linda, "Disabusing the Definition of Domestic Abuse," 30 Fl. St. U. L. Rev.791, 792 (2003) (AA 231-281.) This is confirmed by the uncontroverted experts.

For example, Professor Martin M. Fiebert's Declaration[4] states:

> I have conducted independent research in the field of domestic violence and have studied the prevalence and rationale of female initiated assaults on male partners. [Citation.] Overall, my findings indicate that women are as physically aggressive, or more aggressive, than men in their intimate relationships with male partners or spouses. My findings are supported by the overwhelming majority of

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[4] Dr. Fiebert teaches psychology at California State University, Long Beach.

> sociological survey research. To help illustrate this, I have compiled an annotated bibliography of research examining assaults by women on their spouses or male partners, which currently examines 180 scholarly investigation (142 empirical studies and 38 reviews and/or analyses), with an aggregate sample size exceeding 170,000, finding women are as physically aggressive, or more aggressive than men in their intimate relationships with their spouses or male partners. A portion of the bibliography was published in the 1997 version of the highly respected, referenced and peer-reviewed journal, Sexuality and Culture.

(AA 113-186.) The bibliography is also at www.csulb.edu/~mfiebert/assault.htm.

Professor Donald G. Dutton's[5] Declaration states:

> I have been informed that California Health and Safety Code Section 124250 defines "domestic violence" for purposes of providing funding for domestic violence services, as "the infliction or threat of physical harm against past or resent adult or adolescent female intimate partners . . ." In my expert opinion, there is no justification for the exclusion of male victims from this law. My independent research as to **gender** and domestic violence reveals that women use all forms of domestic violence at least as frequently as do men and with very similar effects on male victims.

(AA 113.)

Professor Murray A. Straus[6] states:

> I have conducted surveys of nationally representative samples of American families funded by the National Institutes of Health in 1975, 1985, and 1992. In 2006 I conducted a study of partner violence in 32 nations. In all of these studies, the rate of men victimized by physical and psychological attacks by their partners is about the same as the rate of women victimized by male partners. . . . Physical attacks by women account for about a third of the injuries.

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[5] Dr. Dutton teaches psychology at the University of British Columbia, has published over 100 peer-reviewed articles and four books on domestic violence, and was a prosecutorial witness in the O.J. Simpson trial and in over 50 cases.

[6] Dr. Straus teaches sociology and is the founder and co-director of the Family Research Laboratory at the University of New Hampshire.

> Although this is much lower than the rate of injuries inflicted by men, it is domestic violence. Studies of homicide by domestic partners find that . . . male partners are the victims in from a quarter to half the cases. The injuries and deaths are one of many indications of the need of services for male victims of domestic violence. Similar results have been found by other federally funded studies such as the National Violence Against Women Survey (conducted by the Centers For Disease Control and the National Institute of Justice), the National Survey of Families and Households, and the National Co-Morbidity Study. . . . Except for domestic homicides, police and crime data uncover only one hundredth to one tenth of the cases of domestic violence as the surveys just mentioned.

(AA 113-186.)

In May 2007, the Centers for Disease Control published a study finding women commit 70% of non-reciprocal domestic violence, which represents about half of domestic violence. Whitaker, Haileyesus, "Differences in Frequency of Violence and Reported Injury Between Relationships With Reciprocal and Nonreciprocal Intimate Partner Violence," Am. J. Pub. Health (5/07), V. 97, N. 5, 941-47. (www.ajph.org/cgi/content/abstract/97/5/941. (RFJN, Exhs. "C," "D.")[7]

A recent 32-nation study by the University of New Hampshire found women commit partner violence as often as men and controlling behavior exists equally in perpetrators of both sexes. The study is publicized in a University news release at www.unh.edu/news/cj_nr/2006/may/em_060519male.cfm?type=n.[8]

A University of Washington study recently found women were nearly twice as likely as men to perpetrate domestic violence including kicking, biting or punching,

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[7] See also http://pn.psychiatryonline.org/cgi/content/full/42/15/31-a.
[8] See also http://pubpages.unh.edu/~mas2/ID41E2.pdf.

threatening to hit or throw something at, and pushing, grabbing or shoving, their partner.[9] Similarly, a University of Florida study recently found women are more likely than men to "stalk, attack and abuse" their partners.[10]

A University of Pennsylvania emergency room report found 13 percent of men were assaulted by a female partner in the previous 12 months, of which 50 percent were choked, kicked, bitten, punched, or had an object thrown at them, 37 percent involved a weapon, and 14 percent sought medical help. Mechem, Shofer, **"**History of Domestic Violence among Male Patients Presenting to an Urban Emergency Department," (1999) Academic Emerg. Med., V. 6, N. 8, 786-91.[11]

Even crime data shows about one-fourth to one-third domestic violence victims who call police are men and also shows a sharp rise in female arrests. (AA 628, 704-726.) But as the experts explain, crime data is unreliably low especially for men because they underreport more than women in crime data.

Professor Dutton states:

> Domestic violence "research" has been misleading, in that data has been extracted from crime reports and/or "crime victim surveys" – in which men underreport more than women – and have been publicized as indicating domestic violence is a gender issue (male-perpetrator/female-victims). In fact, when larger surveys with representative samples are examined, perpetration of domestic violence perpetration is slightly more common for females. . . .

