B170904 (Civil)
BC291977 (Superior Court)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

ELDON RAY BLUMHORST,

Plaintiff and Appellant,

vs.

JEWISH FAMILY SERVICES OF LOS ANGELES; HOUSE OF RUTH, INC.; SU CASA FAMILY CRISIS AND SUPPORT CENTER; DOMESTIC VIOLENCE CENTER OF THE SANTA CLARITA VALLEY; RAINBOW SERVICES, LTD; PEACE AND JOY CARE CENTER; HAVEN HILLS, INC.; SOUTHERN CALIFORNIA ALCOHOL AND DRUG PROGRAM, INC.; YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF GLENDALE, CALIFORNIA; AND HAVEN HOUSE, INC.

Defendants and Appellees.

Service on California Attorney General Required by California Rules of Court Rule 44.5(a)

APPELLANT'S OPENING BRIEF

APPEAL FROM
SUPERIOR COURT OF LOS ANGELES COUNTY
DEPARTMENT 74
HON. JON M. MAYEDA, JUDGE

Marc E. Angelucci, Esq. (SBN 211291)
LAW OFFICE OF MARC E. ANGELUCCI
P.O. Box 41291
Los Angeles, CA 90041
Attorney for Appellant
ELDON RAY BLUMHORST

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

I. CASES

II. STATUTES

III. REGULATIONS

IV. CONSTITUTIONAL PROVISIONS

V. OTHER STATES' STATUTES

VI. LAW REVIEW / SECONDARY

Cal. Research Institute, "The Prevalence of Domestic Violence In Cal.," CRB 02-016 (November 2002) 20

Cal. Office of Attorney General Bureau of Criminal Justice Information and Analysis, "Report on Arrests for Domestic Violence in Cal." v. 1, n. 3 (August 1999) 18

Martin Fiebert, Cal. State University, "References Examining Assaults by Women on Their Spouses or Male Partners: An Annotated Bibliography," <www.csulb.edu/%7Emfiebert/assault.htm>. 19

John Archer, "Sex Differences in Aggression Between Heterosexual Partners: A Meta-Analytic Review," Psychological Bulletin, v. 126, n. 5 (September 2000). 20, 23

Special Report, "Army ahead of society in addressing abuse" (November 2003). 23

Richard E. Heyman and Amy M. Smith Slep, "Do Child Abuse and Interparental Violence Lead to Adulthood Family Violence?" (November 2002), J. of Marriage & Fam., v. 64, pp 864-870, issue 4. 23

Dept. Emergency Medicine, Hospital of the University of Pennsylvania, Academic Emergency Medicine, "History of Domestic Violence among Male Patients Presenting to an Urban Emergency Department" (June 1999) v. 6, n. 8, pp. 786-791, <www.aemj.org/cgi/content/abstract/6/8/786> 20-21

County of Los Angeles, Community and Senior Services, "Services to Male Victims of Domestic Violence" (July 3, 2001), Bulletin CWIII-14. 5

STATEMENT OF FACTS

Appellant, Eldon Ray Blumhorst ("Blumhorst"), is a decorated Vietnam War veteran who served on the USS Valley Forge during the Vietnam War. (CT 238.) Blumhorst also is a battered husband. (CT 239.) Today he walks with a limp due to a severe assault by his former wife who hurled a coffee table at him, which knocked him to the ground and put him in crutches. (CT 239.) He sought help from social services, but found none that were welcoming to men. (CT 239.)

Blumhorst felt alone, isolated and betrayed, and so he decided to join a non-profit organization that works to raise awareness about battered men and the public neglect they face, the National Coalition of Free Men, Los Angeles ("NCFM-LA"). (CT 239.) NCFM-LA spent years asking the domestic violence community in Los Angeles County to be fair and provide shelter for men and women both, but to little or no avail. (CT 240.) In 2002, NCFM-LA submitted a proposal to Los Angeles County's Domestic Violence Council, largely comprised of shelter directors, for a task force on male victims, but received no response. (CT 240.) (<www.dailybreeze.com/content/opinion/nmangelucci22.html>.)

To date, male victims are forced to travel long distances, one hundred miles each way at times, to receive shelter services at the only shelter in California that accepts men, Antelope Valley Domestic Violence Council ("Valley Oasis"). (CT 236.) Valley Oasis is a state-funded shelter in Lancaster, California that has provided shelter to all victims for over ten years. (CT 166-167, 236.)

One way that NCFM-LA fights discrimination against men is to have individual men volunteer as civil rights testers in public and private institutions and, if discrimination occurs, to refer them to legal sources for advise on possible legal redress to help end the discrimination.[1] (CT 240.) NCFM-LA decided to test state-funded domestic violence shelters to document whether they discriminate against men. (CT 240.) Blumhorst volunteered. (CT 240.)

Around December 9, 2002, Blumhorst called Respondents, who are state-funded shelters,[2] and requested shelter as a domestic violence victim. (CT 240.) They each denied him shelter because he was a man. (CT 240-241.) None of them offered a motel arrangement. (CT 241.)

