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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL S. BERMAN and DARRELL B. STAPP,

Plaintiffs,

v.

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

Defendants.

Case No. 5:15-cv-03282-EJD

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

Judge: Hon. Edward J. Davila
Date: October 8, 2015
Time: 9:00 a.m.
Crtrm.: 4, 5th Floor

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NOTICE OF MOTION

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 8, 2015, at 9:00 a.m. or sooner if Plaintiffs' Administrative Motion to Advance the Hearing Date is granted, pursuant to Federal Rule of Civil Procedure 65 and Northern District of California Local Rule 7-2, Plaintiffs Michael S. Berman and Darrell B. Stapp ("Plaintiffs") will and hereby do move this Court for an Order Granting Plaintiffs' Motion For Preliminary Injunction.

Plaintiffs respectfully request that the Court order that the California Department of Corrections and Rehabilitation ("CDCR") shall immediately process Plaintiffs' applications for the Alternative Custody Program ("ACP") on an expedited basis, such that Plaintiffs can be placed into the ACP no later than October 1, 2015. Plaintiffs further seek injunctive relief such that CDCR shall immediately cease denying applications for the Alternative Custody Program on the basis that a prisoner is male. Finally, Plaintiffs seek an order waiving the bond requirement. This motion is based upon this Notice of Motion and Motion for Preliminary Injunction; the Memorandum of Points and Authorities in support thereof; the Declarations of Michael S. Berman, Darrell B. Stapp, and Van Swearingen in Support of Plaintiff's Motion for Preliminary Injunction and Request for Judicial Notice; the Request for Judicial Notice; and the Proposed Order Granting Plaintiffs' Motion for Preliminary Injunction, all filed herewith; and all papers and pleadings on file in this action, and such other pleadings, oral argument and/or documentary evidence as may come before the Court upon the hearing of this matter.

DATED: July 17, 2015

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: /s/ *Gay Crosthwait Grunfeld*
Gay Crosthwait Grunfeld

Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The California Department of Corrections and Rehabilitation ("CDCR") offers an early supervised release program that allows certain prisoners to serve the last 24 months of their sentences in the community with their families rather than behind prison walls. The Alternative Custody Program ("ACP"), authorized by statute and implemented by Defendants California Governor Edmund G. Brown and CDCR Secretary Jeffrey A. Beard (collectively, "Defendants"), includes stringent criteria to ensure that only certain low-level, low-risk offenders are eligible to participate. Those fortunate offenders allowed to participate in the ACP can begin to mend bonds with loved ones, care for their children and relatives, go to school, participate in rehabilitative programs, and obtain employment. However, the great majority of CDCR's low-level offender population will never participate in the ACP because Defendants unconstitutionally restrict access to "female inmates … and **only those persons**." Cal. Pen. Code § 1170.05 (emphasis added). Since its inception, CDCR's message regarding the ACP has been unequivocal: women are welcome; men should not apply.

Defendants' female-only policy blatantly and unconstitutionally discriminates against men. While touting the ACP as a family reunification program, Defendants' practices de-legitimize the role of men returning to family life, and send the message that women — and only women — belong at home. Defendants' administration of the ACP deprives male prisoners of the ability to foster stronger connections with their families while serving their time in the community. Plaintiff Michael S. Berman seeks to participate in the ACP to be reunited with his minor daughter and wife, and to be reintegrated into his home community. Plaintiff Darrell B. Stapp is eager to become an ACP participant so that he can live with and care for his elderly and disabled mother. Both men sought to apply for the ACP; both were rejected solely on account of their sex. Other than not being female, none of the ACP exclusionary criteria applies to either applicant.

Each day that Mr. Berman and Mr. Stapp are barred from ACP participation

because they are men is a missed opportunity in their families' lives. Time spent caring for a minor child or elderly parent is profoundly important to one's identity and life experience. Time away from those closest to us can never be regained. Spending time with family also motivates reform and rehabilitation. To deny these fundamental rights and opportunities to men, but not women, perpetuates outdated notions that only women are adequate caregivers and suitable for family reunification programs. It also "demeans" men and teaches that they "are unequal in important respects"—something the Fourteenth Amendment does not allow. *Obergefell v. Hodges*, No. 14-556, 2015 WL 2473451, at *16 (U.S., June 26, 2015).

