

1 GAY CROSTHWAIT GRUNFELD – 121944
VAN SWEARINGEN – 259809
2 ROSEN BIEN GALVAN & GRUNFELD LLP
315 Montgomery Street, Tenth Floor
3 San Francisco, California 94104-1823
Telephone: (415) 433-6830
4 Facsimile: (415) 433-7104
5 Email: ggrunfeld@rbgg.com
vswearingen@rbgg.com

6 Attorneys for Plaintiffs

7

8

UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11

12 MICHAEL S. BERMAN and DARRELL B.
13 STAPP,

Plaintiffs,

14 v.
15

16 EDMUND G. BROWN, JR, Governor of
California, and JEFFREY A. BEARD,
17 Secretary of the California Department of
Corrections and Rehabilitation, in their
18 official capacities, and DOES 1-10,

Defendants.
19

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

20

21

22

23

24

25

26

27

28

1 **INTRODUCTION**

2 Plaintiffs MICHAEL S. BERMAN and DARRELL B. STAPP challenge
3 Defendants’ unconstitutional exclusion of men from California’s Alternative Custody
4 Program (“ACP”), as authorized by California Penal Code section 1170.05. State law and
5 implementing regulations issued by the California Department of Corrections and
6 Rehabilitation (“CDCR”) allow only female prisoners to be considered for participation in
7 the ACP, a highly desirable alternative to incarceration. Plaintiffs BERMAN and STAPP
8 applied for the program but were denied acceptance solely because they are male. By
9 allowing female but not male prisoners to participate in a CDCR program that allows
10 prisoners to reunite with their families in their home communities in lieu of incarceration,
11 ACP’s blanket sex-based exclusion violates the Equal Protection Clause of the Fourteenth
12 Amendment to the United States Constitution. Plaintiffs bring this action pursuant to 42
13 U.S.C. § 1983, seeking declaratory and injunctive relief.

14 **JURISDICTION AND VENUE**

15 1. This action arises under the Fourteenth Amendment to the United States
16 Constitution and 42 U.S.C. § 1983. This Court has subject matter jurisdiction over this
17 action under 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

18 2. Venue is proper in the Northern District of California under 28 U.S.C.
19 § 1391(b)(2) because substantial acts and omissions giving rise to the claims occurred in
20 this District, including Defendants’ decision to deny ACP applications submitted by
21 Plaintiffs BERMAN and STAPP. Plaintiffs BERMAN and STAPP currently reside in this
22 District.

23 3. Intradistrict venue is appropriate in this division pursuant to Federal Rule of
24 Civil Procedure 3 and N.D. Cal. L.R. 3-2(e) because a substantial part of the events or
25 omissions giving rise to Plaintiffs’ claims occurred in the County of Monterey, which is
26 served by this division. In particular, Defendants’ decision to deny the ACP applications
27 submitted by Plaintiffs BERMAN and STAPP because of their sex occurred in Monterey
28 County. Plaintiffs BERMAN and STAPP continue to be incarcerated in Monterey County.

PARTIES

1
2 4. Plaintiff MICHAEL S. BERMAN is a male CDCR prisoner. He is currently
3 incarcerated at the Correctional Training Facility (“CTF”), located in Soledad, California.
4 Plaintiff BERMAN has a family with whom he wants to reunite and a home community to
5 which he wants to return.

6 5. Plaintiff DARRELL B. STAPP is a male CDCR prisoner. He is currently
7 also incarcerated at CTF. Plaintiff STAPP has a family with whom he wants to reunite and
8 a home community to which he wants to return.

9 6. Defendant EDMUND G. BROWN, JR. is the Governor of the State of
10 California and oversees all state agencies, including the CDCR. Defendant BROWN is
11 legally responsible for ensuring compliance with state and federal laws at all state
12 facilities, including state correctional facilities. Defendant BROWN is legally responsible
13 for the unlawful policies, practices, and procedures challenged herein, and has the
14 authority and legal obligation to abolish these unconstitutional policies, practices, and
15 procedures. Defendant BROWN is sued in his official capacity.

