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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 COUNTY OF SACRAMENTO

9 DAVID WOODS; GREGORY BOWMAN;
10 PATRICK NEFF; AND RAY BLUMHORST,

11 Plaintiffs/Petitioners,

12 v.

13 STATE OF CALIFORNIA; SANDRA
14 SHEWRY, in her official capacity as director of
15 CALIFORNIA DEPARTMENT OF HEALTH
16 SERVICES; CALIFORNIA DEPARTMENT OF
17 HEALTH SERVICES; HENRY RENTERIA, in
18 his official capacity as director of CALIFORNIA
19 OFFICE OF EMERGENCY SERVICES;
20 CALIFORNIA OFFICE OF EMERGENCY
21 SERVICES; CALIFORNIA DEPARTMENT OF
22 CORRECTIONS; JEANNE S. WOODFORD, in
23 her official capacity as director of CALIFORNIA
24 DEPARTMENT OF CORRECTIONS; AND
25 DOES 1 - 90,

26 Defendants/Respondents,
27 Real Parties in Interest.

CASE NO.: 05CS01530

**PETITIONERS' OPENING BRIEF IN
SUPPORT OF PETITION FOR WRIT OF
MANDATE**

Date: December 8, 2006

Time: 1:30 p.m.

Location: Dept. 33

Hon.: Lloyd G. Connelly

Action Filed: October 28, 2005

Trial Date: None Set

28 *"The illegal we do immediately. The unconstitutional takes a little longer."*

-- Henry Kissinger

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1 **I. INTRODUCTION**

2
3 **Equal Protection is a *basic human right*. Governmental and statutory sex discrimination**
4 **is *unconstitutional*.** Cal. Const., Art. I, §§ 7(a), 31. **“Public policy in California mandates the**
5 ***equal treatment of men and women.*”** *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37 (italics in
6 original; bold added). Accordingly, in California, statutory gender classifications are *presumed invalid*
7 and subject to *strict scrutiny*. *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 44. And the
8 availability of non-discriminatory alternatives is *fatal* to the classifications. *Id.*, at 37.
9

10 Former California Chief Justice Rose Bird, speaking for the California Supreme Court, stated:

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

23 *Koire, supra*, at 34-35 (emphasis added).

24 Nonetheless, with notable disregard for the constitutional rights of men and their children,
25 Respondents, State of California (“California”), California Department of Health Services (“CDHS”),
26 Sandra Shewry or current director of CDHS (“Shewry”), California Office of Emergency Services
27 (“COES”), Henry Renteria or current director of COES (“Renteria”), California Department of
28 Corrections (“CDC”), and Jeanne S. Woodford or current director of CDC (“Woodford”), illegally
enacted and implement the sexist, gender-discriminatory classifications in the following statutes:

1 (1) Health and Safety Code Section 124250 and Penal Code Sections 13823.15(f)(14)(A) and
2 13823.16 contain domestic violence provisions only for women but not for men and their children;

3 (2) Penal Code Sections 1174-1174.9 and 3411-3424 provide programs and services for
4 incarcerated mothers and their children but not for incarcerated fathers and their children; and

5 (3) Government Code Section 11139 exempts programs benefiting women, but not programs
6 benefiting men, from the ban on sex discrimination in state-funded programs and activities.
7

8 Respondents admit the above statutes employ gender classifications. Further, California and
9 CDHS admit they implement Health and Safety Code Section 124250 according to the gender
10 classifications therein, and California and CDC admit they implement Penal Code Sections 1174-
11 1174.9 and 3411-3424 according to the gender classifications therein, *i.e., in a discriminatory manner.*
12

13 By law, these classifications are *presumed invalid* and subject to *strict scrutiny*, and *the burden*
14 *is on Respondents* to prove they meet strict scrutiny, *i.e.*, that they are *necessary* to a compelling
15 government interest and that no non-discriminatory alternatives exist. They cannot meet this burden.
16

17 First, Equal Protection protects *individuals*, not groups, so even if the classifications only
18 affected *one* man, they would still be illegal. Second, non-discriminatory alternatives exist, which are
19 automatically *fatal* to the classifications. Third, even *if* statistics mattered, the classifications still
20 would not meet strict scrutiny, because the statistics show *tens of thousands* of men are affected by the
21 classifications, or would be to the extent such classifications are implemented.
22

23 Regarding domestic violence, Petitioners submit herewith sworn declarations from leading
24 domestic violence experts, and official crime data, establishing the extremely high frequency and
25 severity in which men are victims of domestic violence and need services, and how the invisibility of
26 and denial of services to male victims is a serious social problem that is harming male victims and
27 *their children* and is *causing* domestic violence by fueling its intergenerational cycle.
28

1 Regarding incarcerated fathers, Petitioners submit evidence showing, *inter alia*, that: (1) there
2 are far more incarcerated fathers than incarcerated mothers in California *even* when looking only at
3 parents whose minor children are not cared for by another parent; (2) regardless of whether the child is
4 being cared for by another parent, maintaining relations between a child and his/her incarcerated
5 parent – whether mother or father - is critically important for the child’s psychological well-being,
6 reduces recidivism, keeps families intact, and improves the behavior of the parent while incarcerated.
7

8 Further, Petitioners also submit proof that non-discriminatory alternatives for the gender
9 classifications in the above statutes are available. That *alone* is fatal to the classifications.

10 There is simply no justification whatsoever for the sexist and discriminatory gender
11 classifications in the above statutes, *or* for Respondents’ discriminatory implementation of the same.
12 These classifications clearly treat men and fathers as second-class victims or parents. The only reason
13 the classifications still exist is that “men do not speak up, organize, or publicize, so biases against
14 women are eliminated and biases against men remain.” (Warren Farrell, Ph.D., "The Myth of Male
15 Power; Why Men Are The Disposable Sex,” Simon & Schulster (2003).)
16

17 Therefore Petitioners, David Woods (“Woods”), Patrick Neff (“Neff”), Gregory Bowman
18 (“Bowman”) and Ray Blumhorst (“Blumhorst”), as citizens, taxpayers and/or aggrieved persons,
19 petition for a writ of mandate and for injunctive and declaratory relief, ordering, and do now order,
20 that: (1) said statutory gender classifications are illegal; (2) said statutes must apply to both sexes; (3)
21 Respondents must not implement said statutes according to said classifications or deny equal treatment
22 to men; and (4) Respondents must order recipients of funds under said statutes to treat men and
23 women equally.
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1 **II. PETITIONERS HAVE STANDING TO PETITION FOR WRIT OF MANDATE**
2 **AND TO SEEK INJUNCTIVE AND DECLARATORY RELIEF**

3
4 **A. Petitioners Have Standing As Taxpayers, Citizens and Persons Aggrieved.**

5 Taxpayers or citizens may petition for writ of mandate to enforce a public duty or prevent the
6 illegal expenditure of public funds, *without showing special damages*. Code Civ. Proc. § 526(a);
7 *Connerly*, at 29; *Green v. Obledo* (1918) 29 Cal.3d 126, 144. In fact, they may challenge a statutory
8 suspect classification *even if it is not implemented*. *Connerly*, at 31, 49. “while administrative
9 interpretation may save an ambiguous statute, it cannot cure a facially invalid one.” *Id.*, at 49.
10

11 A taxpayer plaintiff must be: (a) a resident of the public entity, or a corporation; and (b)
12 assessed for and liable to pay taxes to the entity or have paid such taxes within the past year. Code
13 Civ. Proc. § 526(a); *Connerly*, at 23. Taxpayer and citizen suits are so closely related that, where
14 standing appears under either one, the action may proceed regardless of the label used. *Connerly*, at
15 29; *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 439.
16

17 In the instant case, Blumhorst and Bowman reside in California, and, in the 12 months prior to
18 the filing of this action, were assessed for, liable to pay, and have paid, taxes, including ad valorem
19 taxes, to California. In addition, all Petitioners are citizens of California, and are concerned about the
20 illegal acts and laws challenged herein. Further, Woods, Neff and Bowman were aggrieved by the
21 discriminatory laws and acts challenged herein when they were denied state-funded domestic violence
22 services based on their gender, and they are likely to need services again. Therefore, Petitioners have
23 standing to challenge Respondents’ illegal laws and acts.
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3 **B. Writ of Mandate**

4 Code of Civil Procedure Sections 1084–1097 govern writs of mandate. **A writ of mandate**
5 **can be used to test the constitutional validity of a statute.** *Connerly*, at 30-31; *Floresta, Inc. v. City*
6 *Council* (1961) 190 Cal.App.2d 599, 612. Mandate may also be used to enforce the nondiscretionary
7 duty of administrative agencies, corporations, or their officers. *Timmons v. McMahon* (1991) 235
8 CA3d 512, 517-518; Code Civ. Proc. § 1085. A writ of mandate requires: (1) a clear, present duty on
9 the part of the defendant, and; (2) a clear, present and beneficial right in the petitioner to the
10 performance of that duty. *Henneberque v. City of Culver City* (1983) 147 Cal.App.3d 250, 253.

11 Although a plaintiff seeking a writ of mandate ordinarily must show an interest in the outcome
12 (Code Civ. Proc. § 1086), **no such interest is necessary where the writ seeks enforcement of public**
13 **rights and duties.** "It is sufficient that he is interested as a citizen in having the laws executed and the
14 duty in question enforced." *Green, supra*, at 144. Moreover, even if an adequate alternative legal
15 remedy exists, a writ of mandate may still be granted where the issue presented is of great public
16 importance requiring prompt resolution and/or constitutional rights are implicated. *Anderson v.*
17 *Super.Ct.* (1989) 213 CA3d 1321, 1328; *Silva v. Superior Ct.* (1993) 14 CA4th 562, 573.