Because the State's explicit exclusion of men from the ACP violates the Equal Protection Clause, a preliminary injunction enjoining Defendants from continuing to exclude Mr. Berman and Mr. Stapp should be granted. As demonstrated below, Plaintiffs are likely to succeed on the merits of this action, Defendants' constitutional violations are causing irreparable harm, the balance of hardships strongly weighs in Plaintiffs' favor, and an injunction serves the public's interest. To apply to the ACP, a prisoner must have at least six months remaining incarceration time. Without a preliminary injunction, Mr. Berman and Mr. Stapp will likely lose forever their opportunity to participate in the ACP.

FACTUAL BACKGROUND

I. THE ACP ALLOWS FEMALE PRISONERS TO RESIDE IN THE COMMUNITY AND ATTEND REHABILITATIVE PROGRAMMING AS AN ALTERNATIVE TO INCARCERATION

Defendants' Alternative Custody Program allows certain low-level female prisoners to spend the last 24 months of their prison sentence living in a residential home, transitional care facility, or residential drug treatment program in the community. *See* Cal. Code Regs. tit. 15 §§ 3078.1, 3078.2(b). Prisoners who have a current conviction for a serious or violent felony, or a current or prior conviction requiring sex offender registration pursuant to California Penal Code section 290, are not eligible to participate in the ACP. *See id.* §§ 3078.2(c), 3078.3(a)(1)-(3). Additional exclusionary criteria include a history

of attempted escape in the last 10 years, an active restraining order, gang affiliation, a criminal or immigration hold, and certain types of in-custody misconduct. *See id.* §§ 3078.2(c), 3078.3(a)(4)-(16). CDCR prepares an Individualized Treatment and Rehabilitation Plan ("ITRP") for ACP participants to address a range of issues related to the individualized needs of the potential ACP participant, including: "(A) Housing; (B) Employment plans; (C) Transportation; (D) Substance abuse treatment; (E) Parenting and life skills; (F) Anger management and criminal thinking; (G) Career Technical Education programs and educational needs; (H) Social services needs, e.g., Veteran's Affairs benefits, general assistance, social security; [and] (I) Medical, dental, and mental health needs." *See id.* § 3078.4(b)(1). Each participant in the ACP is closely monitored by a Division of Parole Operations agent, and is subject to electronic monitoring and searches of her person or residence at any time. *See id.* § 3078.5(b)-(c).

II. DEFENDANTS UNCONSTITUTIONALLY EXCLUDED MR. BERMAN AND MR. STAPP FROM THE ACP SOLELY BECAUSE THEY ARE MALE

A. Plaintiff Berman Cannot Participate in the ACP Solely Because He Is Male

Plaintiff Michael Berman is the father of a minor daughter whom he loves dearly. *See* Declaration of Michael S. Berman In Support of Plaintiffs' Motion for Preliminary Injunction ("Berman Decl."), filed herewith, ¶ 3. He is presently separated from her and his wife due to his incarceration at Correctional Training Facility ("CTF"), a low-level prison facility in Soledad, California. *See id.* ¶ 1. Mr. Berman's earliest possible release date ("EPRD") is approximately June 24, 2016. *See id.* ¶ 2. Mr. Berman aspires to reunite with his wife and child, and to help provide for their well-being. *See id.* ¶ 4. It is painful to him to think of all of the events, milestones, and bonding time that he misses with his daughter. *See id.* ¶ 8. Mr. Berman applied to the ACP so that he can spend the remainder of his CDCR sentence in his home community with his family, rather than in prison. *See id.* ¶¶ 6, 8. Mr. Berman was denied admission based on his ineligibility "per title 15, section 3078.2(a)," which requires that participants must "be female." *See id.* ¶ 6 & Ex. A. CDCR provided no other reason for denying Mr. Berman access to the ACP. *See*

id. Aside from his sex, Mr. Berman meets all program eligibility criteria and no exclusionary criteria apply to him. *See id.* ¶ 5.