On March 12, 2003, Blumhorst filed this action for injunctive relief only. (CT 6.) He alleged that he requested shelter services from Respondents, that they each denied him shelter because he was a man, and that Respondents' acts violated Government Code Section 11135 ("Section 11135"), which prohibits state-funded

---

[1] Civil rights testing is accepted by courts to ferret out discrimination, and civil rights testers have standing to sue. (*Kyles v. J.K. guardian Security Services, Inc.* (2000) 222 F.3d 289; *Evers v. Dwyer* (1958) 358 U.S. 202, 204; *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, 373-374; *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 745; see also *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24.)

[2] Respondents receive hundreds of thousands, if not millions, of dollars in grants. (CT at 124-28, 135-41.) At least one of Respondents has been mandated by Los Angeles County to provide limited services to battered men. (County of Los Angeles, Community and Senior Services, "Services to Male Victims of Domestic Violence" (July 3, 2001) **Ex. 1** to Req. for Jud. Notice).

programs from denying services based on gender and provides a private right of action independent of any other rights and remedies. (CT 6-12.)

On July 18, 2003, Respondents demurred, claiming that Blumhorst failed to state a cause of action because Respondents are exempt from Section 11135 pursuant to Government Code Section 11139 ("Section 11139"), which exempts "lawful programs which benefit . . . minorities and women." (CT 38.) They claimed to be "lawful programs benefiting women" because they are funded pursuant to Health and Safety Code Sections 124250 *et seq.*, which provide funds for domestic violence shelter for women but provide no funds for men, and which define "domestic violence" as only being against women. (CT 39.)

At the hearing on July 24, 2003, Blumhorst challenged the constitutional legality of Section 11139 and the State of California's (hereinafter, "State") policy of funding shelter for women but not for men, and argued that the State's interest is to help all victims. (CT 182; RT A3, A-7.) The court said "I am a long way from considering finding something unconstitutional in this case" and

> [i]t may be that the state might be spending money incorrectly. But these Respondents are not breaking the law; they're following the law.

(RT A-7.) The court sustained the demurrers with leave to amend. (RT A-7.)

On August 12, 2003, Blumhorst filed a First Amended Complaint, this time explaining his role as a civil rights tester and also alleging that Respondents did not offer him a motel arrangement. (CT 235.)

On August 27, 2003, Respondents demurred. (CT 251.) Respondents argued, *inter alia*, that they are exempt under Section 11139 because the State funds them as shelters for battered "women." (CT 264-74). They sought judicial notice of their contracts with the State which specifically state that the funding is only to help women and not men. (CT 276, referring to CT 45.)

At the hearing on October 10, 2003, Blumhorst responded by arguing, *inter alia*, that: 1) the discrimination in Section 11139 and the State's funding policies are illegal and violate equal protection (CT 295-297, 300); 2) whether it would "adversely affect" Respondents to provide shelter or a motel arrangement to a male victim is an issue of fact and not to be decided on demurrer (CT 295); and, 3) Respondents must at least provide motel arrangements to men. (CT 295).

The trial court granted Respondents' demurrers without leave to amend, stating, "I believe the shelters are exempt, and I don't see any way around that at this point. I think it – was it 11139 of the Government Code?" (RT 1-B.) Blumhorst asked the court to respond to his equal protection challenges. (RT 2-B.) The court said, "They're exempt under 11139." (RT 2-B.) Blumhorst re-stated his challenges. (RT 2B - 3B.) The court said, "I guess to the extent you're asking me to find it unconstitutional, I'm not doing that." (RT 3-B.)

A final (appealable) judgment entered on November 13, 2003. (CT 323). Notice of Entry of Judgment was served on Blumhorst on December 2, 2003. (CT 327.) Blumhorst appealed. (CT 336.)

SUMMARY OF ARGUMENT

By law, any gender classification in a state action is *presumed invalid* and is subject to strict judicial scrutiny. Respondents' claim of exemption from Section 11135 is based on state actions that employ illegal gender classifications. The State's domestic violence statutes in Health and Safety Code Section 124250 *et seq.* categorically exclude men from any funding and even from the very definition of domestic violence. Likewise, the State's exemption policy in Section 11139 exempts programs benefiting women but not programs benefiting men. These gender classifications are presumed invalid and are subject to strict scrutiny.

In fact, these policies amount to *harmful public neglect.* Men are *frequently* victims of domestic violence. They are often injured. And they need shelter. Yet they must travel hundred of miles for shelter services that are otherwise available to women in their own neighborhoods because the State refuses to include men in its definition of domestic violence. This is a violation of *basic human rights.*

Respondents, who are state-funded, receive hundreds of thousands, in some cases millions, of dollars. They are capable of providing space for male victims. Valley Oasis has done so for more than ten years with no problems.

The very statutes that fund Respondents provide for motel arrangements as a form of shelter services. At minimum, Respondents could provide that to men.

Blumhorst met his burden by pointing out the classifications. He need not do more. Nonetheless, it is clear that the classifications do not pass strict scrutiny.

Strict scrutiny analysis involves two steps. The first step is to ask whether there is a *compelling* government interest. Specificity and precision are required.

If a compelling interest is shown, courts must ask whether the means chosen (i.e. the classifications) are narrowly tailored, i.e. *necessary*, to that interest. The existence of alternatives is *fatal* to the classification.