18
19 In the instant case, writ of mandate is proper. First, as Respondents admit,¹ they have a clear
20 and present duty to abide by California’s laws and Constitution. Second, this Petition seeks the
21 enforcement of public rights/duties and presents issues of great public importance requiring prompt
22 resolution and implicating constitutional rights. (See Declarations and law review articles filed
23 herewith; Decl. of Marc E. Angelucci; Petitioners’ Request for Judicial Notice (“RFJN”); First
24 Biennial Report, New Hampshire Commission on the Status of Men (Nov. 1, 2005), RFJN, Exh. “I.”)

25
26 _____
27 ¹ Respondents’ Answer (“Answer”) to Second-Amended Complaint/Petition, ¶¶ 26, 30, 34, 50, 54, 58, 62, 67, 71, 75, 79
28 83, 87, 91, 96, 101, 106 and 111.

1 Third, although the public interest nature of this action abrogates any requirement that
2 Petitioners show a special interest in its outcome, Petitioners, as taxpayers, citizens and/or aggrieved
3 persons, *do* have such an interest and also have a clear, present right in the enforcement of
4 Respondent’s public duty to uphold California’s law and Constitution. *Connerly*, at 23, 29, 30-31, 49;
5 *Green, supra*, 29 Cal.3d at 144; *Anderson, supra*, at 1328; *Silva, supra*, at 573; *Floresta, supra*, at 612.
6 Finally, although it is not necessary that Petitioners show there is no adequate alternative legal remedy,
7 there nonetheless is no such adequate alternative remedy. Therefore, Petitioners have standing to
8 petition for writ of mandate, and to seek injunctive and declaratory relief, challenging Respondents’
9 illegal statutory gender classifications and acts.
10
11

12 **C. Injunctive and Declaratory Relief**

13
14 Given the seriousness and magnitude of the matters raised herein, the requirements for
15 injunctive/declaratory relief, including equitable balance and likelihood of continued harm, are met.
16

17 **III. IN CALIFORNIA, STATUTORY GENDER CLASSIFICATIONS** 18 **ARE PRESUMED INVALID AND SUBJECT TO STRICT SCRUTINY,** 19 **AND THE AVAILABILITY OF NON-DISCRIMINATORY** 20 **ALTERNATIVES IS FATAL TO THE CLASSIFICATIONS.**

21 The California Constitution states: “A person may not be ... denied equal protection of the
22 laws.” Cal. Const., art. I, § 7(a) (“Equal Protection”). The goal of Equal Protection is to “completely
23 eliminate” all forms of irrelevant suspect classifications. *Connerly*, at 44.
24

25 **“Public policy in California mandates the *equal* treatment of men and women.”** *Koire,*
26 *supra*, at 37 (bold added, italics in original). Accordingly, in California, statutory gender
27 classifications are *presumed invalid* and subject to *strict scrutiny*. *Connerly*, at 44.
28

1 *Connerly* states:

2 **[U]nder our state Constitution, strict scrutiny applies to gender**
3 **classifications.** In addition, Proposition 209 imposes additional restrictions
4 against racial and gender preferences and discriminatory practices.

5 *Connerly*, at 28 (emphasis added).

6 *Connerly* further states:

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

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

13 Gender classifications are presumed invalid even if applied in a neutral manner. *Id.*, at 44, 49.
14 “While administrative interpretation may save an ambiguous statute, it cannot cure a facially invalid
15 one.” *Id.*, at 49. A statute need not confer a preference to trigger strict scrutiny. *Id.*, at 44-45.

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

19 A plaintiff challenging a statutory gender classification meets its initial burden by merely
20 *pointing out* the classification, and the burden then shifts to the government to prove the classification
21 meets strict scrutiny review. *Id.*, at 44-45. Specificity and precision are required. *Id.*, at 36.

22 Strict scrutiny requires two steps. First, there must be a compelling government interest. *Id.*,
23 at 36-38. Second, the classification must be narrowly tailored, *i.e. necessary*, to that interest. *Id.* at 37.
24 If the classification “is not necessary to the statutory scheme, it may not be employed.” *Ibid.* The
25 availability of non-discriminatory alternatives, *or* the legislature’s failure to consider such alternatives,
26 is *fatal* to the classification. *Ibid.*

1 Connerly states:

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

9 Connerly, at 37 (emphasis added).

10 Moreover, “in applying strict scrutiny, it must be remembered that the rights created by the
11 equal protection clause are not group rights; they are personal rights which are guaranteed to the
12 individual.” *Id.*, at 35; see also *id.* at 38, 51. Blind deference to legislative or executive
13 pronouncements of a classification’s necessity has no place in strict scrutiny analysis. *Id.*, at 36.

14 Courts can “judicially reform” an invalid statute to maintain its clearly-articulated purpose.

15 *Kopp v. Fair Political Practices Comm’n* (1995) 11 Cal.4th 607. As *Kopp* stated:

16 A court may reform a statute to satisfy constitutional requirements if it can
17 conclude with confidence that (i) it is possible to reform the statute in a manner
18 that closely effectuates policy judgments clearly articulated by the enacting body,
19 and (ii) the enacting body would have preferred such a reformed version of the
20 statute to invalidation of the statute.

21 *Id.*, at 615.

22 **IV. THE GENDER CLASSIFICATIONS IN HEALTH AND SAFETY CODE
23 SECTION 124250 AND PENAL CODE SECTIONS 13823.15(f)(14(A) AND
24 13823.16 ARE INVALID.**

25 **A. The Statutes Employ Gender Classifications.**

26 Health and Safety Code Section 124250 states, in part:

27 "Domestic violence" means the infliction or threat of physical harm against past
28 or present adult or adolescent female intimate partners, and shall include physical,

1 sexual, and psychological abuse against the woman, and is a part of a pattern of
2 assaultive, coercive, and controlling behaviors directed at achieving compliance
3 from or control over, that woman. (2) "Shelter-based" means an established
4 system of services where battered women and their children may be provided safe
5 or confidential emergency housing on a 24-hour basis, including, but not limited
6 to, hotel or motel arrangements, haven, and safe houses. (3) "Emergency shelter"
7 means a confidential or safe location that provides emergency housing on a 24-
8 hour basis for battered women and their children. (b) The Maternal and Child
9 Health Branch of the State Department of Health Services shall administer a
10 comprehensive shelter-based services grant program to battered women's shelters
11 pursuant to this section. (c) The Maternal and Child Health Branch shall
12 administer grants . . . to battered women's shelters

13 (Emphasis added.)

14 Penal Code Section 13823.15(f)(14)(A) is part of a statutory scheme that provides programs,
15 services and other provisions for domestic violence victims and defines "domestic violence" as:

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

20 (emphasis added.) California and COES admit said statute employs gender classifications.²

21 Penal Code Section 13823.16 creates a domestic violence advisory council and requires at least
22 one-half of the council consist of "battered women service providers" (Emphasis added.) California
23 and COES admit said statute employs gender classifications.³

24 Therefore, the gender classifications therein, and California's and CDHS's implementation of
25 the classifications in Health and Safety Code Section 124250, are *presumed invalid* and subject to
26 *strict scrutiny*. *Connerly*, at 23, 43. The burden is on Respondents to prove with specificity and
27 precision that strict scrutiny is met. *Id.*, at 43-44. Otherwise, said classifications and acts violate
28 California Constitution, Art. I, Sections 7(a) and 31. Respondents cannot meet this burden.

² See California/COES Responses to First Set of Request for Admissions, 4:26-5:4, Angelucci Decl., Exh. "C."

³ See, *Id.*, at 5:6-10.

1 **B. California, CDHS, and Shewry Implement Health and Safety Code Section**
2 **124250 According To The Gender Classifications Therein, and California,**
3 **COES and Renteria Implement Penal Code Sections 13823.15(f)(14)(A) and**
4 **13823.16.**

5 Respondents, California, CDHS and Shewry enacted, implement, enforce, administer and
6 spend/direct public funds and other money pursuant to Health & Safety Code Section 124250 so as to
7 allow women-only but not men-only programs to receive funds.⁴ California, COES, and Renteria
8 enacted, implement, administer and spend/direct public funds and other money pursuant to Penal Code
9 Sections 13823.15(f)(14)(A) and 13823.16, but claim to do so in a gender-neutral manner.⁵

10
11 **C. Pre-Connerly Case Law Erroneously Used Rational Basis Review.**

12 In 1975, the Fifth District Court of Appeal incorrectly used rational basis review to uphold a
13 Penal Code section that penalized only husband-on-wife violence. *People v. Cameron* (1975) 53
14 Cal.App.3d 786, 793. The court used terms such as “rational distinctions or classifications” and “so
15 long as its judgments are rational.” *Id.*, at 793, 794, 796. The court also cited 1970s crime data
16 showing 93.3 percent of (reported) marital assaults were husband-on-wife, and compared domestic
17 violence to a “prize fight” and said “women are physically less able to defend themselves against their
18 husbands than vice versa.” *Id.*, at 791-792. **The court also nudged the Legislature into the real**
19 **world by advising it to recognize the “modern trend of greater independence and assertiveness**
20 **on the part of the female.”** *Id.*, at 794 (emphasis added). This *alone* demonstrates the gender
21 classifications on California’s domestic violence statutes cannot possibly meet strict scrutiny.
22
23
24

25
26 _____
27 ⁴ See California/CDHS Responses to First Set of Special Interrogatories, 3:24-26, 9:8-25, Angelucci Decl., Exh. “A”;
28 CDHS Responses to First Set of Request for Admissions, 3:3-23, 3:8-14, 5:19-6:9 Angelucci Decl., Exh. “B.”