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[9] See www.sciencedaily.com/releases/2007/06/070625111433.htm.
[10] See http://news.ufl.edu/2006/07/13/women-attackers/.
[11] See www.aemj.org/cgi/content/abstract/6/8/786.

(AA 113.) He also states: "In the United States and other countries, male victims have been unfairly excluded from public outreach and services. (AA 113.)

Similarly, Professor Richard Gelles[12] states:

> The real horror is the continued status of battered men as the "missing persons" of the problem. Male victims do not count and are not counted. . . . Federal funds typically pass to a state coalition against or to a branch of a state agency designated to deal with violence against women. Thirty years ago battered women had no place to go and no place to turn for help and assistance. Today, there are places to go—more than 1,800 shelters, and many agencies to which to turn. For men, there still is no place to go and no one to whom to turn.[13]

Not only is *Cameron's* 93 percent figure inaccurate, but its prize fight analogy is flawed. Comparing a prize fight to domestic violence is like comparing the World Cup to the Vietnam War. Prize fights are controlled events with no weapons, ambushes or children in the ring, and the contestants do not fear arrest, losing custody of children or social stigmas for defending themselves. They are rarely disabled, elderly, mentally ill, drunk, on drugs or asleep.

Weapons are a huge equalizing factor. As Professor Linda Kelly explains:

> Women were found to be twice as likely to throw something at their husbands. . . . They were also more likely to hit, or try to hit, their spouses with something and more likely to threaten their spouses with a knife or gun.

Kelly, *supra,* 30 Fl. St. U. L. Rev. at 798.

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[12] Professor Gelles is Chair of the Child Welfare and Family Violence School of Social Work at the University of Pennsylvania.

[13] "The Hidden Side of Domestic Violence; Male Victims," The Women's Quarterly (1999), reprinted with permission at www.ncfmla.org/gelles.html.

Men also need shelter services. A survey of domestic violence shelters in California by the California Research Bureau found nine percent of people seeking shelter services were men and one shelter in a predominantly gay and lesbian area of Los Angeles reported even more males than females seeking shelter (without outreach or hotline referrals directing men to these shelters). (AA 430, 728-802.)

Valley Oasis' former director Patricia Overberg states that during her eight-year tenure as director of Valley Oasis she saw men travel hundreds of miles each direction because no other shelters would help males. (AA 195-196, 1164.)

In fact, many men, especially gay men, have partners who are of equal or larger size or strength. In fact, there is an equal percentage of violence in gay, lesbian and heterosexual relationships, which tend to follow the same abusive patterns. Bricker, D., "Fatal Defense: An Analysis of Battered Women's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners," 58 Brooklyn L. Rev. 1379 (1993), 1382-84.

The statutes also treat *children* unequally based on the sex of the abused parent. The murdered children of Dr. Caro are a good example. Dr. Caro states:

> Over our time together Cora usually controlled me by simple physical intimidation. At one time or another during our marriage Cora punched and kicked me, blackened my eyes, tore one of my retinas (which required surgical repair), caused me internal injuries requiring antibiotic treatment, and threatened me with a gun and a knife. On other occasions, I had objects, such as D batteries and small appliances, thrown at me. I paid for thousands of repairs to our house due to her outbursts. . . . In retrospect, I believe my boys and I would have been better served by my trying to "escape" these marital problems by quickly taking my children out of Cora's sphere of

> influence, at least until she had time to understand her reality and cool off.

(AA 187-194.)

It cannot seriously be argued that Dr. Caro is not similarly situated with any female domestic violence victims, and no such argument or finding was made. The statutes, however, treat Dr. Caro and his children unequally based on gender. The right of equal protection extends to injured parties outside the excluded class as well. *Buchanan v. Warley* (1917) 245 U.S. 60; see also *Gowens v. Bakersfield* (1960) 179 Cal.App.2d 282, 285; *Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, 6, fn 1.

The expert declarations further elaborate on this problem. Dr. Kelly states:

> In the case of battered men accompanied by their children, the lack of adequate physical space becomes more critical. There is terrific difficulty in finding suitable shelter for homeless families, particularly those headed by men.

Kelly, *supra,* at 851.

Professor Denise A. Hines'[14] states:

> [W]hen men with children try to access domestic violence services and are turned away, we deny their children services and put them in danger. There is an unknown quantity of children in California who cannot find the services they need to escape their violent mothers, and therefore, they must remain in their homes. Thus, by discriminating against male victims of domestic violence, we are also discriminating against their children and putting both the father and his children at risk. It is imperative, then, to assure that male victims and their children can get access to domestic violence services.

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[14] Dr. Hines teaches criminal justice at the University of Massachusetts Lowell and is a research associate for the Family Research Laboratory and Crimes Against Children Research Center, University of New Hampshire

(AA 113-186.) And batterer intervention provider John Hamel states:

> When men are denied services, their children are denied services. Currently, only one or two shelters out of nearly 2,000 in the United States offer beds to male victims and their children. Outreach efforts from established domestic violence organizations target exclusively females, as evidenced by the almost total absence of male victims in video, film, radio and print media. Thus, under current policy abused men are both denied services and told, essentially, that they don't even exist. Ignoring male victims is not only a human rights issue, but also a public health issue. Until all perpetrators of family violence are held accountable for their actions, regardless of gender, our efforts will be limited, with serious implications for future generations.