First, there is no "compelling" interest in protecting only *female* victims of domestic violence. Statistics do not justify suspect classifications. Even if there were only *one* male victim, he would be entitled to equal protection. The fallacy of excluding males because they are (alleged) minority can be seen by applying this policy to others. For instance, 92 percent of occupational deaths occur to men, but a law that excludes women from occupational safety protections would immediately be overturned. Some data shows that Asians comprise only three percent of domestic violence victims, but a law that excludes Asians from protection against domestic violence would likewise be invalidated.

Even *if* numbers mattered, statistics show men are frequently victims of domestic violence, and often *severe* domestic violence, and that they do need shelter. A very recent County of San Diego report on police data shows that at least 26 percent of domestic violence victims who call the police for help are men, and that thousands of male victims of domestic violence seek victims' services every year. A report by the California Research Bureau shows similarly high numbers of male victims. According to official California Attorney General

statistics, female arrests *rose 318.7 percent* between 1988 and 1998 for domestic violence assaults in California, and continue to rise, while male arrests rose 33.7 percent (and that percentage drops each year). A meta-analysis in the November 200 issue of the Psychological Bulletin found that 38 percent of *injured* domestic violence victims are male, that women initiate domestic violence even more often than men do and self defense does not explain the high rate of female violence.

Men also need *shelter*. A report by the California Research Bureau found that one Los Angeles shelter reported even *more* male victims than female victims seeking services. (All the above data is cited in the Argument section herein.)

Second, even if a compelling interest did exist, excluding men from the State's domestic violence policies is not narrowly tailored, i.e. *necessary,* to that interest. Nondiscriminatory alternatives exist. The statutes can provide protection to *all* victims, like New York's statute's do. And an alternative to the gender classification in Section 11139 exists even in its own implementing regulation.

The trial court also improperly decided an issue of fact on demurrer. Whether it would "adversely affect" Respondents to provide shelter, or at least a motel arrangement, to a male victim is an issue of fact, not law. It can depend on a variety of factors. Demurrers only look at issues of law.

The standard of review is *de novo* because the trial court's decision was on a demurrer. (*Ghirardo v. Antonioli* (1994) 8 C4th 791, 799).

The decision should be reversed.

ARGUMENT

I.

ANY GENDER CLASSIFICATION IN A STATE ACTION IS PRESUMED INVALID AND IS SUBJECT TO STRICT SCRUTINY

Any gender classification in a state action is presumed invalid and is subject to strict scrutiny. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 23, 43 (hereinafter, *Connerly*).) A plaintiff challenging a gender classification meets his or her initial burden by merely pointing it out. (*Id.* at 43.)

Equal protection applies to all governmental classifications including legislative, executive, judicial, and administrative. (*Id.* at *32*.) Legislative classification is the act of specifying who will and who will not come within the operation of a particular law. (*Ibid.*)

In *Connerly*, *supra*, a plaintiff challenged numerous statutory schemes that classified individuals based on gender or race. California Community Colleges, for instance, employed gender classifications in employment "for the benefit of women." (*Id.* at 39.) The trial the court invalided the statutes regarding government bonds and state contracting but upheld the other statutes. On review, the Third District Court of Appeal invalidated all the classifications (except data collection/reporting) as violations of equal protection in the Constitutions of California (art. I, § 26) and of the United States (14th amend.). (*Id.* at 57.)

In its analysis, the court first noted that under federal law the United States Supreme Court applies "skeptical" scrutiny to gender classifications and that

"there is a strong presumption that gender classifications are invalid and they must be carefully inspected by the courts." (*Connerly, supra,* at 57.) Even under "skeptical" scrutiny, the burden is "demanding" and "must be exceedingly persuasive." (*Ibid.*)

The court pointed out that, in *California*, gender classifications are subject to *strict* scrutiny.

> It has *now* been held that *all* racial classifications imposed by a governmental entity must be analyzed using the *strict* scrutiny standard of review. And, under our state Constitution, strict scrutiny applies to *gender* classifications. In addition, Proposition 209 imposes additional restrictions against racial and gender preferences and discriminatory practices.

(*Id.* at 28, emphasis added.)

The court said strict scrutiny applies regardless of whether a law is claimed to be benign or remedial. (*Id.* at 35-36.) What matters is that the government draws a line on the basis of a suspect classification. (*Ibid.*)

In 1975, the Fifth District Court of Appeal incorrectly used "rational basis" review to uphold a (former) Penal Code section that penalized the infliction of corporal injury by a husband upon his wife. (*People v. Cameron* (1975) 53 Cal.App.3d 786.) The court did not apply strict or even "skeptical" scrutiny. Its analysis employed terminology such as "rational basis" (*id.* at 793); "rational distinctions or classifications" (*id.* at 794); "distinction reasonably justifying differentiation" (*ibid.*); and, "so long as its judgments are rational" (*Cameron, supra,* at 796). The court also cited 1970s data showing that 93.3 percent of

marital assaults were husband-on-wife, and went on to compare domestic violence to a "prize fight" and made generalizations such as "women are physically less able to defend themselves against their husbands than vice versa" (*Cameron, supra*, at 791) and "the husband's fists are more damaging than the wife's tongue" (*id.* at 792).