⁵ California/COES Responses to First Set of Request for Admissions, 3:17-5:24, Angelucci Decl., Exh. “C”; Answer, ¶ 11.

1 Thereafter, the Legislature amended the statute to be gender-neutral. Then an individual
2 challenged the same statute because it did not protect people in same-sex relationships. *People v.*
3 *Silva* (1994) 27 Cal.App.4th 1160. The same appellate district again applied rational basis and,
4 although it found same-sex couples were at high risk of domestic violence, it nonetheless held the
5 mere omission to deal with same-sex violence did not render the statute “so irrational” as make the
6 classification invalid. *Id.*, at 1170-71.

8 Now, however, *Connerly* makes it clear that statutory gender classifications in California are
9 subject to *strict scrutiny*. *Connerly* plainly states:

10 **[U]nder our state Constitution, strict scrutiny applies to gender**
11 **classifications.** In addition, Proposition 209 imposes additional restrictions
12 against racial and gender preferences and discriminatory practices.

13 *Connerly*, at 28 (emphasis added).

14
15 **D. The First Step in Strict Scrutiny Cannot Be Met.**

16 The gender classifications in Health and Safety Code Section 124250 and Penal Code Sections
17 13823.15(f)(14)(A) and 13823.16 cannot meet the first step in strict scrutiny. First, Equal Protection
18 protects individuals, not groups, (*Connerly*, at 35), so the classifications are illegal regardless of
19 statistics. **By comparison, it is illegal to exclude women from job safety laws even though 92**
20 **percent of job-related deaths happen to men.**⁶ Second, statistics do not justify the classifications.

21 The latest fact sheet from the Centers for Disease Control and Prevention states:

22 **In the United States every year, about 1.5 million women and more than**
23 **800,000 men are raped or physically assaulted by an intimate partner.**

24 (Centers for Disease Control and Prevention fact sheet, p. 2, RFJN, Exh. “A” (emphasis added).⁷

25
26
27
28 ⁶ <http://www.bls.gov/news.release/cfoi.t04.htm>

⁷ <http://www.cdc.gov/ncipc/factsheets/ipvfacts.html>.

1 The latest fact sheet from the Sheriff of San Bernardino County, California states:

2 37% of the domestic violence is against men. . . . **10.8% of the women but**
3 **only 4.1% of the men used a knife on the victim. 21.6% of the male victims**
4 **were threatened with a knife, while only 12.7% of the women were so**
5 **threatened. 43.2% of the male victims were hit with a hard object capable of**
6 **causing serious injury**, while this was true of only 22.6% of the female victims.
7 **When all serious forms of domestic assault were added together, as many**
8 **assaulted men as women were seriously assaulted.**

9 (Fact sheet, San Bernardino County Sheriff, RFJN, Exh. “B” (emphasis added).)⁸

10 The Centers for Disease Control and Prevention’s fact sheet cited above states:

11 Most IPV [Intimate Partner Violence] incidents are not reported to the police.
12 About 20% of IPV rapes or sexual assaults, 25% of physical assaults, and 50% of
13 stalkings directed toward women are reported. **Even fewer IPV incidents**
14 **against men are reported** (Tjaden and Thoennes 2000a). Thus, it is believed that
15 available data greatly underestimate the true magnitude of the problem.

16 (Centers for Disease Control and Prevention fact sheet, (“RFJN”), Exh. “A” (emphasis added).)⁹

17 In contrast to crime data, randomized sociological (*behavior*-based) survey data consistently
18 shows men and women commit domestic violence at similar rates. As Professor Linda Kelly (“Kelly”),
19 a domestic violence expert and Professor of Law and Indiana State University who has done extensive
20 research and other work in the field of domestic violence, explains:

21 Over the past 25 years, leading sociologists have repeatedly found that men and women
22 commit domestic violence at similar rates. The 1977 assertion that 'the phenomena of
23 husband battering' is as prevalent as wife abuse is confirmed by nationally
24 representative studies, such as the Family Violence Surveys, as well as [other sources].

25 Kelly, *supra*, 30 Fl. St. U. L. Rev. at 792.¹⁰

26 Petitioners submit and incorporate herein by reference sworn declarations by leading domestic
27 violence experts confirming Kelly’s statement above and explaining how damaging the problem is.

28 ⁸ http://www.co.san-bernardino.ca.us/sheriff/dvra/dom_viol_facts_main.htm.

⁹ <http://www.cdc.gov/ncipc/factsheets/ipvfacts.htm>.

¹⁰ The Canadian government confirms the 50/50 figures; see National Clearinghouse on Family Violence, Govt. of Canada, “Intimate Partner Abuse Against Men,” http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/pdfs/Intimate_Partner.pdf.

1 Professor Donald G. Dutton (“Dutton”), a domestic violence expert from the University of
2 British Columbia, who appeared as a prosecutorial witness in the O.J. Simpson trial and in more than
3 50 cases, and has published more than 100 peer-reviewed articles and four books on the topic, states:

4 I have been informed that California Health and Safety Code Section 124250
5 defines “domestic violence” for purposes of providing funding for domestic
6 violence services, as “the infliction or threat of physical harm against past or
7 resent adult or adolescent female intimate partners . . .” In my expert opinion,
8 there is no justification for the exclusion of male victims from this law. My
9 independent research as to gender and domestic violence reveals that women use
10 all forms of domestic violence at least as frequently as do men and with very
11 similar effects on male victims. Domestic violence “research” has been
12 misleading, in that data has been extracted from crime reports and/or “crime
13 victim surveys” – in which men underreport more than women – and have been
14 publicized as indicating domestic violence is a gender issue (male-
15 perpetrator/female-victims). In fact, when larger surveys with representative
16 samples are examined, perpetration of domestic violence perpetration is slightly
17 more common for females. . . . In the United States and other countries, male
18 victims have been unfairly excluded from public outreach and services.

19 (Dutton Decl., ¶¶ 2-5 (emphasis added).

20 Professor Murray A. Straus (“Straus”), a domestic violence expert and Co-Director of the
21 Family Research Laboratory University of New Hampshire, states:

22 I have conducted surveys of nationally representative samples of American
23 families funded by the National Institutes of Health in 1975, 1985, and 1992. In
24 2006 I conducted a study of partner violence in 32 nations. In all of these studies,
25 the rate of men victimized by physical and psychological attacks by their partners
26 is about the same as the rate of women victimized by male partners. . . . Physical
27 attacks by women account for about a third of the injuries. Although this is much
28 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.

(Straus Decl., ¶ 2.)

1 Professor Martin M. Fiebert (“Fiebert”), an expert from California State University, states:

2 I have conducted independent research in the field of domestic violence and have
3 studied the prevalence and rationale of female initiated assaults on male partners.
4 (See Fiebert/Gonzalez, “Why Women Assault; College Women Who Initiate
5 Assaults on their Male Partners and the Reasons Offered for Such Behavior,”
6 1997, Psychological Reports, 80, 583-590.) Overall, my findings indicate that
7 women are as physically aggressive, or more aggressive, than men in their
8 intimate relationships with male partners or spouses. My findings are supported
9 by the overwhelming majority of sociological survey research. To help illustrate
10 this, I have compiled an annotated bibliography of research examining assaults by
11 women on their spouses or male partners, which currently examines 180
12 scholarly investigation (142 empirical studies and 38 reviews and/or analyses),
13 with an aggregate sample size exceeding 170,000, finding women are as
14 physically aggressive, or more aggressive than men in their intimate relationships
15 with their spouses or male partners. A portion of the bibliography was published
16 in the 1997 version of the highly respected, referenced and peer-reviewed journal,
17 Sexuality and Culture. . . . Attached [is a true copy of said bibliography].

18 (Fiebert Decl., ¶¶ 1-4.)

19 Fiebert surveyed college women in California and found *30 percent* had assaulted a male
20 partner, their most common three reasons being: (1) my partner wasn’t listening; (2) my partner
21 wasn’t being sensitive to my needs; and (3) I wished to gain my partner’s attention. Fiebert, Martin
22 and Denise Gonzales, “Why Women Assault; College Women Who Initiate Assaults on their Male
23 Partners and the Reasons Offered for Such Behavior,” Psychological Reports, 80 (1997), 583-590.

24 Professor John Archer (“Archer”), a domestic violence expert and President of the
25 International Society for Research on Aggression, published a meta-analysis of research and found:

26 Women were slightly more likely ($d = -.05$) than men to use one or more acts of
27 physical aggression and to use such acts more frequently. Men were more likely
28 to inflict injury, and overall, 62% of those injured by a partner were women.

Fiebert Decl., ¶ 6, citing Archer, “Sex Differences in Aggression Between Heterosexual Partners: A
Meta-Analytic Review,” Psych. Bulletin, v. 126, n. 5 (Sept. 2000), p. 651; Angelucci Decl., Exh. “D.”