(AA 113-186.)

The exposure of children to domestic violence causes more violence. For example, one study found a woman's likelihood of abusing her children increases each time she sees her mother hit her father. Heyman, R. and Slep, Amy Smith, "Do Child Abuse and Interparental Violence Lead to Adulthood Family Violence?" (11/03), J. of Marriage & the Family, 4, v. 64, 864-70.

Despite the above, male victims are culturally hidden. Dr. Fiebert states:

> Culturally the problem of female initiated partner aggression is grossly underreported. Courts, police, and the public are largely unaware of the extent of the problem. Services for victimized men are almost nonexistent.

(AA 113-186.)[15]

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[15] This neglect of male domestic violence victims has a long history. In post-Renaissance France, battered men were forced to ride backwards on a donkey through the streets while holding the donkey's tail. Steinmetz, Suzanne, "The Battered Husband Syndrome," Victimology, An International Journal (1977-1978), 2, 499-509. In medieval England, battered men were strapped to a cart and paraded around town while people threw trash at them. George, Malcolm J., "Riding A Donkey Backwards; Men As The

The above expert declarations and other evidence make it clear there is no justification for excluding male victims from domestic violence laws. And even aside from statistics, the trial court's ruling was flawed because equal protection protects individuals, not groups. The ruling strips equal protection of its force and leaves it an obsolete relic subject to the whimsical decisions and biases of courts. Equal protection would not apply, for example, to the exclusion of women from job safety laws or veterans benefits because men are significantly more likely to need such protections. Race classifications could be exempt from equal protection based on similar grounds. The ruling was gross error and should be reversed.

D. <u>Many men and women are similarly situated as inmate parents, and no finding was made to the contrary.</u>

A 1997 California Research Bureau report on California prisons shows:

1. There were 84,000 inmate fathers and 6,200 inmate mothers;
2. 176,400 children had a father in prison and 15,600 had a mother in prison;
3. 30,200 homes had a custodial inmate father and 3,300 had a custodial inmate mother (pp. 7-11);
4. The minor children of 85 percent of inmate fathers and 29 percent of inmate mothers were cared for by the other parent.

Unacceptable Victims of Marital Violence," J. of Men's Studies, v. 3, n. 2 (Nov. 1994), pp. 137-59.

5. One-third of inmate fathers and one-half of inmate mothers lived with their minor children during the month prior to incarceration;
6. Of inmates, 57 percent of men and 64 percent of women were parents; and

(AA 881-916.)

If inmate fathers outnumber mothers by ten to one, and 29 percent of the fathers had children who were not cared for by another parent, then the number of sole caretaker fathers and mothers is comparable. As one scholar put it: "Because there are many more men in prison than women, there are a significant number of children who are orphaned when their father is sent to prison." Zealand, Elise, "Protecting the ties that bind from behind bars: A call for equal opportunities for incarcerated fathers and their children to maintain the parent-child relationship," Columbia J. of Law & Social Prob., 31 (18) 247, 282-299. (AA 282-299.)

In fact, the above numbers provide a strong argument that there are *more* sole caretaker fathers than mothers in California prisons. Although qualifying for Number 6 above does not make someone a caretaker, it is fair to assume a parent is a sole caretaker if both Numbers 1 and 6 apply. Accordingly, we do the math.

Out of 84,000 inmate fathers, 36 percent, or 30,240, lived with their children just before imprisonment. About 15 percent of those 30,240 fathers had children who were not cared for by another parent. That means 4,536 fathers were sole caretakers. Out of 6,200 inmate mothers, 53 percent, or 3,286, lived with their children just before imprisonment. About 71 percent of those 3,286 mothers had children who were not cared

for by another parent. That means 2,333 mothers were sole caretakers. Therefore, 4,536 fathers and 2,333 mothers who were sole caretakers in prison. And a *larger* disparity exists for *children*, with 176,400 children of inmate fathers and 15,600 of inmate mothers.[16]

In any event, for purposes of equal protection, it should not matter whether there are more sole caretaker fathers or mothers, because equal protection protects individuals, not groups. Inmate fathers are entitled to equal protection. Even if there were only one sole caretaker inmate father, he would be entitled to equal protection. The trial court's failure to apply equal protection should be reversed.

II.

THE TRIAL COURT ERRED IN FINDING APPELLANTS FAILED TO RAISE A PROPOSITION 209 CHALLENGE.