In 1994, after the legislature amended said Penal Code section to be gender neutral, an individual challenged the amended statute before the same appellate court on the ground that it did not protect people in same-sex relationships. (*People v. Silva* (1994) 27 Cal.App.4 1160.) The court cited *Cameron* and again applied "rational basis" to uphold the amended statute. (*Id.* at 1170.) The court recognized that "cohabitating partners are in the high risk category for domestic violence," but, by incorrectly applying "rational basis," the court said the mere omission to deal with domestic violence in same-sex relationships did not render the statute "so irrational" as to make it invalid. (*Id.* at 1171.)

Now, however, the law is clear that any gender classification in any State policy is presumed invalid and is subject to *strict* scrutiny.[3] (*Connerly, supra*, at 23, 43.)

---

[3] Moreover, courts can invalidate a state statute even if a state is not a party to the action. (*Mulkey v. Reitman* (1936) 64 Cal.2d 529 (Cal. Const. Art. I, § 26 invalidated as violation of 14th Amendment, state not a party) (aff'd in *Reitman v. Mulkey* (1967) 387 U.S. 369; *see also, City of Los Angeles v. Lewis* (1917) 175 Cal. 777 (Political Code section invalidated); *Reed v. Reed* (1971) 404 U.S. 71 (Idaho Probate Code section invalidated)).

II.

RESPONDENTS' CLAIM OF EXEMPTION IS BASED ON STATE ACTIONS THAT EMPLOY GENDER CLASSIFICATIONS THAT ARE PRESUMED INVALID AND ARE SUBJECT TO *STRICT* SCRUTINY

Section 11135 states:

> No person in the State of California shall, on the basis of . . . sex . . . be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.

Section 11139 states:

> This article shall not be interpreted in a manner that would adversely affect lawful programs which benefit . . . minorities, and women.

Respondents cannot be exempt based on the unconstitutional gender classifications in Health and Safety Code Section 124250 *et seq.* and in Section 11139. These statutes are presumed invalid and are subject to strict scrutiny.

A. THE STATE VIOLATES EQUAL PROTECTION BY FUNDING SHELTER FOR WOMEN BUT NOT FOR MEN

Health & Safety Code Sections 124250 *et seq*. do not pass strict scrutiny.

Strict scrutiny involves two steps. First, courts must ask whether there is a *compelling* government interest. (*Connerly, supra,* at 36.) Specificity and precision are demanded. (*Id.* at 44) Blind deference to legislative or executive pronouncements of a discriminatory classification's supposed necessity has no

place in the analysis. (*Connerly, supra,* at 36.) Nor does it matter if the classification is part of a statutory scheme that is so broad or amorphous that it might be employed in a neutral manner. (*Id.* at 44.)

Also, equal protection is about protecting *individuals,* not groups. (*Id.* at 35.) Statistics alone cannot justify the classification. (*Id.* at 56.)

The second step in strict scrutiny, if a compelling interest is shown, is to ask whether the means chosen are narrowly tailored to the interest. (*Id.* at 34.) The means must be "necessary" to the interest, not just reasonable or efficient. (*Id.* at 37.) If it "is not necessary to the statutory scheme, it may not be employed." (*Ibid.*) The availability of *alternatives* – or the legislature's failure to consider such alternatives – is *fatal* to the classification. (*Ibid.*)

The means must also be "*limited in scope and duration* to that which is *necessary* to accomplish" the goal. (*Id.* at 37, emphasis added.)

Health & Safety Code Sections 124250 *et seq*. cannot pass this analysis.

1. <u>No "compelling" government interest.</u>

The first step in strict scrutiny asks whether there is a *compelling* government interest. (*Connerly, supra,* at 36.) "Specificity and precision" are demanded. (*Id.* at 44) Blind deference to legislative or executive pronouncements of necessity has no place in the analysis. (*Id*. at 36.) Nor does it matter if the classification is part of a statutory scheme that is so broad or amorphous that it might be employed in a neutral manner. (*Id.* at 44.)

In the analysis, **"**[s]tatistical anomalies, without more, do not give a government entity the legal authority to employ racial and gender classifications." (*Id.* at 56.) After all, equal protection protects *individuals*.

> In applying the strict scrutiny test, 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.)

> Any rule, policy or practice which treats men and women differently for purposes of any program or activity on the basis of aggregate statistical characteristics of men or women, whether founded in fact, belief or statistical probability is a discriminatory practice.

(2 Cal. Code of Regs. § 98243.)

No "compelling" government interest has been shown, let alone with "specificity and precision," for protecting only *female* victims. Even if Blumhorst were the *only* male victim of domestic violence in California (he is not), he would still be entitled to equal protection as an individual. There would be no excuse for excluding him as a man. The fallacy of using percentages to justify the exclusion of men from the definition of and protections against domestic violence can be seen by comparing a similar (hypothetical) exclusion based on race or religion. For example, Asians account for approximately three percent of domestic violence victims. (*See* California Research Institute, "The Prevalence of Domestic Violence in California" (November 2002) p. 48, **Ex. 7** to Req. for Jud. Notice.) , Does this justify excluding Asians from the definition of and protections against

domestic violence? Likewise, if Amish people (hypothetically) accounted for a small number of domestic violence victims and were underrepresented compared to their population, this would not justify Respondent's exclusion of Amish people from the definition of and protections against domestic violence.