B. Plaintiff Stapp Cannot Participate in the ACP Solely Because He Is Male

Plaintiff Darrell Stapp loves and misses his mother. *See* Declaration of Darrell B. Stapp In Support of Plaintiffs' Motion for Preliminary Injunction ("Stapp Decl."), filed herewith, ¶ 3. He is currently also incarcerated at CTF, with an EPRD of approximately August 23, 2016. *See id.* ¶¶ 1, 2. Mr. Stapp is eager to participate in the ACP so that he can live with his elderly mother, and help her with daily tasks that she finds difficult due to her age and disabilities. *See id.* ¶¶ 3, 7. He also wants to return to his home community and take advantage of rehabilitative programs that are available to ACP participants. *See id.* ¶ 3. Mr. Stapp applied to the ACP, but was refused admission because the ACP is currently a program only for female inmates. *See id.* ¶ 5 & Ex. A. Aside from being male, Mr. Stapp meets all program eligibility criteria and none of the ACP's exclusionary criteria apply to him. *See id.* ¶ 4. Defendants' refusal to consider his application on account of his sex has emotionally and psychologically harmed Mr. Stapp, who feels that he is being judged as less capable of helping his family because he is male and not female. *See id.* ¶ 7.

C. Other Men Cannot Participate in the ACP Solely Because of Their Sex

Other male prisoners have been denied an opportunity to apply to the ACP on the basis of their sex. For example, William Sassman, currently incarcerated at Valley View Fire Camp, filed a challenge in the Eastern District of California to his unconstitutional exclusion from the ACP, which was supported by declarations from other male prisoners. *See, e.g., Sassman v. Brown*, No. 2:14–01679 (E.D. Cal.), Docket Nos. 1, 5-3, and 50-9; *see also Sassman v. Brown*, __ F. Supp. 3d __, 2014 WL 5242591 at *3 (E.D. Cal., Oct. 14, 2014) ("a CDCR correctional counselor denied Plaintiff's application because he is male"). Mr. Sassman's case has not yet been decided.

III. BOTH THE AUTHORIZATION AND IMPLEMENTATION OF THE ACP IMPERMISSIBLY DISCRIMINATE AGAINST MEN

From its inception, the ACP has been promoted by Defendants as a program intended to reunite low-level California prisoners with their families and to provide a transition back into their communities. *See Sassman*, 2014 WL 5242591 at *8 ("CDCR has repeatedly made clear that the primary objectives of the ACP are family reunification and community reintegration"). Defendants are defeating those objectives by allowing only female prisoners to participate in the ACP.

A. Certain Male Prisoners Were Statutorily Eligible to Participate in the ACP Under Its Implementing Legislation

On September 30, 2010, Governor Schwarzenegger signed into law California Senate Bill No. 1266, which added section 1170.05 to the California Penal Code ("Section 1170.05"). *See* Declaration of Van Swearingen In Support of Plaintiffs' Motion for Preliminary Injunction and Request for Judicial Notice ("Swearingen Decl.") ¶ 2 & Ex. A (SB 1266, Cal. 2009-10 Reg. Sess.) (hereinafter, "SB 1266"). As originally enacted by the Legislature, the ACP was open to all female prisoners but to male prisoners only if they were "primary caregivers" of dependent children. SB 1266 § 2 ("female inmates, pregnant inmates, or inmates who were primary caregivers of dependent children immediately prior to incarceration … may be allowed to participate in a voluntary alternative custody program … in lieu of their confinement in state prison"). Even the "primary caregiver" restriction was considered controversial and potentially unconstitutional. *See* Swearingen Decl. ¶ 6 & Ex. E (letters from California Office of the Legislative Counsel stating that SB 1266 may violate "the constitutional requirement of equal protection"); Emilie A. Whitehurst, *Shaping California's Prisons: How the Alternative Custody Program, Designed to Remedy the State's Eighth Amendment Violations in the Prison System, Encroaches on Equal Protection*, 21 WM. & MARY BILL RTS. J. 303, 305, 325 (2012) ("the Alternative Custody Program [] clearly runs afoul of the Constitution's guarantee of equal protection").