1 Even crime data, which only reflects *reported* violence, shows approximately one-fourth to
2 one-third of people who call police as victims of domestic violence are men. For example, in the
3 County of San Diego, *26 percent* of such calls come from men. (San Diego Office of Violence
4 Prevention, “Domestic Violence Compr. Plan Findings” (March 19, 2004), p. 6a, RFJN, Exh. “C.”)

5 California crime data confirms the same and shows a sharp *rise* in female arrests. For instance:
6

- 7 • Female arrests for domestic violence rose *318.7%* between 1988 and 1998 (pp. 4, 9);
- 8 • Women went from 6% to 18.2% of domestic violence arrestees and men went from 94% to
9 81.8% between 1988 and 2000) (p. 41);
- 10 • 9,340 women and 41,885 men were arrested for domestic violence in 2000 (p. 40);
- 11 • In 2000, out of 147 homicide victims involving domestic violence, there were 22 husbands,
12 72 wives; 8 boyfriends, 32 girlfriends; one ex-husband, 0 ex-wives (p. 45); and
- 13 • Between July 1, 2001 and May 31, 2002, 2,936 male domestic violence victims
14 participated in San Diego’s victim compensation program (p. 53).

15 (“Report on Arrests for Domestic Violence in California” (Aug. 1999), v. 1, n. 3, RFJN, Exh. “D.”)¹¹
16

17 Not only is *Cameron’s* 93% statistic inaccurate and unreliable, but its “prize fight” analogy is
18 utterly flawed. Prize fights are controlled events in which contestants cannot use guns, knives, frying
19 pans and fireplace pokers, cannot ambush each other from behind a door or while sleeping, do not fear
20 arrest or social stigma for hitting back, do not have their children beside them in the ring, and are
21 rarely drunk, on drugs, mentally ill, emotionally unstable, disabled or elderly. Comparing a prize fight
22 to domestic violence is like comparing the World Cup to the Vietnam War.
23
24

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26 _____
27 ¹¹ California and CDHS have authenticated said report. See First Set of Request for Admissions served upon California, ¶
28 2B, Exh. “B,” Angelucci Decl., Exh. “E”, and California’s/CDHS’ Responses to the same, 8:1-9:3, Angelucci Decl., Exh.
“F.” Administrative agency reports are judicially noticeable. *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.

1 Kelly points out that nationally representative domestic violence surveys have found:

2 Women were found to be twice as likely to throw something at their husbands.
3 Wives were also more likely than husbands to kick, bite and punch. They were
4 also more likely to hit, or try to hit, their spouses with something and more likely
5 to threaten their spouses with a knife or gun.

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

7 At University of Pennsylvania, 13% of men in an emergency room said they were physically
8 assaulted by a female partner in the previous 12 months; *37% of the time a weapon was used*; nearly
9 half of them had been choked, kicked, bitten, punched, or had an object thrown at them; 14% required
10 medical attention; 6% sought counseling; and most were African-American men with no health
11 insurance. (“History of Domestic Violence Among Male Patients Presenting to an Urban Emergency
12 Dept.,” *Academic Emerg. Medicine*, v. 6, n. 8 (June 1999), 786-791, Angelucci Decl., Exh. “G.”)¹²

13 *Children* are another factor not found in prize fights. When male victims “take it,” children are
14 *damaged*. Professor Denise A. Hines, a domestic violence expert from the Department of Criminal
15 Justice at the University of Massachusetts Lowell and a research associate at the Family Research
16 Laboratory and Crimes Against Children Research Center at the University of New Hampshire, states:

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

26 (Hines Decl. (emphasis added).)

27 ¹² <http://www.aemj.org/cgi/content/abstract/6/8/786>. Moreover, the Centers for Disease Control fact sheet states: “At least
28 42% of women and **20% of men who were physically assaulted since age 18 sustained injuries during their most recent victimization.**” <http://www.cdc.gov/ncipc/factsheets/ipvfacts.htm> (emphasis added), RFJN, Exh. “A.”

1 John Hamel, a domestic violence expert and court-certified batterer intervention provider, says:

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

13 (Hamel Decl., ¶ 2 (emphasis added).)

14 Professor Xavier J. Caro ("Caro"), a renowned Rheumatologist and Professor of Medicine at
15 UCLA School of Medicine, whose former wife is currently on death row for murdering three of their
16 four children at gunpoint (the fourth one escaped) in a high profile murder case, explains:

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

28 (Caro Decl. (emphasis added).)

Caro was financially well-off and could have found a place to escape had he chosen to. But
low-income or unemployed men, and their children, are left out in the cold. As Kelly explains:

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.

Id., at 851 (emphasis added).

24

1 The increased exposure of children to domestic violence due this invisibility and lack of
2 services also *causes* domestic violence by fueling its intergenerational cycle, as studies show such
3 exposure increases a child’s likelihood of committing domestic violence later in life. In one study, the
4 likelihood a woman will abuse her child increased each time she witnessed her mother hit her father.
5 Heyman, Richard and Amy Smith Slep, “Do Child Abuse and Interparental Violence Lead to
6 Adulthood Family Violence?” (Nov. 2003), *J. of Marriage & the Family*, v. 64, issue 4, pp 864-70.
7

8 Moreover, many men, especially those in same-sex relationships, have partners who are of
9 equal or larger size or strength. In fact, there is an equal percentage of violence in gay, lesbian and
10 heterosexual relationships, all of which tend to follow the same abusive patterns. Bricker, D., “Fatal
11 Defense: An Analysis of Battered Women’s Syndrome Expert Testimony for Gay Men and Lesbians
12 Who Kill Abusive Partners,” 58 *Brooklyn L. Rev.* 1379 (1993), 1382-84.
13

14 Men also need shelter services. A survey of domestic violence shelters in California,
15 performed by the California Research Bureau, found 9% of people seeking shelter services were *men*,
16 and one shelter in a predominantly gay and lesbian vicinity of Los Angeles reported even *more* males
17 than females seeking shelter. (California Research Bureau, “The Prevalence of Domestic Violence in
18 California” (Nov. 2002), p. 14, RFJN, Exh. “E.”)¹³
19

20 Nonetheless, male victims and their children remain culturally *invisible*.¹⁴ As Fiebert explains:

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

24 (Fiebert Decl., ¶ 7 (emphasis added).)

25
26 ¹³ <http://www.library.ca.gov/crb/02/16/02-016.pdf>. California and CDHS admit the authenticity of said report. See
27 California/CDHS Responses to First Set of Request for Admissions, 8:1-9:3, Angelucci Decl., Exh. “F.”

28 ¹⁴ In standard anti-oppression training, making a group invisible is only a few steps away from genocide.

1 Professor Richard Gelles (“Gelles”), a domestic violence expert and Chair of the Child Welfare
2 and Family Violence School of Social Work at the University of Pennsylvania, states:

3 **The real horror is the continued status of battered men as the “missing**
4 **persons” of the problem. Male victims do not count and are not counted. . . .**
5 **Federal funds typically pass to a state coalition against or to a branch of a**
6 **state agency designated to deal with violence against women. Thirty years**
7 **ago battered women had no place to go and no place to turn for help and**
8 **assistance. Today, there are places to go—more than 1,800 shelters, and**
9 **many agencies to which to turn. For men, there still is no place to go and no**
10 **one to whom to turn.**¹⁵

11 The invisibility of male victims of domestic violence is part of a long history of societal
12 disdain for battered men based on gender stereotypes. In post-Renaissance France, battered men were
13 forced to ride backwards on a donkey through the streets while holding the donkey’s tail. Steinmetz,
14 Suzanne, “The Battered Husband Syndrome,” *Victimology, An International Journal* (1977-1978), 2,
15 499-509. In medieval England, battered men were strapped to a cart and paraded around town while
16 ridiculed. George, Malcolm J., “Riding A Donkey Backwards; Men As The Unacceptable Victims of
17 Marital Violence,” *J. of Men’s Studies*, v. 3, n. 2 (Nov. 1994), pp. 137-59.

18 More recently, in the past 40 years, the invisibility of male victims has not only been caused by
19 ignorance and stereotypes but also by *gender-driven politics and ideology*, which Kelly documents
20 well in her law review article. *Kelly, supra.*; see also, Nathanson, Paul and Katherine Young,
21 “Legalizing Misandry; From Public Shame to Systemic Discrimination against Men,” McGill-Queens
22 University Press; First Biennial Report, New Hampshire Commission on the Status of Men
23 (November 1, 2005), pp. 13-17, RFJN, Exh. “F.”¹⁶

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25
26 ¹⁵ (Gelles, "The Hidden Side of Domestic Violence; Male Victims," *The Women's Quarterly* (1999) (emphasis added), reprinted with
author’s permission at <http://www.ncfmia.org/gelles.html>.)

27 ¹⁶ http://www.nh.gov/csm/downloads/nh_status_of_men_2005.pdf.

1 As Straus explains:

2 **Domestic violence services for men are denied on ideological grounds, not**
3 **scientific grounds. This ideology views only women as victims, and is**
4 **contradicted by the many studies cited above. These organizations want to**
5 **serve only women, even when they are funded to serve all victims of domestic**
6 **violence. In my expert opinion, that ideology, rather than scientific evidence,**
7 **is the basis for the section of the California Health & Safety Code Section**
8 **124250 that defines domestic violence as only being against a “female” or a**
9 **“woman.” This is contrary to an overwhelming body of evidence from**
10 **studies by many researchers showing that there are large numbers of male**
11 **victims. It is my opinion that this provision of the code should be changed to**
12 **give equal recognition to all victims of domestic violence, not just female**
13 **victims.**

14 (Straus Decl., ¶ 2 (emphasis added).)