Without explanation, the trial court found Appellants failed to raise a Proposition 209 challenge to the gender classifications in the challenged statutes. However, Appellants' *explicitly* raised Proposition 209 challenges. In their Petition, they defined California Constitution, Article I, Section 31 as "PROP 209" (AA 6), stated the gender-based classifications are "in violation of PROP 209" (AA 11, 15, 19, 22, 25, 26) and the

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[16] Respondents' reliance on the higher *percentage* of inmate mothers who are sole caretakers without looking at the other figures and the 10:1 ration of inmate fathers and mothers was pure smoke and mirrors. This is why *Connerly* stated: "Blind deference to legislative or executive pronouncements of a classification's necessity has no place in strict scrutiny analysis." *Id.,* at 36.

gender-based classification in Government Code Section 11139 "violates PROP 209" (AA 9) In their Opening Brief, they cited California Constitution, Article I (AA 68), stated the gender-based classifications and implementation of the challenged statutes "violate California Constitution, Art. I, Sections 7(a) and 31" (AA 76), and stated:

> the gender classifications in Health and Safety Code Section 124250 and Penal Code Sections 13823.15(f)(14)(A) and 13823.16 are unconstitutional in that they violate Equal protection and the California Constitution, Article I, Sections 7(a) **and 31**.

(AA 92.) (Emphasis added.)

Clearly, the finding that Appellants did not raise a Proposition 209 challenge was gross error. Therefore, trial court's decision should be reversed.

III.

THE TRIAL COURT ERRED IN RULING *BLUMHORST* BARS A CITIZEN/TAXPAYER CHALLENGE TO THE CONSTITUTIONAL VALIDITY OF GOVERNMENT CODE SECTION 11139.

The trial court ruled *Blumhorst* bars a citizen and taxpayer challenge to the constitutional validity of the gender classification in Government Code Section 11139, which exempts "lawful programs benefiting minorities and women" from that ban on sex discrimination in sex discrimination in taxpayer-funded programs as set forth in Government Code Section 11135. However, *Blumhorst* never once address citizen or taxpayer standing to challenge the validity of Government Code Section 11139.

Blumhorst is *wrong* on the law and should not be followed. Therefore, the trial court's decision should be reversed.

A. ***Blumhorst*** **does not bar a citizen/taxpayer challenge to the constitutional validity of Government Code Section 11139.**

In *Blumhorst,* a former domestic violence victim posed as a current victim and requested services from ten taxpayer-funded domestic violence shelters in Los Angeles County, each of which denied him services because of his sex. He sued the shelters as a civil rights tester (not as a citizen and taxpayer) for injunctive relief under Government Code Section 11135, which forbids sex discrimination in taxpayer-funded programs and provides a private right of action for injunctions.

The trial court dismissed the case for lack of standing because the plaintiff was only a tester and also because Government Code Section 11139 exempts "lawful programs benefiting minorities and women" from Section 11135's ban on discrimination. The appellate court affirmed *only* on standing, stating the right to sue for violation of Section 11135 requires one to be "injured." *Id.,* at 1003-1004.

In the instant case, Appellants did *not* sue as civil rights testers or under Government Code Section 11135. Rather, Appellants filed a citizen and taxpayer challenge to the constitutional validity of Government Code Section *11139*, which is **expressly allowed by statute** under Code of Civil Procedure Section 526a. Therefore,

the trial court erred in holding *Blumhorst* bars a citizen and taxpayer challenge to Government Code Section 11139, and the ruling should be reversed.

B. <u>In any event, *Blumhorst* is wrong and should not be followed.</u>

Not only is *Blumhorst* inapposite to this case, but *Blumhorst* is also wrong. It failed to follow federal law where it was required to do so and it ignored public policy. Appellants challenged *Blumhorst* below (AA 1105, fn 1) and do so now.

Government Code Section 11135 was modeled after the Civil Rights Act, Title VI, which "**rests on the principle that 'taxpayers' money, which is collected without discrimination, shall be spent without discrimination.**" *Guardians Ass'n v. Civil Service Comm.* (1983) 463 U.S. 582 (emphasis added). Where California law is based on a federal statute, federal decisions are compelling. *People v. Soto* (1998) 64 Cal.App.4th 966, 987; *Toshiba America Electronic Components, Inc. v. Sup.Ct.* (2004) 124 Cal.App.4th 762, 770.

Prior to *Blumhorst,* no California authority addressed tester standing. However, the United States Supreme Court and lower federal courts examined the issue extensively and ruled civil rights testers have standing to sue to enforce civil rights statutes if the statutes protect all persons from discrimination and if their purpose is preventative in nature. *Havens Realty v. Coleman* (1982) 455 U.S. 363, 364; *Kyles v. J.K. Guardian Security Svcs., Inc.* (7th Cir. 2000) 222 F.3d 289, 299.

For example, in *Havens Realty,* testers posed as home buyers and found black testers were discriminated against based on race. The black testers sued for injunctive relief under the Fair Housing Act ("FHA"). The lower courts held the testers lacked standing, but the Supreme Court reversed, holding testers have standing to sue because FHA "establishes an enforceable right of 'any person' to truthful information" concerning housing, and therefore the testers "suffered injury in precisely the form the statute was intended to guard against." *Id.,* at 364.

In *Kyles,* testers falsified work credentials and posed as jobseekers and found black testers were discriminated against. The black testers sued for injunctive relief under the Civil Rights Act ("CRA"), Title VII. The district court held the testers lacked standing, but the appellate court reversed, relying on *Havens Realty* and stating "recognizing tester standing is consistent with the statute's purpose" of eradicating discrimination from the workplace, and thus a tester "**has standing to sue, even if she has not been harmed apart from the statutory violation**." *Kyles, supra,* 222 F.3rd at 298-299 (emphasis added).