Indeed, if percentages could justify Respondent's exclusion of men from the definition of protections against domestic violence, then Respondent could also justify the above, and also could exclude women from the definition of and protections against work-related deaths because, for instance, 92 percent of work-related deaths occur to men. (*See* <www.bls.gov/news.release/cfoi.t04.htm>.)

Connerly pointed out that it is a violation of equal protection to assume that members of one gender classification is disadvantaged but not the other.

> [The fact that some individuals must prove disadvantage while others are conclusively presumed to be disadvantaged based solely on race, ethnicity, and gender, establishes impermissible race, ethnicity, and gender classifications.

(*Connerly, supra,* at p. 48.)

Just as it was illegal, in *Connerly*, to assume women were disadvantaged and men were not, it is illegal here to assume all men are not victims of domestic violence (or that they don't need shelter, funding, motel arrangements and other protective provisions). Indeed, a number of female victims do not need such

protections and are entitled to them under the statutes, while all men are excluded whether they need such protections or not.

Even if numbers mattered, statistics show that men are frequently victims of severe domestic violence and they do need shelters.[4]

At the federal level, the United States Department of Justice in 1998 announced that:

> [A]pproximately 1.5 million women and 834,732 men are raped and/or physically assaulted by an intimate partner annually in the United States.

(U.S. Department of Justice, "Violence Against Women Survey" (1998) <www.ncjrs.org/txtfiles1/nij/181867.txt>.)

Thus, the division of the federal government which is officially charged with tracking domestic violence statistics has declared that males compose approximately 36 percent, or well over one third, of the victims.

In California, female arrests for domestic violence *rose 318.7 percent* between 1988 and 1998, and is steadily rising (male arrests rose 33.7 percent, a figure that is dropping). (California Attorney General, Bureau of Criminal Justice Information and Analysis, "Report on Arrests for Domestic Violence in California," August 1999, v. 1, n. 3, pp. 4, 9, **Ex. 2** to Req. for Jud. Notice.)

---

[4] Even *Cameron*, as far back as *1975*, in its "rational basis" analysis, advised the legislature to recognize the growing "modern trend of greater independence and assertiveness on the part of the female" (*Cameron*, *supra*, at 794). Since that time, statistics increasingly show a markedly different picture than that which *Cameron* observed.

San Diego County's Office of Violence Prevention recently announced that twenty sex percent of domestic violence victims who called police for help between July 2002 and June 2003 were *men*. (San Diego County Office of Violence Prevention, "Domestic Violence Comprehensive Plan Findings, March 19, 2004, p. 6a, **Ex. 3** to Req. for Jud. Notice.) And that is only reported violence. Randomized surveys show even higher numbers. "Over the last twenty-five years, leading sociologists have repeatedly found that men and women commit violence at similar rates." (Linda Kelly, "Disabusing the Definition of Domestic Abuse: How Women Batter Men and the Role of the Feminist State," 30 Florida State University Law Review 791, 792 (2003), **Ex. 4** to Req. for Jud. Notice, <www.law.fsu.edu/journals/lawreview/downloads/304/kelly.pdf>.)

To illustrate, California State University maintains an online bibliography summarizing 150 scholarly investigations, with an aggregate sample size of over 100,000, finding that "women are as physically aggressive, or more aggressive, than men in their relationships with their spouses or male partners. (CT at 171; <www.csulb.edu/%7Emfiebert/assault.htm>, **Ex. 5** to Req. for Jud. Notice.)

One such study is a meta-analysis published in the November 2000 issue of the Psychological Bulletin, a journal of the American Psychological Association. After examining all relevant data, the meta-analysis found:

> Women were slightly more likely (d = -.05) than men to use one or more act of physical aggression and to use such acts more frequently. Men were more likely (d = .15) to inflict

> injury, and overall, 62% of those injured by a partner were women.

(John Archer, Ph.D., Psychological Bulletin, "Sex Differences in Aggression Between Heterosexual Partners: A Meta-Analytic Review" (September 2000) v. 126, n. 5, 651, pp. 651, 689, **Ex. 6** to Req. for Jud. Notice.) Thus, 38 percent of *injured* domestic violence victims were *men*. The meta-analysis also found self-defense does not explain most violence committed by women. (*Id.* at 664.)

Men also need *shelter* services. In fact, an official report by the California Research Bureau found that one Los Angeles shelter recently reported *more* male domestic violence victims than female. (Cal. Research Institute, "The Prevalence of Domestic Violence in California" (November 2002) p. 14, **Ex. 7** to Req. for Jud. Notice, <www.library.ca.gov/crb/02/16/02-016.pdf>.)

The same California Research Bureau report also found:

- From July 1, to May 31, 2002, in the victim compensation program, *2,936 primary domestic violence claimants were male* (9,898 female). (*Id.* at p. 53).
- In San Diego County in 1996, *18 percent* of domestic violence victims were male and 82 percent were female, while 82 percent of suspects were male and 18 percent were female. (*Id.* at p. 48).
- From 1988 to 2000, women went from 6 percent to 18.2 percent of domestic violence arrestees (men went from 94 percent to 81.8 percent). (*Id.* at p. 41).