15 Valley Oasis’ former director, Patricia Overberg, in her declaration, states that during her
16 eight-year tenure as director of the Valley Oasis domestic violence shelter in Lancaster, California, she
17 saw men travel hundreds of miles each direction because no other shelters would help them.

18 Petitioners, Woods, Neff and Bowman, were repeatedly assaulted by their intimate partners.
19 When they sought help, they had trouble finding it due to their gender, as state-funded programs
20 refused to help them because they were male. They are likely to need services again.

21 Assembly Bill 2051 (2005-2006) provides an example of gender-driven politics shaping
22 domestic violence law. The bill, sponsored by Equality California, aimed to expand Health and Safety
23 Code Section 124250 to include same-sex violence. When first introduced, it would have made the
24 statute gender-neutral. (RFJN, Exh. “G.”) But, as the Senate Judiciary Committee explains:

25 This bill was originally drafted to make the existing grant program (funded by
26 \$23 added on to marriage license fees) gender-neutral and thus ensure that DV
27 shelters catering to the LGBT community have a competitive chance to obtain
28 grants from the DHS. However, the **severe deficiency in funding of domestic
violence shelter that provide services to battered women and their children
caused an outcry among the existing domestic violence shelter providers.**

(Sen. Jud. Comm. Analysis, August 9, 2006, p. 3 of 10 (emphasis added), RFJN, Exh. “G.”)

1 As Straus has correctly stated, **“These organizations want to serve only women, even when**
2 **they are funded to serve all victims of domestic violence.”** (Straus Decl., ¶ 2 (emphasis added).)

3 That is why, as her declaration explains, Overberg was subjected to “continuous abuse” by other
4 shelter directors for sheltering battered men. (Overberg Decl.)

5 Even if there were a “severe deficiency,” it would not justify excluding victims based on
6 gender, as Equal Protection protects individuals, not groups. In any event, while more services would
7 be good, there is no “severe deficiency” of services for female victims. Every year since 2000, Health
8 and Safety Code Section 124250 alone has provided annual grants totaling over **\$22,000,000.00** to
9 shelters in California.¹⁷ One Sacramento program, “Women Escaping A Violent Environment” (a
10 name that automatically discourages male victims from seeking services), **admits it receives more**
11 **than four million dollars annually**, half of which is from private funds and half from public funds.¹⁸
12 (In fact, some shelters are going for-profit because they are finding they can make enough money.)

13 Haven Hills, a state-funded program in Los Angeles County that receives at least \$221,422.00
14 annually under said statutes alone,¹⁹ refuses to provide *any* services, even counseling, to male victims.
15 For proof of this, Petitioners submit with this Petition a micro cassette tape containing consensual
16 recordings of conversations between Petitioners’ counsel and Haven Hills in which Petitioners’
17 counsel was told Haven Hills will not provide *any* services, even counseling, to male victims, and that
18 the only program that will provide shelter to male victims is Valley Oasis in Lancaster, California.
19 (Angelucci Decl., ¶¶ 3-14, Exh. “H.”) (This clearly violates Government Code Section 11135.)

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25 ¹⁷ See California/CDHS Responses to First Set of Special Interrogatories, 12:6-12, Angelucci Decl., Exh. “A.” Despite the
26 annual \$22,000,000.00 given to battered women’s shelters, California *does not even care to track* how many of these
27 programs help men. See California/CDHS Responses to First Set of Special Interrogatories, 9:7-25, Angelucci Decl., Exh.
28 “A”. As Gelles correctly states, “male victims do not count and are not counted.” (Gelles, *supra*.)

¹⁸ See Fiona Cash Decl., ¶¶ 5-7, signed March 10, 2006 and filed on or about March 16, 2006.

¹⁹ See California/CDHS Responses to First Set of Special Interrogatories, 14:18-27, Angelucci Decl., Exh. “A.”

1 In 1985, the California Supreme Court helped set a legal trend against sex discrimination in the
2 law and public policy by aptly stating:

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

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

16 Following a similar trend at the federal level, Congress just recently amended the Violence
17 Against Women Act to state: "Nothing in this title shall be construed to prohibit male victims of
18 domestic violence . . . from receiving benefits and services under this title." 42 U.S.C. § 40002(b)(8).

19 California needs to follow this same trend and uphold its own public policy of treating men and
20 women equally, as well as take *Cameron's* advice of recognizing female violence. Constitutionally, it
21 is imperative that California eschew the discriminatory gender classifications in its domestic violence
22 statutes so that services are readily available *all victims of domestic violence and their children*.

23 Respondents cannot show, especially not with specificity and precision, that there is any
24 compelling government interest in excluding male victims from Health and Safety Code Section
25 124250 and Penal Code Sections 13823.15(f)(14)(A) and 13823.16. Accordingly, the gender
26 classifications therein, and California's and CDHS's discriminatory implementation of Health and
27 Safety Code Section 124250, do not meet the first test in strict scrutiny review, and therefore, said
28 classifications and acts are *unconstitutional*.

E. The Second Step in Strict Scrutiny Cannot Be Met.

The second step in strict scrutiny asks whether the classification is *necessary* to the compelling interest. *Connerly*, at 34. Non-discriminatory alternatives are *fatal* to the classification. *Id.*, at 37. Accordingly, the gender classifications cannot meet this test, especially because non-discriminatory alternatives are available. Compare California’s and New York’s Domestic Violence Prevention Acts:

California Health and Safety Code § 124250	N.Y. Consolidated Statutes § 459(a)
<p>"Domestic violence" means the infliction or threat of physical harm against past or present adult or adolescent <u>female</u> intimate partners, and shall include physical, sexual, and psychological abuse against the <u>woman</u> . . . (2) "Shelter-based" means an established system of services where battered <u>women</u> 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 <u>women</u></p>	<p>"Victim of domestic violence" means any <u>person</u> over the age of sixteen, any married <u>person</u> or any parent accompanied by <u>his or her</u> minor child . . . in a situation in which such <u>person</u> or such <u>person's</u> 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 <u>person</u> or such <u>person's</u> 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 providing emergency shelter . . .to <u>victims</u> of domestic violence. . . .</p>

N.Y. Consol. Statutes § 459(a) (emphasis added) (RFJN, Exh. "H").

The New York statute provides a non-discriminatory alternative to Health and Safety Code Section 124250. That alone is *fatal* to the classifications therein. Equally fatal is the Legislature’s failure to consider such alternatives.²⁰ Further, as California and COES claim they require agencies funded under Penal Code Sections 13823.15(f)14 and 13823.16 to be gender-neutral,²¹ it is *axiomatic* that said classifications are not *necessary* to a compelling government interest.

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.

²¹ See California/COES Responses to First Set of Special Interrogatories,” 4:20-23, Angelucci Decl., Exh. "T"; California/COES Responses to First Set of Request for Admissions, 4:1-24, Angelucci Decl., Exh. "C."

1 Moreover, the gender classifications are not “limited in scope and duration” as required by
2 *Connerly*, but instead have “no logical stopping point” or time limit after which they expire, or any
3 goal which, once attained, would end the classifications, as required by *Connerly*. *Connerly*, at 37.

4 Therefore, as Respondents cannot meet their burden of proving the gender classifications in
5 said statutes meet strict scrutiny, said classifications are *unconstitutional*.

6
7
8 **F. The Court Can Reform the Statutes to be Gender-Neutral.**

9 This Court can either invalidate Health and Safety Code Section 124250 and Penal Code
10 Sections 13823.15(f)(14)(A) and 13823.16, or judicially reform them to be gender-neutral. *Kopp*,
11 *supra*, 11 Cal.4th at 615. Reformation would be more equitable because it would maintain the
12 statutory purpose of serving domestic violence victims within the parameters of the State Constitution.

13
14 The California Assembly Floor Analysis stated that Assembly Bill 100, which implemented
15 Health and Safety Code Section 124250, helps “guarantee that domestic violence shelters receive the
16 support they need from the state” and “ensure that this support is applied in the best interest of victims
17 of domestic violence.”²² That provides a clearly-articulated legislative intent to provide services to
18 domestic violence victims. Therefore, the Court can conclude with confidence that the Legislature
19 intended to provide shelter to such victims and thus would have preferred reformation to invalidation.

20
21 Reforming the statutes to be gender-neutral would also be *plausible*, as California and COES
22 admit they already require agencies funded under Penal Code Sections 13823.15(f)14(A) and
23 13823.16 to be gender-neutral,²³ and thus they cannot seriously argue doing so would be problematic.

24
25
26 ²² See California/CDHS Responses to First Set of Form Interrogatories, 5:9-13, Angelucci Decl., Exh. “I.”

27 ²³ See California/COES Responses to First Set of Special Interrogatories,” 4:20-23, Angelucci Decl., Exh. “J”;
28 California/COES Responses to First Set of Request for Admissions, 4:1-24, Angelucci Decl., Exh. “C.”