16 7. Defendant JEFFREY A. BEARD is the Secretary of the California
17 Department of Corrections and Rehabilitation. As Secretary of CDCR, Defendant
18 BEARD is responsible for implementing the ACP, including the development and
19 maintenance of regulations implementing the program. Defendant BEARD is legally
20 responsible for ensuring compliance with state and federal laws at all correctional
21 facilities. Defendant BEARD is legally responsible for the unlawful policies, practices,
22 and procedures challenged herein, and has the authority and legal obligation to abolish
23 these unconstitutional policies, practices, and procedures. Defendant BEARD is sued in
24 his official capacity.

25 8. The true names and identities of Defendants DOES 1 through 10 are
26 presently unknown to Plaintiff. Each of Defendants DOES 1 through 10 are or were
27 employed by and are or were agents of the State of California or the California Department
28 of Corrections and Rehabilitation and are or were personally involved in the adoption

1 and/or implementation of the ACP. Plaintiffs will seek to amend this Complaint as soon as
2 the true names and identities of Defendants DOES 1 through 10 have been ascertained.

3 9. Each and every act and omission alleged herein of Defendants, their officers,
4 agents, servants, employees, or persons acting at their behest or direction, were done and
5 are continuing to be done under the color of state law and within the scope of their official
6 duties as employees or agents of the State of California or the California Department of
7 Corrections and Rehabilitation.

8 **FACTS**

9 **The Alternative Custody Program As Currently Amended Categorically**
10 **Excludes Male Prisoners From Participation**

11 10. On September 30, 2010, California Governor Arnold Schwarzenegger signed
12 into law Senate Bill (“SB”) 1266, which added section 1170.05 to the California Penal
13 Code, authorizing CDCR to “offer a program under which female inmates, pregnant
14 inmates, or inmates who were primary caregivers of dependent children immediately prior
15 to incarceration ... may be allowed to participate in a voluntary alternative custody
16 program ... in lieu of confinement in state prison.”

17 11. As enacted and as amended, participants in the ACP are released from prison
18 and allowed to live in a residential home, transitional care facility, or residential drug or
19 treatment program in the community for the remainder of their prison sentence.

20 12. Prisoners who have a current conviction for a serious or violent felony, or a
21 current or prior sex-offense conviction or California Penal Code section 290 registration
22 requirement, are not eligible for the ACP. Additional exclusionary criteria include a
23 history of attempted escape in the last 10 years, an active restraining order, gang
24 membership, a criminal or immigration hold, and certain types of in-custody misconduct.

25 13. When California prisoners apply for the ACP, CDCR conducts a screening
26 process to determine whether the prisoner is eligible for the program. CDCR then prepares
27 an Individualized Treatment and Rehabilitation Plan which identifies rehabilitative
28 programs based on a participant’s individual needs. CDCR approves an appropriate

1 housing placement for each ACP participant, typically at a private residence in the
2 community. ACP participants are monitored by an agent from CDCR's Division of Adult
3 Parole Operations while in the community, and are subject to electronic monitoring and
4 searches of the prisoner and his or her residence at any time. Participants in the ACP may
5 be returned to state prison at any time, with or without cause.

6 14. As originally enacted by the Legislature, the ACP was open to at least some
7 men, although men were still required to be "primary caregivers of dependent
8 children immediately prior to incarceration" while women applicants faced no such
9 restriction. SB 1266 included legislative findings expressly emphasizing the importance of
10 reuniting incarcerated fathers with their children, noting that research "demonstrates that a
11 father's involvement in his child's life greatly improves the child's chances for success.
12 Helping incarcerated fathers foster stronger connections with their children, where
13 appropriate, can have positive effects for children. Strong family connections help to
14 ensure that fathers stay out of prison once they are released."

15 15. On or about September 12, 2011, CDCR announced the formal launch of the
16 ACP, which according to CDCR was a "Community-Based Program ... aimed at reuniting
17 low-level offenders with their families and providing inmates with rehabilitative services
18 within the community," but stated that "[i]nitially, the program will be offered to
19 qualifying female inmates" and that "[p]articipation may be offered at a later date to male
20 inmates, at the discretion of the Secretary of CDCR."

21 16. On June 27, 2012, Defendant BROWN signed into law SB 1021, which
22 modified Penal Code section 1170.05 to categorically exclude men. As amended by SB
23 1021, the ACP now explicitly excludes all men, in that the statute authorizes a program in
24 which "female inmates ... and only those persons, shall be eligible to participate in the
25 alternative custody program."