- In 2000, out of 147 homicides with domestic violence as a precipitating event, 22 of the victims were husbands and 72 were wives; 8 were boyfriends and 32 were girlfriends; 1 was an ex husband and 0 were ex wives. (*Id.* at p. 45).
- In 2000, 9,340 women and 41,885 men were arrested for domestic violence. (*Id.* at p. 40).

The American Medical Association ("AMA") "recognizes that men also are among the victims of intimate violence" and

> *urges* hospitals, community mental health agencies, and other helping professionals to develop appropriate interventions for *all* victims of intimate violence. Such interventions might include . . . *shelters*.

(AMA, "Violence Toward Men: Fact or Fiction?" (1994), p. 7, <http://www.ama-assn.org/ama/pub/print/article/2036-2559.html>, emphasis added.)

In 1999, the Department of Emergency Medicine of the Hospital of the University of Pennsylvania surveyed male patients in the emergency room for a 13-week period and found that 12.6 per of them had been victims of domestic violence committed by a female intimate partner within the preceding year, of which 37 percent involved a weapon, 46.8 percent had an object thrown at them, and 19 percent called police for help. (Dept. Emergency Medicine, Hospital of the University of Pennsylvania, Academic Emergency Medicine, "History of Domestic Violence among Male Patients Presenting to an Urban Emergency Department" (June 1999), v. 6, n. 8, pp. 786-791, <www.aemj.org/cgi/content/abstract/6/8/786>, **Ex. 8** Req. for Jud. Notice.)

Not only is *Cameron's* 93 percent statistic outdated, but its generalizations and its "prize fight" analogy are flawed. Domestic violence is not like a "prize fight." In sharp contrast to prize fights, cohabitating couples have countless opportunities to surprise and even ambush their partners, and to use objects or weapons to equalize size differences.

> *Women were found to be twice as likely to throw something at their husbands.* Wives were also more likely than husbands to kick, bite and punch. 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 Fla. St. U. L. Rev. at 798, emphasis added.)

> There are, of course, hundreds of men killed each year by their partners. At a minimum, one-fourth of the men killed have not used violence towards their homicidal partners. Men have been shot, stabbed, beaten with objects . . . . Battered men face a tragic apathy . . . . 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 . . . . *For men, there still is no place to go and no one to whom to turn.*

(Richard Gelles, CT at 175, emphasis added.)

Other factors can come into play as well. Many men are raised not to hit women. Many men aptly fear the consequences of arrest if they strike back. And some men *are* of equal or lesser size and/or strength than their female partners. Indeed, women today are increasingly involved in professional sports. To assume they cannot inflict harm on a man is extremely misguided. And, many men are in same-sex relationships with a partner who often is of equal or larger size.

Generalizing about average size or strength by gender is no excuse for denying protection to an entire class of victims because of their gender. Such policies are "by their very nature odious to a free people who institutions are founded upon the doctrine of equality." (*Connerly, supra,* at 34.) And the consequences are severe. For example, in California, men are forced to "travel very long distances," "100 miles each way at times," for shelter. (Decl. of Patricia Overberg, former Valley Oasis director, CT at 166.) This is simply *wrong.*

The most vulnerable victims of this discrimination are males who are disabled, unemployed, undocumented, or fathers who do not want to leave their children at home with an abusive partner but who have no place to bring them.

> 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,* 30 Fla. St. U. L. Rev. at 851.)

The discrimination even *fosters* violence by leaving many males with no place to go and discouraging them from seeking help, which can escalate violence.

> [W]hen well-established, partner abuse is very hard to stop. Thus, actions are needed to prevent and deescalate physical aggression by women and men in its early stages. . . . The need to address physical aggression in intimate relations by *both men and women is now inescapable.*

(Archer, *supra,* at 689, emphasis added.)

The discrimination also fosters the intergenerational cycle of violence by increasing *children's* exposure to the violence. Studies show exposure of children

to domestic violence between their parents increases children's chances of engaging in domestic violence later in life. For example, the chances that a woman will abuse her child increased every time she saw her mother assault her father. (Richard E. Heyman and Amy M. Smith Slep, "Do Child Abuse and Interparental Violence Lead to Adulthood Fam. Violence?" (November 2003) J. of Marriage & Fam., v. 64, issue 4, pp 864-70, **Ex. 9** to Req. for Jud. Notice.)

Even the U.S. Army now recognizes the serious problems that result from neglecting males in domestic violence policies. (Special Report, "Army ahead of society in addressing abuse" (November 2003)[5] **Ex. 10** to Req. for Jud. Notice.)

The current legal trend is to move away from stereotypical classifications by gender.[6] As the California Supreme Court has said:

> Men and women alike suffer from the stereotypes perpetrated by sex-based differential treatment [Citations.] 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, at once the most respected and most feared of social institutions, continue to 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

[5] <http://tradoc.monroe.army.mil/casemate/archive/nov03/abuse1107.htm>

[6] California Code of Regulations, Title 5, Section 4910(k) even defines "gender" to include one's "perceived sex."

> legal as well as social institutions, society as a whole remains less than it could otherwise become.