1 The Court should also order Respondents to require state-funded programs to be gender neutral
2 and either create space for male victims or, at minimum, provide hotel arrangements for male victims
3 pursuant to Health and Safety Code Section 124250(1)(2), which lists “hotel arrangements” as one
4 form of residential shelter-based domestic violence service. This is a reasonable and plausible solution
5 as well. If Valley Oasis can provide services to both male and female victims for more than ten years
6 with no problems, and if California and COES already require domestic violence programs funded
7 under the Penal Code to be gender-neutral (as they claim they require), then other shelters can do so as
8 well, especially those receiving millions of dollars annually in public and private funds.
9

10 As Kelly explains:

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

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

19 Therefore, the gender classifications in Health and Safety Code Section 124250 and Penal
20 Code Sections 13823.15(f)(14)(A) and 13823.16 are *unconstitutional* in that they violate Equal
21 Protection and the California Constitution, Article I, Sections 7(a) and 31. Preferably, the Court
22 should reform said statutes to be gender neutral, and also order California, CDHS, Shewry, COES and
23 Renteria to implement said statutes in a gender-neutral manner, and order said Respondents to require
24 programs receiving funds under said statutes to not deny services based on gender.
25
26
27
28

1 **VI. THE GENDER CLASSIFICATIONS IN PENAL CODE SECTIONS 1174-1174.9**
2 **AND 3411-3424 ARE INVALID.**

3
4 **A. The Statutes Employ Gender Classifications.**

5 Penal Code Sections 1174-1174.9 establish the Pregnant and Parenting Women’s Alternative
6 Sentencing Program Act, which, among other things, appropriates \$15,000,000 to Respondent CDC
7 “for the purpose of constructing facilities for pregnant and parenting women’s alternative sentencing
8 programs.” Pen. Code § 1174.2(a).

9
10 Penal Code Sections 3411-3424 establish a “community treatment program” for “women
11 inmates sentenced to state prison pursuant to Section 1168 or 1170 who have one or more children
12 under the age of six years” Pen. Code § 3411. Said program provides pediatric care and other
13 services, but only for incarcerated women and not incarcerated men.
14

15
16 **B. California, CDC and Woodford Implement the Statutes According to the**
17 **Gender Classifications Therein.**

18 Respondents, California, CDC and Woodford enacted, implement, enforce, administer and
19 receive/direct public funds and other money pursuant to, Penal Code Sections 1174-1174.9 and 3411-
20 3424.²⁴ Said Respondents also admit they implement said statutes according to the gender
21 classifications therein, *i.e.*, in a discriminatory manner.²⁵
22
23
24

25 _____
26 ²⁴ See CDC Responses to First Set of Special Interrogatories,” 3:9-4:3, Angelucci Decl., Exh. “K”; CDC Supplemental
27 Responses to First Set of Special Interrogatories,” 4:14-18, Angelucci Decl., Exh. “K”; CDC Responses to First Set of
Request for Admissions,” 3:9-13, Angelucci Decl., Exh. “L”; Answer, ¶¶ 94, 99, 104 and 109.

28 ²⁵ See CDC Responses to Second Set of Request for Admissions, at 3:9-12:23, Angelucci Decl., Exh. “M.”

1 In CDC's responses to Ray Blumhorst's First Set of Request for Admissions, CDC admits:²⁶

- 2 • "Penal Code Sections 1174 through 1174.9 employ gender classifications" (at 6:10-15);
- 3 • "Penal Code Sections 1174 through 1174.9 allow women but not men to participate in the
- 4 program established by said statutes" (at 6:17-26);
- 5 • "You implement Penal Code Sections 1147 through 1174.9 according to the gender
- 6 classifications therein" (at 6:28-7:7);
- 7 • "In your implementation of Penal Code Sections 1174 through 1174.9, **you allow women**
- 8 **to participate in the program established therein**" (at 7:8-18);
- 9 • "In your implementation of Penal Code Sections 1174 through 1174.9, **you do not allow**
- 10 **men to participate in the programs established therein**" (at 7:20-27);
- 11 • "**A parenting woman with an established history of substance abuse who has one or**
- 12 **more children under six years old can meet the criteria for participation in the**
- 13 **program established by Penal Code Sections 1174 through 1174.9**" (at 3:23-4:1);
- 14 • "**A parenting man with an established history of substance abuse who has one or**
- 15 **more children under six years old cannot meet the criteria for participation in the**
- 16 **program established by Penal Code Sections 1174 through 1174.9**" (at 4:3-7);
- 17 • "Women can meet the criteria for participation in the program established by Penal Code
- 18 Sections 1174 through 1174.9" (at 4:9-14);
- 19 • "Men cannot meet the criteria for participation in the program established by Penal Code
- 20 Sections 1174 through 1174.9" (at 4:16-19);
- 21 • "Currently, there are women participating in the program established by Penal Code
- 22 Sections 1174 through 1174.9" (at 4:26-5:2);
- 23
- 24
- 25
- 26
- 27

²⁶ See CDC Responses to Second Set of Request for Admissions, Angelucci Decl., Exh. "M."

- 1 • “Currently there are women who meet the criteria for participation in the program
2 established by Penal Code Sections 1174 through 1174.9” (at 5:4-11);
- 3 • “Currently, there are no men who meet the criteria for participation in the program
4 established by Penal Code Sections 3410 through 3424, **because said statutes require that**
5 **a person be a woman in order to participate in said program**” (at 5:20-26);
- 6
- 7 • “In determining who is eligible to participate in the program established by Penal Code
8 Sections 1174 through 1174.9, **you consider women but not men, because said statutes**
9 **only provide a program for women but not for men**” (at 5:28-6:8);
- 10
- 11 • “Penal Code Sections 3410 through 3424 employ gender classifications” (at 11:1-7);
- 12 • “Penal Code Sections 3410 through 3424 **allow women but not men to participate in the**
13 **program established by said statutes**” (at 11:9-18);
- 14
- 15 • “**You implement Penal Code Sections 3410 through 3424 according to the gender**
16 **classifications therein**” (at 11:20-27);
- 17 • “**In your implementation of Penal Code Sections 3410 through 3424, you allow women**
18 **to participate in the program established therein**” (at 12:1-12);
- 19 • “**In your implementation of Penal Code Sections 3410 through 34324, you do not**
20 **allow men to participate in the program established therein**” (at 12:13-24);
- 21
- 22 • “**A parenting women with an established history of substance abuse who has one or**
23 **more children under six years old can meet the criteria for participation in the**
24 **program established by Penal Code Sections 3410 through 3424**” (at 8:14-20);
- 25
- 26 • “**A parenting man with an established history of substance abuse who has one or**
27 **more children under six years old cannot meet the criteria for participation in the**
28

1 program established by Penal Code Sections 3410 through 3424” (at 8:22-26);

- 2 • “Women can meet the criteria for participation in the program established by Penal
3 Code Sections 3410 through 3424” (at 8:28-9:5);
- 4 • “Men cannot meet the criteria for participation in the program established by Penal
5 Code Sections 3410 through 3424” (at 9:7-10);
- 6 • “Currently, there are no men who meet the criteria for participation in the program
7 established by Penal Code Sections 3410 through 3424, because said statutes require that
8 a person be a women in order to participate in said program” (at 10:11-17); and
- 9 • “In determining who is eligible to participate in the program established by Penal Code
10 Sections 3410 through 3424, you consider women but not men, because said statutes
11 only provide a program for women but not for men” (at 10:19-27).

12 (Emphasis added.)

13
14 Therefore, California and CDC admit they implement said statutes according to the gender
15 classifications therein, *i.e.*, in a gender-discriminatory manner. Said classifications are *presumed*
16 *invalid* and subject to *strict scrutiny*, and California and CDC must prove the classifications, *and* their
17 implementation of the same, meet strict scrutiny. Respondents cannot meet this burden.
18
19

20
21 **C. The First Step in Strict Scrutiny Cannot be Met.**

22 The Gender classifications in Penal Code Sections 1174-1174.9 and 3411-3424, and
23 California’s and CDC’s discriminatory implementation of said classifications, cannot meet the first
24 step in strict scrutiny, because there is no compelling government interest in only providing such
25 services to incarcerated mothers but not incarcerated fathers.
26
27

1 First, equal protection protects individuals, not groups. “In applying strict scrutiny, it must be
2 remembered that the rights created by the equal protection clause are not group rights; they are
3 personal rights which are guaranteed to the individual.” *Connerly*, at 35. Therefore, if *any*
4 incarcerated father is treated unequally with a similarly-situated incarcerated mothers, the statutory
5 gender classification is presumed invalid. Again, Equal Protection is a *basic human right*.

6
7 Second, even *if* statistics mattered, they do not justify the classifications. In fact, just as strong
8 a statistical argument could be made for only including incarcerated *fathers* with the statutory
9 provisions at issue here, as fathers outnumber mothers in jails and prisons by a ratio of 8:1.

10 According to a 1997 survey by the California Research Bureau:

- 11 1. There were *84,000 incarcerated fathers* and 6,200 incarcerated mothers in California;
- 12 2. An estimated *176,400 children had a father in state prison* and 15,600 children had a mother in
13 state prison. Those 192,000 children represent 2.1 percent of the California’s child population.
- 14 3. *One-third of incarcerated fathers* and one-half of incarcerated mothers reported they lived with
15 their minor child/children during the month prior to incarceration;
- 16 4. 57 percent of male inmates and 64 percent of female inmates were parents; and
- 17 5. 85 percent of incarcerated fathers and 29 percent of incarcerated mothers reported their minor
18 child or children are cared for by the other parent or step-parent.

19
20
21 (California Research Bureau, “California State Prisoners with Children: Findings from the 1997
22 Survey of Inmates in State and Federal Correctional Facilities” (Nov. 2003) p. 7, RFJN, Exh. “I.”)²⁷
23

24
25
26 ²⁷ California admits the authenticity of said Report. See California/CDHS Responses to First Set of Request for
27 Admissions, 8:1-9:3, Angelucci Decl., Exh. “E.” The report is available at
28 <http://www.library.ca.gov/crb/03/14/03-014.pdf#search=%22california%20state%20prisoners%20with%20children%22>.