SB 1266 included legislative findings expressly emphasizing the importance of reuniting incarcerated fathers with their children, noting that research "demonstrates that a father's involvement in his child's life greatly improves the child's chances for success. Helping incarcerated fathers foster stronger connections with their children, where appropriate, can have positive effects for children. Strong family connections help to ensure that fathers stay out of prison once they are released." *Id.* § 1(g). The Legislature stated that "[t]o break the cycle of incarceration, California must adopt policies that facilitate parenting and family reunification." *Id.* § 1(h). The Legislature further found that "[s]eparating parents from children has a substantial impact on their futures. Children of inmates are much more likely than their peers to become incarcerated." *Id.* § 1(g).

B. CDCR Nonetheless Excluded All Men from the ACP

On September 12, 2011, CDCR announced the formal launch of the ACP. While promoting the program as "aimed at reuniting low-level offenders with their families," CDCR announced that the program would bar men from the very outset: "Initially, the program will be offered to qualifying female inmates. Participation may be offered at a later date to male inmates, at the discretion of the Secretary of CDCR." *See* Swearingen Decl. ¶ 3 & Ex. B. During the program's rollout, a CDCR spokesperson explained that CDCR might eventually allow some men to participate as a cost-saving way to comply with its court-ordered obligations to reduce the inmate population. *See id.* ¶ 9 & Ex. H.

C. The Legislature Then Revised the ACP to Categorically Exclude All Men

Following CDCR's exclusionary implementation of the ACP, the Legislature amended Section 1170.05 expressly to exclude all men. On June 27, 2012, Governor Brown signed into law Senate Bill No. 1021 ("SB 1021"), which modified Section 1170.05 to read: **"[F]emale inmates … and only those persons**, shall be eligible to participate in the Alternative Custody Program." Cal. Penal Code § 1170.05(c) (emphasis added); *see* Swearingen Decl. ¶ 4 & Ex. C, at 65-69 (relevant portions of SB 1021). Despite barring men from program participation, SB 1021 did not withdraw or otherwise amend the

legislative findings in SB 1266 regarding the importance of facilitating family reunification and fostering relationships between male prisoners and their children.

D. CDCR's Regulations Followed Suit, and Now All Men Are Unconstitutionally Excluded From Participating in the ACP

On September 13, 2012, CDCR issued emergency regulations excluding male prisoners from ACP participation, providing that "[t]o be eligible to participate in the Alternative Custody Program (ACP), the inmate must volunteer and **be female**." *See* Cal. Code Regs. tit. 15 § 3078.2(a) (emphasis added). During the public comment period on these regulations, CDCR received numerous written comments expressing concerns that the ACP impermissibly discriminates against men. *See* Swearingen Decl. ¶ 5 & Ex. D (Final Statement of Reasons, Comments and Responses 1 through 5C). CDCR acknowledged that the ACP discriminates based on sex, but asserted that this was somehow permissible. *See e.g., id.*, Comment and Response 5A ("CDCR is legally permitted to treat male and female inmates differently if they are not 'similarly situated.'"). CDCR's regulations excluding men from the ACP became permanent on February 25, 2013. *Id.*

CDCR continues to assert that family reunification and community reintegration are the ACP's primary goals. Indeed, according to a March 2013 CDCR "Alternative Custody Program" Fact Sheet, the purpose of the ACP is "reuniting low-level inmates with their families and reintegrating them back into their community." *See id.* ¶ 7 & Ex. F.

LEGAL STANDARD

A preliminary injunction should issue where a plaintiff demonstrates "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013) (citation omitted). The Ninth Circuit evaluates these factors using a "sliding scale approach" such that "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the

plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal citation and quotation marks omitted).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs Berman and Stapp state a claim under Section 1983, as they allege that the State violated rights secured by the Constitution of the United States by a person acting under the color of State law. *See* 42 U.S.C. § 1983; *West v. Atkins*, 487 U.S. 42, 48 (1988).