Kyles went on to contrast Title VII against a specific provision of the FHA that did *not* allow tester standing. The key difference was Title VII protected "any individual" whereas the FHA provision only protected those who made a "**bona fide offer."** *Id.,* at 300 (emphasis added). The court said testers have standing under any other FHA provision with no "bona fide offer" restriction. *Ibid.,* fn 7.

Had *Blumhorst* followed federal jurisprudence, *Blumhorst* would have allowed standing. Just like the federal statutes in *Havens Realty* and *Kyles,* Government Code Section 11135 protects all persons from discrimination by stating "no person in the State of California shall, on the basis of . . . sex . . . be unlawfully denied . . . .". It contains no "bona fide" or other restriction on standing. It creates a private right of action for injunctive relief. And its purpose is to prevent discrimination in taxpayer-funded programs.

Further, Government Code Section 11139 states Government Code Section 11135 shall not be interpreted in a way that frustrates Section 11135's purpose. Clearly, Government Code Section 11135 should be interpreted to allow tester standing because it is consistent with the statute's preventative purpose.

There are also strong public policy grounds for upholding tester standing. As the court in *Kyles* stated "testers provide evidence that, we have recognized, 'is frequently valuable, if not indispensable.'" *Kyles, supra,* 222 F.3rd at 299. The Equal Opportunity Employment Commission has stated, "the civil rights movement has a long history of using testers to uncover and illustrate discrimination**.**"[17] (RFJN, Exh. "E.") Federal courts have further stated:

> It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. It is surely regrettable that testers must mislead commercial landlords and home owners as to their real intentions to

[17] EEOC Enforcement Guideline No. N-915.002, May 22, 1996, "Whether 'testers' can file charge and litigate claims of employment discrimination." See www.eeoc.gov/policy/docs/testers.html.

> rent or buy housing. Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination.

Richardson v. Howard (7th Cir. 1983) 712 F.2d 319, 321-322.

The public interest in tester standing to enforce Government Code Section 11135 parallels that of FHA and CRA Title VI, as numerous barriers exist to enforcing the statute and its purpose. People who are discriminated against in state-funded programs or benefits are frequently in circumstances that render it difficult to sue. They often cannot afford an attorney, do not know the law, do not know discrimination occurred, are too occupied with hardships to sue, are unable to plead they will need services again (which is required for injunctive relief), or do not want the stress or humiliation that can come with such a lawsuit.

Even the California Supreme Court has stated people who are discriminated against are injured *per se* regardless of actual injuries. *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 174, citing *Koire* (the penalties for unequal treatment of patrons by sex or race applies "regardless of the plaintiff's actual damages" under the Unruh Civil Rights Act). Accordingly, *Blumhorst* is not only inapposite, but is also wrong and should not be followed, and the trial court's denial of Appellants' standing was gross error and should be reversed.

IV.

THE CLASSIFICATIONS DO NOT MEET STRICT SCRUTINY.

Strict scrutiny involves two steps. First, there must be a compelling government interest. *Connerly,* at 36-38. Second, the suspect classification must be *necessary* to that interest. *Id.* at 37. If it "is not necessary to the statutory scheme, it may not be employed." *Ibid.* This Court has stated:

> Once a compelling interest is shown, the inquiry focuses on the means chosen to address the interest. It is not enough that the means chosen to accomplish the purpose are reasonable or efficient. Only the most exact connection between justification and classification will suffice. The classification must appear necessary rather than convenient, and the availability of nonracial alternatives - or the failure of the legislative body to consider such alternatives – will be fatal to the classification.

Id., at 37 (emphasis added). Although it is Respondents burden to prove strict scrutiny is met, we will briefly demonstrate strict scrutiny is not met.

The domestic violence statutes

The gender-based classifications in the domestic violence statutes do not meet the first step in strict scrutiny because equal protection protects individuals, not groups, and therefore the gender-based classifications are illegal regardless of statistics. By comparison, it would be unconstitutional to exclude women from job safety laws because 92 percent of job deaths happen to men.[18]

Even if statistics mattered, they do not justify the classifications. As was set forth in Section I-C above, statistics show men and their children are frequently victims of

[18] See www.bls.gov/news.release/cfoi.t04.htm

domestic violence, including severe violence, and often need shelter. No finding was ever made to the contrary in this case. As Dr. Straus states:

> Domestic violence services for men are denied on ideological grounds, not scientific grounds. This ideology views only women as victims, and is contradicted by the many studies cited above. These organizations want to serve only women, even when they are funded to serve all victims of domestic violence. In my expert opinion**,** that ideology, rather than scientific evidence, is the basis for the section of the California Health & Safety Code Section 124250 that defines domestic violence as only being against a "female" or a "woman." This is contrary to an overwhelming body of evidence from studies by many researchers showing that there are large numbers of male victims. It is my opinion that this provision of the code should be changed to give equal recognition to all victims of domestic violence, not just female victims.

(AA 113-186.)