1 According to the above figures, even if we were to only look at incarcerated parents who lived
2 with their minor children during the month prior to incarceration and/or whose children are not cared
3 for by another parent, **there *still* are more incarcerated fathers than mothers.**

4 Furthermore, whether a child is or is not cared for by another parent *does not negate the*
5 *importance of maintaining the child's relations with the incarcerated parent.* Again, *one-third* of
6 incarcerated fathers lived with one or more of their minor children in the month before arrest.

7
8 As one court aptly put it: "We cannot emphasize too strongly the . . . significance of
9 recognizing a child's right to the 'nurturing, support and companionship of her father.'" *Holm v.*
10 *Smilowitz* (Ohio App. 4th Dist. 1992) 615 N.E.2d 1047, 1060.

11
12 Studies show when *either father or mother* becomes incarcerated, the children immediately
13 begin acting out. They become hostile and aggressive, use drugs or alcohol, run away from home, and
14 become truant and delinquent. Fritsch, Travis A. and John D. Burkhead, "Behavior Reactions of
15 Children to Parental Absence Due to Imprisonment, 30 Fam. Relations 83, 85 (1981).

16 **"In terms of number of problems per child, male and female inmates report almost**
17 **exactly the same number."** *Ibid.* (emphasis added). Moreover, the same data shows maintaining the
18 relationship between these children and their incarcerated parents, *fathers or mothers*, significantly
19 *reduces* the harm to children, improves the parents' behavior and reduces recidivism. *Id.*, at 83.

20
21 Elise Zealand ("Zealand"), a legal scholar who has worked extensively with prisoners, strongly
22 criticizes the gender classifications in Penal Code Section 3411, stating: "**Because there are many**
23 **more men in prison than women, there are a significant number of children who are orphaned**
24 **when their father is sent to prison."** Zealand, Elise, "Protecting the ties that bind from behind bars:
25 A call for equal opportunities for incarcerated fathers and their children to maintain the parent-child
26 relationship," *Columbia J of Law and Social Problems*, 31 (1998), 247, 280-281 (emphasis added).
27
28

1 Zealand cites *substantial* evidence of the importance of maintaining relations between children
2 and their incarcerated fathers, then calls for Equal Protection challenges, and accurately concludes:

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

10 Zealand, *supra*, Columbia J of Law and Social Problems, 31, at 258 (emphasis added).

11 Zealand is absolutely correct. Just like with domestic violence, this discrimination is driven
12 mostly by *gender stereotypes*. As the New Hampshire Commission on the Status of Men explains:

13 As women have had difficulty establishing their role as important contributors to
14 the workplace, men have had difficulty establishing themselves as important
15 nurturers for their families and children. . . .

16 (First Biennial Report, N.H. Comm'n on Status of Men (Nov. 1, 2005), pp. 10-12, RFJN, Exh. "F.")²⁸

17 Professor Gordon E. Finley ("Finley"), a Professor of Psychology at Florida International
18 University in Miami, Florida and an expert on parenting and divorce issues, who has also taught at the
19 Universities of British Columbia, Toronto and California at Berkeley and whose research has
20 published in numerous peer-reviewed journals, sets forth in his declaration numerous reasons why "it
21 is critical to maintain father-child relationships under conditions of separation." He then concludes:

22 The clear implications of the very well established divorce literature, for the
23 California Penal Code, is that it is in the best interests of children, fathers, and
24 mothers that the State of California make every effort to maintain the father-child
25 relationship while the father is incarcerated. This remains true regardless of
26 whether the child is cared for by another parent or step-parent, because that does
27 not detract from the importance of maintaining the child's relationship with the
28 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

28 ²⁸ www.nh.gov/csm/downloads/nh_status_of_men_2005.pdf.

1 the divorce research cited above) to make equal provision for maintaining the
2 father-child relationship to facilitate the well-being of both incarcerated fathers
3 and their children. Specifically, Penal Code Sections 1174-1174.9 and 3411-
4 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.

5 (Finley Decl., ¶ “D.”)

6 Psychologist Ken Druck (“Druck”), an author and lecturer with 25 years of experience as an
7 expert on parenting and the psychology of fathers and children, states in his declaration:

8 Maintaining the relationship between children and their incarcerated fathers
9 (and/or mothers), including consideration of visitation, pediatric services,
10 alternative sentencing and other parent-related services, needs to be considered a
11 critical element in the psychological and interpersonal well-being and
12 development of children. The rationale for providing such services to
13 incarcerated mothers but not fathers (which is too often the case) is erroneous.
14 Children of incarcerated mothers are less likely than children of incarcerated
fathers to be cared for by another parent, but this is not a good enough reasons.
The relationships between children and their incarcerated parents are important
regardless of whether the child is cared for by another parent.

15 (Druck Decl., ¶¶ 2-3.)

16 The New Hampshire Commission on the Status of Men cites *substantial* proof of this, stating:

17 Studies have conclusively shown that children who receive higher levels of
18 attention and interaction with their natural fathers are healthier and better
19 psychologically adjusted than children without fathers or with uninvolved fathers.
20 Whether the outcome is cognitive development, sex-role development, or psycho-
21 social development, children are better off when their relationship with their
22 father is close and secure. Fathers who were affectionate, spent time with their
23 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.)

24 Children with involved fathers are more confident and less anxious when placed
25 in unfamiliar settings, better able to deal with frustration, better able to adapt to
26 changing circumstances and breaks from their routine, and better able to gain a
27 sense of independence and an identify outside the mother/child relationship.
28 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.)

1 Children whose fathers were highly involved in their schools were more likely to
2 do well academically, to participate in extracurricular activities, and to enjoy
3 school, and were less likely to have ever repeated a grade or been expelled
4 compared to children whose fathers were less involved in these schools. This
5 effect held for both two-parent and single-parent households, and was distinct and
6 independent from the effect of mother involvement. (Source: Nord, Christine
7 Windquist, "Students Do Better When Their Fathers Are Involved At School,
8 NCES 98-121, Washington, D.C.: U.S. DOE, National Center for Education
9 Statistics, 1998.)

7 Father involvement correlates with fewer behavior problems exhibited by their
8 children. This finding holds after controlling for the level of maternal
9 involvement. (Amato and Rivera. "Paternal Involvement and Children's
10 Behavior Problems. Journal of Marriage and the Family 61 (1999): 375-384.)

10 Fatherless children score lower on tests and have lower grade point averages.
11 Family scholar Barbara Dafoe Whitehead says, "Even after controlling for race,
12 income and religion, scholars find significant differences in educational
13 attainment between children who grow up in intact families and children who do
14 not." Fatherless children are twice as likely to drop out of school. (U.S. Health
15 & Human Services. National Center for Health Statistics. Survey on Child
16 Health. Washington, DC: GPO, 1993.)

15 In a study of 75 toddlers it was found that children who were attached to their
16 fathers were better problem solvers than children who were not securely attached
17 to their fathers. Children whose fathers spent a lot of time with them and who
18 were sensitive to their needs were found to be better adapted than their peers
19 whose fathers were not as involved. (Esterbrooks, M. Ann and Wendy Goldberg.
20 Toddler Development in the Family: Impact of Father Involvement and Parenting
21 Characteristics. Child Development 55 (1984): 740-572.

19 (First Biennial Report, N.H. Comm'n on Status of Men (Nov. 1, 2005), pp. 10-12, RFJN, Exh. "F."²⁹

20
21 *Clearly*, the gender classifications in Penal Code Sections 1174-1174.9 and 3411-3424, and
22 California's and CDC's implementation of the same, *cannot* meet the first step in strict scrutiny.
23 Therefore, said classifications and implementation of the same are *unconstitutional*.

1 **D. The Second Step in Strict Scrutiny Cannot be Met.**

2 Even if there *were* a compelling government interest in the gender classifications, they are still
3 not *necessary* to such an interest, as non-discriminatory alternatives are available.

4 For example, Zealand explains:

5 A detention center in San Antonio, Texas, could serve as a model for other
6 prisoners and jails. At the Bexar County Detention Center, equal parenting
7 programs exist for mothers and fathers. The father’s program, Pappas and Their
8 Children (“PATCH”), was initiated in 1993, and modeled after the Mothers and
9 Their Children program (“MATCH”), which in 1984 was the first parenting
10 program in the country for mothers at the county detention center. The seventy
11 fathers in the PATCH program live together in the same unit. Membership in the
12 program is voluntary, but once an inmate enters PATCH, he must attend
13 parenting and life skills classes four times a week.

14 Zealand, *supra*, at 274 (emphasis added).

15 Aida Camero (“Camero”), the Jail Support Services Manager at the Bexar County Adult
16 Detention Center in San Antonio, Texas and a former PATCHMATCH coordinator, explains:

17 We have a MATCH (Mothers And Their Children) and a PATCH (Pappas And
18 Their Children) program for incarcerated mothers and fathers and their children.
19 MATCH was established in 1984 for mothers, and PATCH was established in
20 1993 as a residential program for fathers and was modeled after MATCH. In
21 2004 there were more than 300 participants in the PATCH program. Both
22 programs have been very successful. They have a beneficial impact on the
23 children, the parents, and the families, and it improves the lives and behavior of
24 both the children and the parents. There is no reason why similar programs for
25 both mothers and fathers cannot be started in other parts of the nation. . . .
26 Attached hereto is a true and correct copy of a document that provides accurate
27 information about the MATCH/PATCH program.