A. The Fourteenth Amendment Prohibits the ACP's Sex-Based Classifications

Defendants' blanket exclusion of men from ACP participation violates the Equal Protection Clause of the Fourteenth Amendment, which prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. Sex-based classifications have long been subject to heightened, intermediate scrutiny under the Equal Protection Clause. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197-98 (1976). A determination of the validity of classifications based on sex "must be applied free of fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). "That [the] statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." *Id.* at 723.[1]

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[1] The fact that the ACP involves prisoners does not change the level of scrutiny applied. *See Sassman*, 2014 WL 5242591 at *6 (applying intermediate scrutiny "[b]ecause the ACP is not a program limited to a particular prison, and because the focus of Plaintiff's claim is not how prisoners at a certain facility are being favored"). This case does not implicate matters of institutional administration, and even if it did, the Supreme Court has required correctional authorities to adhere to the same equal protection standards as other governmental actors. In *Johnson v. California*, 543 U.S. 499 (2005), the Supreme Court held that racial classifications by prison administrators were subject to strict scrutiny because the right to be free from racial discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration." *Id.* at 510. Following *Johnson*, an Eastern District of California court concluded that "the right to be free of gender discrimination is a 'right that need [not] necessarily be compromised for the sake of (footnote continued)

"Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia ("VMI")*, 518 U.S. 515, 531 (1996) (citations omitted). "The burden of justification is demanding and it rests entirely on the State." *Id.* at 533. Defendants' "burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Mississippi Univ. for Women*, 458 U.S. at 724 (citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)). Any alleged justification for such discrimination "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533; *cf. Ambat v. City and Cnty. of San Francisco*, 757 F.3d 1017, 1029 (9th Cir. 2014) (concluding in Title VII context that blanket generalizations about abilities of male officers supervising female inmates "would amount to the kind of unproven and invidious stereotype that" Title VII was designed to eliminate) (internal quotation marks and citation omitted).

In *VMI*, the Supreme Court addressed the constitutionality of Virginia's exclusion of women from the Virginia Military Institute. 518 U.S. at 519. There, the state argued and the district court concluded that maintaining VMI as a single-sex institution was justified because male and female students had different educational needs, based on testimony about "typically male or typically female 'tendencies.'" *Id.* at 540-41. In reversing, the Supreme Court observed that it has "cautioned reviewing courts to take a 'hard look' at generalizations or 'tendencies' of the kind" relied on by the state and district

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proper prison administration'" and rejected CDCR's justifications as based on "fixed notions" about men and women. *Greene v. Tilton*, Case No. 2:09-0793, 2012 WL 691704, at *8 (E.D. Cal. Mar. 2, 2012), *report and recommendation adopted*, 2012 WL 1130602 (E.D. Cal. Mar. 29, 2012). *See also Leinweber v. Tilton*, Case No. 1:09-00793, 2010 WL 3521869, at *3 (E.D. Cal. Sept. 8, 2010) (stating that intermediate scrutiny should be used to analyze prisoner's sex discrimination claim), *Carpenter v. Pallito*, Vt. Supreme Ct. No. 531-9-13 at 9 & n.1 (attached hereto as Appendix A) (applying intermediate scrutiny to strike down Vermont's policy of sending all men, but no women, to out-of-state prisons to reduce overcrowding).

court. *Id.* at 541 (citation omitted). It further noted that "[s]tate actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females." *Id.* (internal quotation marks omitted). In striking down the exclusion, the Court concluded that the state's educational goals were "not substantially advanced by women's categorical exclusion, in total disregard of their individual merit" from attending VMI. *Id.* at 546. As described below, neither does the exclusion of all men from the ACP, in total disregard for their individual merit as parents or otherwise, substantially advance any goal of the State in implementing the ACP.

B. Male and Female Prisoners Are Similarly Situated for Purposes of ACP Participation

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Reed v. Reed*, 404 U.S. 71, 76 (1971). The California Office of the Legislative Counsel explicitly warned both the author of the bill enacting the ACP and the Governor in 2010 that: "[i]nsofar as this bill would create a program that provides for early release of women from prison custody to less-restrictive confinement based on gender, **the bill may be construed as violating the constitutional requirement of equal protection of law**." *See* Swearingen Decl. ¶ 6 & Ex. E (emphasis added). The district court in *Sassman* agreed that a male ACP applicant who "meets the gender-neutral standards in order to be eligible to apply and participate in the program … is thus similarly situated to female inmates permitted to apply." 2014 WL 5242591 at *11.