To illustrate, Haven Hills, a state-funded program in Los Angeles County that receives at least $221,422.00 annually under said statutes (AA 14), denies any services, even counseling and hotel vouchers, to male victims. Appellants' Tape contains consensual recordings of conversations between Angelucci and Haven Hills and the Hotline confirming this and indicating no shelter in Los Angeles County serves male victims except Valley Oasis in far-away Lancaster.

Health and Safety Code Section 124250 lists "hotel arrangements" as one form of shelter-based services. So even if Haven Hills could not mix men and women in its shelter or create separate space for men as Valley Oasis has done, it could still provide a certain number of hotel arrangements to male victims, and could certainly provide counseling and legal services rather than denying all services to men based on gender.

There is simply no justification for this. Nor is there any justification for the categorical exclusion of male victims, or programs helping only male victims, from the statutory provisions for domestic violence protections and services. These men and their children have been covered up and swept under the rug for decades, and California's gender-based statutes and gender-based implementation unconstitutionally support this discrimination.

Even if a compelling interest is shown (such as the compelling interest may be protecting domestic violence victims altogether), the second test in strict scrutiny is not met because excluding men is not "necessary" to that interest, and non-discriminatory alternatives clearly exist.

In fact, virtually all other states define domestic violence in gender-neutral ("victims") or gender-inclusive ("men and women," "he or she") terms in their domestic violence statutes that are otherwise similar to Health and Safety Code Section 124250. Compare, for example, California's and New York's statutes:

CA Health and Safety Code § 124250
"Domestic violence" means the infliction or threat of physical harm against past or present adult or adolescent **female** intimate partners, and shall include physical, sexual, and psychological abuse against the **woman** . . . (2) "Shelter-based" means an established system of services where battered **women** and their children may be provided safe or confidential emergency housing on a 24-hour basis, including, but not limited to, hotel or motel arrangements, haven, and safe houses. (3) "Emergency shelter" means a confidential or safe location that provides emergency housing on a 24-hour

N.Y. Consolidated Statutes § 459(a)
"Victim of domestic violence" means any **person** over the age of sixteen, any married **person** or any parent accompanied by **his or her** minor child . . . in a situation in which such **person** or such **person's** child is a victim of an act which would constitute a violation of the penal law . . . and (i) such act or acts have resulted in actual physical or emotional injury . . . to such **person** or such **person's** child; and (ii) such act or acts are . . . committed by a family or household member . . . . "Residential program for victims of domestic violence" means any residential care . . . for the purpose of

basis for battered **women** . . . .

providing emergency shelter . . .to **victims** of domestic violence. . . . .

N.Y. Consol. Statutes § 459(a) (emphasis added). (AA 879.)

The New York statute provides a non-discriminatory alternative to the gender-based discriminatory classifications in Health and Safety Code Section 124250. That alone is fatal to the classifications therein.[19]

Equally fatal is the Legislature's failure to consider such alternatives.[20] In fact, Respondents claim they require domestic violence programs funded under Penal Code Sections 13823.15(f)14 and 13823.16 to serve both genders, and thus it is axiomatic that the classifications are not necessary to a compelling interest.

Courts can reform invalid statutes to be gender-neutral. *Kopp, supra,* 11 Cal.4th at 615. In the instant case, reformation would be more equitable because it would maintain the statutory purpose of serving domestic violence victims within the parameters of the California Constitution. In fact, the bill implementing Health and Safety Code Section 124250 was aimed to "ensure that this support is applied in the best interest of **victims** of domestic violence." (AA 575.) (Emphasis added.) This indicates the legislature's intent to help domestic violence victims, even if the legislature improperly restricted services to women.

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[19] Note that Congress has recently recognized male victims by amending the Violence Against Women Act to state: "Nothing in this title shall be construed to prohibit male victims of domestic violence . . . from receiving benefits and services under this title." 42 U.S.C. § 40002(b)(8).

[20] Even if the statutory scheme contained generalizations about gender, thankfully "[b]lind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis . . . ." *Connerly,* at 36.

Accordingly, the gender classifications in Health and Safety Code Section 124250 and Penal Code Sections 13823.15(f)(14)(A) and 13823.16 are subject to strict scrutiny. **They also violate Proposition 209 and public policy**. They explicitly and facially discriminate against individuals based solely on gender. That is unconstitutional. Therefore, the trial court's decision should be reversed.

The inmate parent statutes

The gender-based classifications in the inmate parenting statutes do not meet the first step in strict scrutiny because there is no compelling government interest in excluding inmate fathers from the provisions. Equal protection protects individuals, not groups. Therefore, unless Respondents can prove no inmate father can be similarly situated with an inmate mother, which they have even so much as argued, equal protection applies. Further, even if statistics mattered, the statistics do not justify the gender-based classifications. As was demonstrated in Section I-D hereinabove, there are *many* inmate fathers who are sole caretakers and who are similarly situated with inmate mothers as incarcerated parents.

Moreover, whether a child is or is not cared for by another parent does not negate the importance of maintaining the child's relations with the incarcerated parent. Again, one-third of inmate fathers lived with their minor children during the month before arrest. "We cannot emphasize too strongly the . . . significance of recognizing a child's right to

the 'nurturing, support and companionship of her father." *Holm v. Smilowitz* (Ohio App. 4th Dist. 1992) 615 N.E.2d 1047, 1060.