26 17. On or about September 13, 2012, CDCR issued emergency regulations for
27 the ACP. Those regulations provide that "[t]o be eligible to participate in the Alternative
28 Custody Program (ACP), the inmate must volunteer and be female." *See* Cal. Code Regs.

1 tit. 15, § 3078.2. Those regulations became permanent on February 25, 2013.

2 18. CDCR has expressed its intention to expand the ACP as part of its efforts to
3 meet court-ordered population reduction benchmarks. *See* Defs.’ Mar. 2014 Status Report
4 in Resp. to Feb. 10, 2014 Order of the Three-Judge Court, *Coleman v. Brown*, E.D. Cal.
5 Case No. 2:90-cv-00520, Dkt. No. 5114-2 (Mar. 17, 2014) at Ex. B, p. 4.

6 19. No men have ever been accepted to the ACP.

7 **CDCR’s Refusal to Consider Plaintiff BERMAN for the ACP is**
8 **Sex-Based Discrimination**

9 20. Plaintiff MICHAEL S. BERMAN has a minor daughter, with whom he lived
10 and for whom he shared caregiving responsibilities with his wife before he was
11 incarcerated. Plaintiff BERMAN is concerned for his daughter’s welfare and wishes to be
12 present in her life and to help provide for her well-being. He also yearns to be reunited
13 with his wife and provide financial, emotional, and practical support to his family.
14 Plaintiff BERMAN would like to be reintegrated into his home community, and is
15 interested in participating in rehabilitation programs available through the ACP. He has a
16 residential home to which he can return if accepted into the ACP.

17 21. On March 9, 2015, Plaintiff BERMAN applied to the ACP, requesting that
18 he be allowed to finish his sentence in his home community. Plaintiff BERMAN meets the
19 eligibility criteria to participate in the ACP as set out in Section 3078.2 of Title 15 of the
20 California Code of Regulations, and none of ACP’s exclusionary criteria set out in Section
21 3078.3 of Title 15 of the California Code of Regulations apply to him.

22 22. On March 12, 2015, CDCR denied Plaintiff BERMAN admission to the
23 ACP, informing him that he is ineligible “per Title 15, section 3078.2(a).” Title 15,
24 section 3078.2(a) of the California Code of Regulations provides that “[t]o be eligible to
25 participate in the Alternative Custody Program (ACP), the inmate must volunteer and be
26 female.”

1 **CDCR's Refusal to Consider Plaintiff STAPP for the ACP is**
2 **Sex-Based Discrimination**

3 23. Plaintiff DARRELL B. STAPP desires to reunite with his elderly mother,
4 who has back and knee problems that make it difficult for her to complete daily tasks.
5 Plaintiff STAPP is concerned for his mother's safety and well-being, and wishes to reside
6 with her so that he can provide her with caregiving assistance. Plaintiff STAPP would like
7 to be reintegrated into his home community, and would like to participate in rehabilitation
8 programs available through the ACP. He has a residential home to which he can return if
9 accepted into the ACP.

10 24. On February 21, 2015, Plaintiff STAPP applied to the ACP, requesting that
11 he be allowed to finish his sentence in his home community. Plaintiff STAPP meets the
12 eligibility criteria to participate in the ACP as set out in Section 3078.2 of Title 15 of the
13 California Code of Regulations, and none of ACP's exclusionary criteria set out in Section
14 3078.3 of Title 15 of the California Code of Regulations apply to him.

15 25. On or about March 4, 2015, CDCR informed Plaintiff STAPP that he could
16 not participate in the ACP because the program is available only for female prisoners.

17 **Defendants Have Refused to Remedy Their Refusal to Consider**
18 **Plaintiffs for the ACP Based Solely on Plaintiffs' Sex**

19 26. Male prisoners other than Plaintiffs BERMAN and STAPP have also been
20 denied the opportunity to apply and be considered for the ACP solely based on their sex,
21 male. Plaintiffs' counsel have repeatedly informed Defendants that their sex-based
22 exclusionary policies violate the United States Constitution, but Defendants will not
23 change their unconstitutional policies, practices, and procedures.

24 27. Defendants' actions have violated, continue to violate, and are reasonably
25 expected in the future to violate Plaintiffs' constitutional rights.

26 28. Defendants BROWN, BEARD, DOES 1-10, and other agents of the State of
27 California and the California Department of Corrections and Rehabilitation are responsible
28 for or personally participated in creating and implementing these unconstitutional policies,

1 practices, and procedures.