28 (Camero Decl., ¶¶ 1-7.)

The availability of non-discriminatory alternatives, as well as the Legislature’s failure to
consider such alternatives, are equally fatal to said gender classifications in Penal Code Sections 1174-
1174.9 and 3411-3424. Therefore, said classifications, and California’s and CDC’s discriminatory
implementation of the same, are *unconstitutional*.

1 **E. The Court Can Reform the Statutes to be Gender-Neutral.**

2 This Court has the power to either invalidate Penal Code Sections 1174-1174.9 and 3411-3424
3 or reform the same to be gender-neutral. Reformation would be more equitable because it would
4 preserve the statutory purpose of maintaining relationships between children and incarcerated parents,
5 among other things, within the parameters of the California Constitution, while ensuring no parents or
6 children are excluded based on sexist gender stereotypes. Therefore, the Court should invalidate the
7 gender classifications in said statutes, and, preferably, reform the same to be gender-neutral.
8

9
10 **VII. THE GENDER CLASSIFICATION IN GOVERNMENT CODE SECTION 11139**
11 **IS INVALID.**

12
13
14 **A. The Statute Employs a Gender Classification.**

15 Government Code Section 11135 (“GC 11135”), which is part of the same statutory scheme as
16 GC 11139, forbids state-funded programs from illegally denying services based on gender. GC 11135
17 was modeled after Title VI of the Civil Rights Act, which is based on the principle that **“taxpayers’**
18 **money, which is collected without discrimination, shall be spent without discrimination.”**
19 *Guardians Ass’n. v. Civil Service Comm.* (1983) 463 U.S. 582, 599 (emphasis added).
20

21 In the 1970s, during a time when the constitutionality of affirmative action programs was
22 unclear, California enacted GC 11139 to exempt “lawful programs benefiting minorities and women”
23 from the ban on state-funded discrimination set forth in GC 11135. As said statute employs a gender
24 classification, it is *presumed invalid* and subject to *strict scrutiny*. Petitioners met their initial burden
25 by pointing this out, and the burden is now on said Respondents to prove the classifications meet strict
26 scrutiny. Respondents cannot meet this burden.
27

1 **B. California Implements Government Code Section 11139.**

2 Respondent California enacted, implements, enforces, administers and receives/directs public
3 funds and other money pursuant to, Government Code Section 11139 (“GC 11139”).
4

5
6
7 **C. The First Step in Strict Scrutiny Cannot be Met.**

8 There is no compelling government interest in the gender classification in GC 11139. In fact,
9 although the purpose of its classification is unclear, its history indicates its exemption for programs
10 benefiting “minorities and . . . women” was added to protect remedial affirmative action programs
11 during a time when the Legislature was uncertain of the illegality of such programs. (RFJN, ¶ “J,” p.
12 180, citing *Bakke v. Regents* (1976) 18 Cal.3d 34, which was pending certiorari review, and then
13 stating it is unclear the extent to which programs may discriminate against minorities/nonminorities.)
14

15 This is similar to the statutes that were invalidated by *Connerly*. As *Connerly* states:

16 [T]he statutory schemes at issue here were enacted over many years, some more
17 than 20 years ago, during a time when the manner of applying equal protection
18 principles to affirmative action programs was not settled. It has now been held
19 that all racial classifications imposed by a governmental entity must be analyzed
20 using the strict scrutiny standard of review. And, under our state Constitution,
21 strict scrutiny applies to gender classifications.

22 *Connerly*, at 28.

23 In any event, the purpose of the gender classification in GC 11139 is not even clear. A suspect
24 classification “cannot withstand strict scrutiny based upon speculation about what may have motivated
25 the legislature . . . The State must show that the alleged objective was the legislature’s actual purpose
26 for the discriminatory classification.” *Connerly*, at 38. Thus, the gender classification in GC 11139
27 cannot meet the first step in strict scrutiny, and is unconstitutional.
28

1 Third, suspect classifications are harmful to society in and of themselves (*Connerly*, at 44-45),
2 and thus are invalid even if they are part of a statutory scheme that is so broad that it might be applied
3 neutrally (*ibid.*) or are not administered in discriminatory manner (*id.*, at 49). Therefore, the gender
4 classification in GC 11139 is subject to a constitutional challenge.

5
6
7 **F. The Statute Should Be Invalidated, Not Reformed.**

8 Respondents might argue that, if GC 11139 is unconstitutional, the Court should reform it
9 rather than invalidate it. However, a court can only reform a statute if it can conclude with confidence
10 the Legislature’s purpose based on clearly articulated intent. *Kopp, supra*, 11 Cal.4th at 615. Although
11 this standard can be met with the other statutes challenged herein, it cannot with GC 11139, because
12 its legislative history contains no clearly articulated intent regarding the classification (RFJN, ¶ “J”),
13 and thus the Court cannot conclude with confidence that it can reform GC 11139 to “closely effectuate
14 policy judgments clearly articulated” by the legislature or that the legislature would have preferred
15 reformation. Courts cannot second guess the legislature. *Village Trailer Park, Inc. v. Santa Monica*
16 *Rent Control* (2002) 101 Cal.App.4th 1133, 1145. Therefore, the classification should be *invalidated*.

17
18
19
20 **G. If the Statute is Reformed, its Administrative Construction Should Apply.**

21 If the Court reforms GC 11139, it should reform it according to California Code of
22 Regulations, Title 22, Section 98102. The administrative construction of a statute is frequently
23 invoked to determine legislative intent, and, while not necessarily controlling, is entitled to great
24 weight and should be respected by courts unless clearly erroneous or unauthorized. *Village Trailer*
25 *Park, supra*, at 1142; *Whitcomb Hotel v. Cal. Emp. Com.* (1944) 24 C.2d 753, 575; *Mantzoros v. State*
26 *Bd. of Equal.* (1948) 87 C.A.2d 140, 143; *Richfield Oil Corp. v. Crawford* (1952) 39 C.2d 729, 736.

1
2 **H. The Statute is Severable.**

3 Respondents might argue that GC 11139 is inseverable from GC 11135, and if the Court
4 invalidates the former, it must invalidate the latter. This argument lacks merit.

5 An invalid provision is severable from its remaining provision if the remaining provision
6 would be "complete in itself" and would have been adopted without the invalid provision. *Barlow v.*
7 *Davis* (1999) 72 Cal.App.4th 1258, 1264. To be severable, a provision must be grammatically,
8 functionally, and volitionally severable. *Ibid.* GC 11139 is clearly grammatical severable from GC
9 11135. To be functionally severable, the *remaining* statute (GC 11135) must be:
10

11 capable of independent application. In order to pass this test *the remaining*
12 *provisions* must stand on their own, unaided by the invalid provisions nor
13 rendered vague by their absence nor inextricably connected to them by policy
14 considerations.

15 *People v. Library One, Inc.* (1991) 229 Cal.App.3d 973, 989.

16 GC 11135 can certainly stand on its own without GC 11139 and its suspect classifications. GC
17 11135 is not “inextricably connected” to or “rendered vague” without GC 11139. In fact, GC 11135
18 was (roughly) modeled after Title VI of the Civil Rights Act, which does not even contain a provision
19 similar to GC 11139, and it contains almost nothing about the purpose of the gender classification.
20

21 For volitional severability, the main inquiry is whether severing the invalid provision would
22 leave the remaining provision an unintended fragment. *Franklin Life Ins. Co. v. State Bd. of*
23 *Equalization* (1965) 63 Cal.2d 222. Severing GC 11139 would not leave GC 11135 an unintended
24 fragment. The legislative history contains substantial discussion about GC 11135’s purpose but
25 virtually nothing about GC 11139’s purpose. (RFJN, ¶ “J.”) As shown earlier, if anything can be
26 derived from the history, it is that the statute’s suspect classifications were added to protect remedial
27

1 affirmative action programs, and that the Legislature was simply uncertain about the legality of
2 affirmative action when it enacted GC 11139.

3 Therefore, invalidating GC 11139 while retaining GC 11135 would “preserve within the
4 constitutional framework the proper purpose of the Legislature.” *Franklin, supra*, at 230. Moreover,
5 the severability clause in the regulation further indicates severability. 22 Cal. Code Regs. § 98009.
6

7 Therefore, the gender classification in GC 11139, and California’s implementation of said
8 classification, cannot meet strict scrutiny, and is unconstitutional.
9

10 **VIII. CONCLUSION**
11

12
13 For all the foregoing reasons, Petitioners respectfully request that the Court issue a writ of
14 mandate, and injunctive and declaratory relief, ordering that: (1) the gender classifications in Health
15 and Safety Code Section 124250, GC 11139, and Penal Code Sections 1174-1174.9, 3411-3424,
16 13823.15(f)(14)(A) and 13823.16, are illegal and unconstitutional; (2) said statutes must apply to all
17 persons irrespective of gender, or not at all; (3) Respondents must not implement said statutes
18 according to their gender classifications and must not deny equal treatment based on gender; (4)
19 Respondents must not spend or direct public or other funds in a way that denies equal treatment to
20 based on gender under said statutes; and (5) Respondents must order the recipients of funds under said
21 statutes to not deny equal treatment based on gender.
22

23
24 Dated: October 1, 2006

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26 By: _____

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