Studies show when either father or mother becomes incarcerated, the children immediately begin acting out, become hostile and aggressive, use drugs or alcohol, run away from home, and become truant and delinquent. Fritsch, T. A. & Burkhead, J. D., "Behavior Reactions of Children to Parental Absence Due to Imprisonment, 30 Fam. Relations 83, 85 (1981). "In terms of number of problems per child, male and female inmates report almost exactly the same number." *Ibid.* The same data shows maintaining relations between children and innate fathers reduces harm to children, improves inmate behavior and reduces recidivism. *Id.,* at 83. Zealand cites substantial evidence of this, calls for Equal protection challenges to the California statutes that exclude inmate fathers, and concludes:

> Judges, lawmakers, and corrections officials have, for the most part, failed to recognize the important role an imprisoned father can play in the lives of his children. More importantly, they have failed to assess the dangers inherent in keeping him from that role -- to the children, their mothers, and society. Giving fathers equal access to parenting and visitation programs... will help keep vulnerable families intact and break the bitter, intergenerational cycle of incarceration partly responsible for our burgeoning prison population. . . .

Zealand, *supra,* at 258.

Zealand goes on to state:

> Efforts to maintain the fathers-child relationship while the father is in prison can ameliorate the harmful effects of the separation on the children. [Citation.] Arthur Hamilton has demonstrated that a father may still provide love, guidance, and support for his children from prison. [Citation.] In additional, fathers who maintain ties to their

> families have a greater chance of success upon their release. One researcher "reported a consistently strong and positive relationship between the maintenance of strong inmate/family ties and later parole success." [Citation.] The coordinator of a parenting program in a men's jail said it is "the only program I've seen that works in keeping people out of jail. The program causes an emotional upheaval. Children are the key. We need these programs nationwide. [Citation.]

Id., at 279.

Professor Gordon E. Finley[21] states:

> The clear implications of the very well established divorce literature, for the California Penal Code, is that it is in the best interests of children, fathers, and mothers that the State of California make every effort to maintain the father-child relationship while the father is incarcerated. This remains true regardless of whether the child is cared for by another parent or step-parent, because that does not detract from the importance of maintaining the child's relationship with the incarcerated parent. Given that the State of California already makes provisions for maintaining the mother-child relationship for incarcerated mothers to facilitate the well-being of both mothers and children, it is absolutely essential (based on the divorce research cited above) to make equal provision for maintaining the father-child relationship to facilitate the well-being of both incarcerated fathers and their children. Specifically, Penal Code Sections 1174-1174.9 and 3411-3424 must be made equal for men as they currently exist for women. This further is supported by the research literature that demonstrates that both fathers and mothers are equally competent caregivers.

(AA 197-223.)

Dr. Ken Druck[22] states:

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[21] Professor Finley teaches psychology at the University of Florida International and has taught at the University of British Columbia, University of Toronto and University of California at Berkeley, and has published extensive peer-reviewed research and articles primarily on the topic of parenting.

> Maintaining the relationship between children and their incarcerated fathers (and/or mothers), including consideration of visitation, pediatric services, alternative sentencing and other parent-related services, needs to be considered a critical element in the psychological and interpersonal well-being and development of children.

(AA 219-223.)

The State of New Hampshire's Commission on the Status of Men found:

> Studies have conclusively shown that children who receive higher levels of attention and interaction with their natural fathers are healthier and better psychologically adjusted than children without fathers or with uninvolved fathers. Whether the outcome is cognitive development, sex-role development, or psycho-social development, children are better off when their relationship with their father is close and secure. Fathers who were affectionate, spent time with their children, and had a positive attitude were more likely to have securely attached infants. (Cox, M.J., *et al.,* "Prediction of Infant-Father and Infant-Mother Attachment. Developmental Psychology 28 (1992): 474-483.) Children with involved fathers are more confident and less anxious when placed in unfamiliar settings, better able to deal with frustration, better able to adapt to changing circumstances and breaks from their routine, and better able to gain a sense of independence and an identify outside the mother/child relationship. Father-child interaction has been shown to promote a child's physical well-being, perceptual abilities, and competency for relatedness with others, even at a young age. (Krampe and Fairweather. Journal of Family Issues 14.4, December 1993: 572-591.)
> . . . Father involvement correlates with fewer behavior problems exhibited by their children. This finding holds after controlling for the level of maternal involvement. (Amato and Rivera. "Paternal Involvement and Children's Behavior Problems. Journal of Marriage and the Family 61 (1999): 375-384.) Fatherless children score lower on tests and have lower grade point averages. Family scholar Barbara Dafoe Whitehead says, "Even after controlling for race, income and religion, scholars find significant differences in educational attainment between children who grow up in intact families and children who do not." Fatherless children are twice as likely to drop

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[22] Dr. Druck is a psychologist, an author and a lecturer with 25 years of experience as an expert on parenting and the psychology of fathers and children.

> out of school. (U.S. Health & Human Services. National Center for Health Statistics. Survey on Child Health. Washington, DC: GPO, 1993.) In a study of 75 toddlers it was found that children who were attached to their fathers were better problem solvers than children who were not securely attached to their fathers. [Citation.]