(*Koire, supra,* 40 Cal.3d at 34-35.)

It is constitutionally imperative that California's domestic violence policies also eschew outdated, discriminatory gender classifications. *All* people need protection, and no victim should be denied equal protection because of gender.

2. <u>Not narrowly tailored.</u>

The second step in strict scrutiny analysis, if a compelling interest is shown, asks whether the chosen means are narrowly tailored to the interest.

> 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. [Citations.] Only the most exact connection between justification and classification will suffice. [Citations.] 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. [Citations.] In addition, the use of a racial classification must be *limited in scope and duration* to that which is *necessary* to accomplish the legislative purpose. For example, in *Wygant,* it was asserted that a school board's interest in providing role models for its minority students could justify a race-based layoff scheme. The plurality opinion noted that nondiscriminatory hiring practices would in time achieve the desired result, while nondiscriminatory practices based upon the role model theory would have no logical stopping point and could even lead to the thoroughly discredited separate-but-unequal educational system. [Citations.]

(*Connerly, supra,* at 37, citing *Wygant v. Jackson Bd. of Educ.* (1986) 476 U.S. 267.)

Even if there were a "compelling" government interest in protecting only *female* victims of domestic violence (there is not), the State's policy of excluding victims based on gender is not "narrowly tailored," i.e. *necessary*¸ to the interest. *Nondiscriminatory* alternatives exist. The State's statutes can provide funds for shelters that include *all* victims. For example, compare Health and Safety Code Sections 124250 *et seq.* to New York's Domestic Violence Prevention Act.

Health and Safety Code Sections 124250 *et seq.* state:

> (a) . . . (1) "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 . . . . that propose to maintain shelters or services previously granted funding pursuant to this section, to expand existing services or create new services, and to establish new battered **women's** shelters to provide services, in any of the following four areas: (1) Emergency shelter to **women** and their children escaping violent family situations. (2) Transitional housing programs to help **women** and their children find housing and jobs so that they are not forced to choose between returning to a violent relationship or becoming homeless. . . . The programs may offer up to 18 months of

> housing, case management, job training and placement, counseling, support groups, and classes in parenting and family budgeting. (3) Legal and other types of advocacy and representation to help **women** and their children pursue the appropriate legal options. (4) Other support services for battered **women** and their children.

(Health & Safety Code, §§ 124250 *et seq*., emphasis added.)

Now compare New York's Domestic Violence Prevention Act:

> 1. "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 or children in 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 or have created a substantial risk of physical or emotional harm to such **person** or such **person's** child; and (ii) such act or acts are or are alleged to have been committed by a family or household member . . . . 4. "**Residential program for victims of domestic violence**" means any residential care program certified by the department and operated by a not-for-profit organization in accordance with the regulations of the department for the purpose of providing emergency shelter, services and care to **victims** of domestic violence. **Residential programs** for **victims** of domestic violence shall include, but shall not be limited to: (a) "**Domestic violence shelters**," which shall include any residential care facility organized for the exclusive purpose of providing emergency shelter, services and care to **victims** of domestic violence and their minor children, if any; (b) "**Domestic violence programs**" which shall include any facility which otherwise meets or would meet the requirements of paragraph (a) of this subdivision, except that **victims** of domestic violence and their minor children, if any, constitute at least seventy percent of the clientele of such program; and (c) "**Safe home networks**" which shall include any organized network of private homes offering emergency shelter and services to **victims** of domestic violence and their minor children, if any. Such network shall be coordinated by a not-for-profit organization

(55 New York Consolidated Statutes § 459(a), **Ex. 11** to Req. for Jud. Notice, emphasis added.)

The New York statutes demonstrate that a nondiscriminatory alternative exists. Like in *Wygant,* where the layoff scheme's goal of providing minority role models could be accomplished through non-discriminatory means, here, any goal of preventing domestic violence or even protecting *female* victims can be accomplished through *nondiscriminatory* means as well. This fact alone is *fatal* to the gender classifications in Health and Safety Code Sections 124250 *et seq.*

Equally fatal to the State's classifications is the fact that the State has not even considered alternatives; Health and Safety Code Sections 124250 *et seq.* contain no consideration of alternatives to its categorical exclusion of men.[7]

Moreover, the gender classifications in Health & Safety Code Sections 124250 *et seq*. are not "limited in scope and duration," as required by *Connerly.* Instead, like in *Wygant,* they have "no logical stopping point." There is no time limit after which the classifications expire. Nor is there any goal which, once attained, would end the exclusionary classifications.

Invalidating the gender classifications in Health & Safety Code Sections 124250 *et seq.* would not stop state-funded shelters from helping women. It would only provide that the government funds be used to help *all* victims.

[7] Even if the statutory scheme contained generalizations about gender, it still would not justify the equal protection violation; as *Connerly* points out, "[b]lind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis . . . ." (92 Cal.App.4th at 36).

> Even if it is conceded that battered women may have a greater need for shelter space than battered men, such concession does not mandate that both the services and the space provided by a battered women's shelter cannot be utilized to accommodate battered men. *Existing space is often already partitioned in such a way to give families separate living quarters. Future space can be built to better accommodate men.* Yet, perhaps most importantly, as is recognized in the support of domestic violence shelters, shelters provide more than a place of physical safety. Domestic violence shelters offer 'hope, support, and counseling specifically targeted to the victims of domestic violence.' *Such an offer should be as readily made to battered men as it is to battered women.*

(Kelly, *supra,* 30 Fla. St. U. L. Rev. at 851, emphasis added.)