CDCR's implementing regulations contain sixteen mandatory and another six discretionary exclusionary criteria to insure that only low-risk, low-level offenders participate in the ACP. *See* Cal. Code Regs. tit. 15 § 3078.3. Each of these exclusionary criteria is sex-neutral, and focused solely on the prisoner's risk level (*e.g.*, history of escape). *Id.* Other than the sex-based criteria prohibiting male participation, none of the eligibility criteria relate in any way to a prisoner's sex. ACP participants are not required

to be mothers or caregivers to minor children, nor are they required to need any particular type of rehabilitative programming offered by the ACP. *See Sassman*, 2014 WL 5242591 at *5 ("none of the female ACP participants are required to make any of the[se] showings"). Instead, ACP participants are offered rehabilitative programs based on their **individual** needs, such as substance abuse or vocational training. *See* Cal. Code Regs. tit. 15 § 3078.4(b)(1). The only thing prohibiting Mr. Berman and Mr. Stapp from ACP participation is their sex. Plaintiffs are similarly situated to eligible female prisoners since they meet "all of the gender-neutral eligibility criteria required by the regulations." *See Sassman*, 2014 WL 5242591 at *5; *see also* Berman Decl. ¶ 5; Stapp Decl. ¶ 4.

C. The ACP's Exclusion of Male Prisoners Serves No Important Governmental Objectives

Defendants' sex-based classification fails to further an important governmental objective. As the district court explained in *Sassman*:

> As written, the current ACP is not substantially related to an important government interest . . . **CDCR has repeatedly made clear that the primary objectives of the ACP are family reunification and community reintegration.** However, since all women are permitted to participate in the ACP, not just women with children, it is unclear how the statute furthers those goals. Moreover, this court still cannot see how either goal is advanced by excluding male prisoners. **To the contrary, it seems that permitting men to participate in the program would actually serve the State's objectives.** Defendants have thus failed to show how the ACP can be substantially related to the State's interests of family reunification and community reintegration when, to apply, women need not be mothers, nor must they show a need for rehabilitation or recovery services aimed at substance abuse or domestic violence, but men, even if they show all of the foregoing, may not apply at all.

2014 WL 5242591, at *7-8 (emphasis added); *see also West v. Virginia Dep't of Corr.*, 847 F. Supp. 402, 408 (W.D. Va. 1994) (striking down unconstitutional law because "when an extremely favorable sentencing alternative is provided to one class of inmates and not another, and when that classification is based solely on the inmates' gender, the line is crossed"). The sole basis for the offending classification administered by Defendants is the sex of the individuals involved.

The primary objectives of the ACP, according to CDCR's own description and

promotion of the program, are family reunification and community reintegration. *See* Swearingen Decl. ¶ 7 & Ex. F. Excluding male prisoners with identical commitment offenses and risk criteria as eligible female prisoners advances neither goal. "To the contrary, it seems that permitting men to participate in the program would actually serve the State's objectives." *Sassman*, 2014 WL 5242591, at *8.

Defendants' practice of excluding men from the ACP runs not only against their own stated objectives, it conflicts with the legislative findings emphasizing the importance of male prisoners in their children's lives. *See* SB 1266, §§ 1(g), 1(h). Mr. Berman exemplifies this interest, as he has a daughter who could benefit from his presence at home. *See* Berman Decl. ¶¶ 3-4, 8. That he is a father and not a mother should have no bearing on his program eligibility. "[A] father, no less than a mother, has a constitutionally protected right to the companionship, care, custody, and management of the children he has sired and raised, (which) undeniably warrants deference and, absent a powerful countervailing interest, protection." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (quotation marks omitted) (holding that the sex-based distinction under 42 U.S.C. § 402(g) of the Social Security Act of 1935—which permitted widows but not widowers to collect special benefits while caring for minor children—violated the right to equal protection). The program's inclusion of all women, regardless of whether they actually have children to care for, while excluding all men, even those that were caregivers, is precisely the type of "overbroad generalization[ ] about the different talents, capacities, or preferences of males and females" that the Constitution proscribes. *See VMI*, 518 U.S. at 533.