2 29. Defendants' unconstitutional policies, practices, and procedures are ongoing
3 and continue to violate Plaintiffs' rights, causing irreparable harm to Plaintiffs. Each day
4 Plaintiffs BERMAN and STAPP are denied participation in the ACP solely on the basis
5 that that they are male, not female, violates their fundamental rights under the Fourteenth
6 Amendment to be free of sex-based discrimination and to bond with and care for their
7 families. Defendants' discrimination is emotionally and psychologically damaging to
8 Plaintiffs. Every day that Plaintiffs BERMAN and STAPP are discriminated against based
9 on their sex represents precious time that could have been spent with their families. This
10 time cannot be regained. As such, Plaintiffs have no adequate remedy at law.

11 30. Plaintiffs are entitled to injunctive relief prohibiting Defendants from
12 continuing categorically to exclude male prisoners like Plaintiff BERMAN and Plaintiff
13 STAPP from the ACP.

14 31. Defendants' categorical exclusion of all male prisoners from the ACP harms
15 the public interest by exacerbating the overcrowding of California's state prisons and
16 denying low-risk male offenders the opportunity to pursue reintegration with their
17 communities and their families, which would reduce California's excessively high
18 recidivism rate. Defendants' blanket exclusion further harms the public interest by
19 perpetuating outdated and damaging stereotypes suggesting that only mothers care for
20 children, that children can only benefit from reunification with their mothers, and that only
21 females can successfully bond with family members. These inappropriate stereotypes
22 harm and denigrate male prisoners' image of themselves and their understanding of their
23 own roles in their families' lives. The exclusion further harms the public interest by
24 denying children the benefits that attend the presence and participation of fathers in their
25 lives, as research has demonstrated and the Legislature has acknowledged.

26 WHEREFORE Plaintiffs pray for relief as hereinafter alleged.
27
28

1 **FIRST CLAIM FOR RELIEF**
2 **(Against All Defendants – For Violations of the Equal Protection Clause of the**
3 **Fourteenth Amendment Under Color Of State Law – Section 1983)**

4 32. Plaintiffs reallege and incorporate herein by reference paragraphs 1-31
5 above.

6 33. The Equal Protection Clause of the Fourteenth Amendment to the United
7 States Constitution prohibits any state from denying “to any person within its jurisdiction
8 the equal protection of the laws.”

9 34. By excluding Plaintiffs and other male prisoners who are similarly situated
10 from participation in the ACP, Defendants have deprived and continue to deprive Plaintiffs
11 and other male prisoners of equal protection under the laws, in violation of the Fourteenth
12 Amendment to the United States Constitution and thus in violation of 42 U.S.C. § 1983.

13 35. The acts described above have caused and will continue to cause irreparable
14 harm to Plaintiffs.

15 36. Plaintiffs seek declaratory and injunctive relief against all Defendants.

16 **PRAYER FOR RELIEF**

17 The conduct previously alleged, unless and until enjoined by order of this Court,
18 will cause great and irreparable injury to Plaintiffs. Further, a judicial declaration is
19 necessary and appropriate at this time so that all parties may know their respective rights
20 and act accordingly.

21 WHEREFORE, Plaintiffs request relief as follows:

22 1. A declaration that Defendants’ categorical exclusion of men from the
23 Alternative Custody Program, as memorialized in California Penal Code section 1170.05
24 and the associated implementing regulations in Title 15 of the California Code of
25 Regulations, violates the Fourteenth Amendment to the United States Constitution.

26 2. A preliminary and permanent injunction enjoining Defendants and their
27 employees, agents, and any and all persons acting in concert with them, from enforcement
28 or application of the categorical exclusion of men from the Alternative Custody Program.

1 3. A preliminary and permanent injunction requiring Defendants to consider
2 Plaintiff BERMAN's and Plaintiff STAPP's application for the ACP forthwith without
3 regard to their sex.

4 4. An award of costs and reasonable attorney's fees under 42 U.S.C. § 1988 and
5 other applicable law.

6 5. Such other relief as the Court deems just and equitable.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: July 14, 2015

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: /s/ Gay Crosthwait Grunfeld
Gay Crosthwait Grunfeld

Attorneys for Plaintiffs