B. SECTION 11139 VIOLATES EQUAL PROTECTION

Section 11139 states:

> This article shall not be interpreted in a manner that would adversely affect lawful programs which benefit . . . minorities**,** and women**.**

Again, Blumhorst met his burden by merely pointing out this classification. He need not show anything further. Nonetheless, the gender classification in Section 11139 does not pass strict scrutiny.

1. No "compelling" government interest

There is *no* "compelling" government interest in exempting only programs benefiting women but not programs benefiting men in Section 11139. Its broad-sweeping classification protects only members of a particular gender. No justification has been shown for this, let alone with "specificity" and "precision."

In fact, the classification in Section 11139 is even broader than those in *Connerly*. For instance, in *Connerly*, California Community Colleges at least had a detailed scheme (however invalid) for laying off individuals based on gender. In contrast, the classification in Section 11139 broadly exempts *all* "lawful programs which benefit . . . (minorities and) women" while excluding *any* lawful program which benefits males (or non-minorities).

For the same reasons shown above for Health & Safety Code Sections 124250 *et seq*., there is no "compelling" government interest in only exempting programs benefiting women but not programs benefiting men.

2. <u>Not narrowly tailored</u>

Even if a "compelling" interest did exist, the chosen means (i.e. excluding males from the exemption) are not "narrowly tailored," i.e. *necessary*, to that interest. Again, nondiscriminatory alternatives exist. In fact, a nondiscriminatory alternative is found in the very regulation that implements Section 11139, namely California Code of Regulations, Title 2, Section 98102:

> The provisions of Section 98101 are not intended: (a) to limit, by the enumeration of specific forms of prohibited discrimination, the general prohibition against discrimination set forth in Section 98100; (b) to adversely affect lawful programs which benefit persons of a particular ethnic group . . . sex . . . color . . . 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; . . . .

This regulation leaves no question that a nondiscriminatory alternative exists to the gender classification in Section 11139, and therefore that said

classification is not "necessary." This fact alone is *fatal* to the classification. Also fatal is the fact that the legislature did not consider alternatives in Section 11139. There is no record of the legislature considering alternatives to the classification.

The classification in Section 11139 is also not "limited in scope and duration" as required by *Connerly*. Instead, like in *Wygant, supra,* it has "no logical stopping point." There is no time limit after which the classification expires. Nor is there any goal which, once attained, would end the classification.

The regulations implementing Sections 11135 and 11139 even recognize that portions of the scheme may be invalidated and state that in such a case the remainder of the scheme is still valid:

> If any provision of this Division, or any portion thereof, is adjudged to be invalid . . . that judgment does not affect the remainder of the provisions of this Division.

(Cal. Code Regs. Tit. 2, § 98009).

III.

THE COURT IMPROPERLY DECIDED A FACTUAL ISSUE ON DEMURRER

The trial court erred in holding, on demurrer, that providing shelter (or a motel arrangement) to a male victim would "adversely affect" Respondents per Section 11139. This is a disputed issue of fact, not law.

A demurrer only looks at issues of law. (*Mechanical Contractors v. Greater Bay Area Ass'n*. (1998) 66 Cal.App.4th 672, 677.)

Whether providing shelter or motel arrangements to a male victim would "adversely affect" Respondents can depend on factors such as a facility's size, layout, and revenue. It can also hinge on whether providing shelter to males is in fact so difficult to do (Valley Oasis has done so for years with no problems).

Patricia Overberg, Valley Oasis' director of eight years, says "female residents never had a problem with this practice [of sheltering male victims and even mixing genders as needed]." (CT 166.) Yet she was still "subjected to continuous abuse by other directors for sheltering battered men." (Ct 166.)

Even if, *arguendo*, the gender classifications were constitutionally valid (they are not), the trial court still improperly decided an issue of fact on demurrer.

IV.

RESPONDENTS CAN PROVIDE MOTEL ARRANGEMENTS

Health and Safety Code Section 124250(a)(2), which is part of the State's statutory scheme that funds Respondents' services, provides that motel arrangements are a form of shelter-based services. The City of San Pedro has provided motel arrangements to male victims. (CT 169.)

Motel arrangements "do not provide the safety and the emergency counseling that is imperative for victims within the first 24 hours of a 911 domestic violence call." (CT 169.) However, if Respondents insist on denying their state-funded services to male victims, they can at least offer a motel arrangement to the men they reject. Their failure to do so violates Section 11135.

CONCLUSION

The trial court's decision should be reversed.

Dated: October 9, 2004 LAW OFFICE OF MARC E. ANGELUCCI

By: _____
Marc E. Angelucci, Esq.
Attorney for Appellant,
Eldon Ray Blumhorst

WORD COUNT CERTIFICATION

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

Dated: _____ LAW OFFICE OF MARC E. ANGELUCCI

By: _____
Marc E. Angelucci, Esq.
Attorney for Appellant,
Eldon Ray Blumhorst