(AA 219-224.)

The second step in strict scrutiny is also not met, because the gender-based classifications are not *necessary* to a compelling interest, and non-discriminatory alternatives are available. To illustrate, Aida Camero of the Bexar County Adult Detention Center in San Antonio states:

> We have a MATCH (Mothers And Their Children) and a PATCH (Pappas And Their Children) program for incarcerated mothers and fathers and their children. MATCH was established in 1984 for mothers, and PATCH was established in 1993 as a residential program for fathers and was modeled after MATCH. In 2004 there were more than 300 participants in the PATCH program. Both programs have been very successful. They have a beneficial impact on the children, the parents, and the families, and it improves the lives and behavior of both the children and the parents. There is no reason why similar programs for both mothers and fathers cannot be started in other parts of the nation. . . . Attached hereto is a true and correct copy of a document that provides accurate information about the MATCH/PATCH program.

(AA 225-230.) See also, Zealand, *supra,* at 274.

The availability of non-discriminatory alternatives, and the legislature's failure to consider such alternatives, are both independently equally fatal to the gender-based classifications in Penal Code Sections 1174-1174.9 and 3411-3424. Therefore, the gender-based classifications and implementation violate equal protection, Proposition 209 and California's public policy against discrimination.

It is clear from the foregoing that the trial court grossly erred in ruling the gender-based classifications and gender-based implementation of Penal Code Sections 1174-1174.9 and 3411-3424 are not subject to strict scrutiny equal protection analysis. Therefore, trial court's ruling should be reversed.

Government Code Section 11139

Government Code Section 11139 ("GC 11139") exempts "lawful programs benefiting minorities and women" from the ban on sex discrimination in taxpayer-funded programs in Government Code Section 11135's ("GC 11135"), which was modeled after Title VI of the Civil Rights Act ("CRA"). CRA Title VI was enacted on the principle that "**taxpayers' money, which is collected without discrimination, shall be spent without discrimination**." *Guardians Ass'n. supra,* 463 U.S. at 599 (emphasis added).

The gender classification in Government Code Section 11139 cannot meet the first step in strict scrutiny because there is no compelling interest in the suspect classification. Equal protection protects individuals, not groups. GC 11139's exemption for "lawful programs benefiting minorities and women" was added to protect affirmative action programs at a time when the legislature was uncertain about the legality of the same. This is similar to the case in *Connerly,* in which

> the statutory schemes at issue here were enacted over many years, some more than 20 years ago, during a time when the manner of applying equal protection principles to affirmative action programs was not settled. It has now been held that all racial classifications imposed by a governmental entity must be analyzed using the strict scrutiny standard of review.

Connerly, at 28.

In fact, the purpose of the gender-based classification in GC 11139 is arguably not even clear. A suspect classification "cannot withstand strict scrutiny based upon speculation about what may have motivated the legislature . . . The State must show that the alleged objective was the legislature's actual purpose for the discriminatory classification." *Connerly,* at 38. Clearly, the gender-based classification in GC 11139 cannot meet the first step in strict scrutiny.

The second step in strict scrutiny is also not met, because the gender-based classification is not *necessary* to a compelling interest. This lack of necessity is shown by the fact that the statutes own interpretive regulation is gender-neutral. :

> The provisions of Section 98101 are not intended to: . . . (b) adversely affect lawful programs which benefit persons of a particular ethnic group identification, religion, age, sex, color, or with a physical or mental disability to overcome the effects of conditions that result or have resulted in limited participation in, or receipt of benefits from, any State supported program or activity.

22 Cal. Code Regs § 98102.

As shown earlier, the availability of a non-discriminatory alternative is *fatal* to a suspect classification. Equally fatal, under *Connerly,* is legislature's failure to consider such alternatives. Therefore, GC 11139's gender-based classification simply cannot meet the first *or* second test in strict scrutiny.

Should Respondents argue GC11139 is exempt as an "interpretive statute" adding no substantive rights to GC 11135, they would be mistaken. GC 11139 affects substantive rights by specifying which gender falls within its operative law. Equal protection applies such classifications. *Connerly,* at 32. Under the doctrine of *expressio*

unius est exclusio alterius, when a statute expresses such exceptions, other exceptions are excluded. *Gonzales v. Concord Gardens Mobile Home Park Ltd.* (1979) 90 Cal.App.3d 871, 874. Further, if interpretive statutes are immune from challenge, any form of discrimination can pass as "interpretive."

GC 11139's gender-based classification cannot meet strict scrutiny. It violates equal protection, Proposition 209 and public policy. Therefore, the trial court's ruling should be reversed.

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that the Court reverse the trial court's incorrect judgment in its entirety.

Dated: _____ LAW OFFICE OF MARC E. ANGELUCCI

By: _____
Marc E. Angelucci, Esq.
Attorney for Appellants,
David Woods, Gregory Bowman and Ray Blumhorst

WORD COUNT CERTIFICATION

I certify the word count in this brief is _____ using Word XP Word Count.

Dated: _____

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Marc E. Angelucci, Esq.