Sex-based distinctions that hinge on assumptions about women's role as family caregivers cannot stand. *See Orr v. Orr*, 440 U.S. 268, 280 (1979) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas") *quoting Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975). The Supreme Court has repeatedly affirmed that mothers and fathers both play important parenting roles. In *Caban v. Mohammed*, 441 U.S. 380, 389 (1979), for example, the

Court rejected the argument and "apparent presumption" that mothers bear a closer relationship to a child, explaining that "maternal and paternal roles are not invariably different in importance." There, the Court rejected "the claim that the broad, gender-based distinction of [the statute] is required by any universal difference between maternal and paternal relations …." *Id.*

Statutes that permit different treatment of males and females through a reliance on gender stereotypes reinforce the antiquated notion that only females are responsible for the family. In *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 730 (2003), the Supreme Court addressed Congress's attempt to challenge "firmly rooted" societal stereotypes about the allocation of parental duties through the enactment of a gender-neutral family leave law. The Court recognized the detrimental effect of prior state discrimination arising from gender stereotypes, noting that parental leave policies that were only available to women relied on the presumption that "caring for family members is women's work," a presumption that has "historically produced discrimination in the hiring and promotion of women." *Id.* at 731 n.5; *see also Sassman*, 2014 WL 5242591 at *6 ("assuming that female inmates and their families will benefit more from the ACP than male inmates and their families promulgates the notion that women, regardless of their specific circumstances, are more fit to parent and are more important to the family than men").

Other courts have also cautioned that sex-based distinctions regarding caregiving can "perpetuat[e] the damaging stereotype that a mother's role is one of caregiver, and the father's role is that of an apathetic, irresponsible, or unfit parent." *Dalin v. Dalin*, 512 N.W.2d 685, 689 (N.D. 1994) (quotation marks and citation omitted); *see also Orr*, 440 at 283 ("Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection"); *Zummo v. Zummo*, 574 A.2d 1130, 1135 (Pa. 1990) ("The time in which such gender preferences could be rationalized or justified, however, has since past into unlamented history along with the repressive gender

stereotypes which drove the preferences. Women now pursue careers and provide for their children; men now nurture and care for their children.").

D. Plaintiffs' ACP Participation Would Promote Defendants' Interests

Allowing men to participate in the ACP "would actually serve the State's objectives" of family reunification and community reintegration. *Sassman*, 2014 WL 5242591 at *8. By reuniting men with their families, expanding ACP access to low-risk male prisoners could lead to enhanced public safety, as the program already has a sex-neutral exclusion of all prisoners with current convictions for serious, violent, or sex-based felonies, as well as those determined to pose a high safety risk. *See* Cal. Code Regs. tit. 15 § 3078.3. Indeed, the Legislative findings indicate that expanding program access to male prisoners would help to reduce recidivism. *See* SB 1266 § 1(g) ("Strong family connections help to ensure that fathers stay out of prison once they are released."); *see also id.* § 1(h) ("To break the cycle of incarceration, California must adopt policies that facilitate parenting and family reunification.").

Further, the State's explicit exclusion of qualified men defeats, rather than serves, other important governmental objectives, including saving the State money and reducing prison overcrowding. *See, e.g.*, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2009) *aff'd sub nom. Brown v. Plata*, 131 S. Ct. 1910 (2011) (ordering the State to reduce its adult institution population to 137.5 percent of design capacity); *see also* Swearingen Decl. ¶ 8 & Ex. G (Order of the Three-Judge Court Granting in Part and Denying in Part Defs.' Req. for Extension of Dec. 31, 2013 Deadline, *Coleman v. Brown*, E.D. Cal. Case No. 2:90-00520, Dkt. No. 5060 (Feb. 10, 2014)) at ¶ 4(h)). Excluding men from the ACP is contrary to the *Coleman* Orders because overcrowding would be further reduced if the program were offered to men as well. CDCR itself has even acknowledged that expanding ACP participation to men would be consistent with its court-ordered responsibility to reduce prisoner overcrowding. *See id.* ¶ 9 & Ex. H (report that a CDCR spokesperson "said men could one day be included in the [ACP] early release program as the department looks for ways to save money and seeks to comply with the federal court

order to reduce its prison population"); *accord West*, 847 F. Supp. at 407 (providing alternative incarceration program only to men is "not substantially related to" the objectives of decreasing "overcrowding and recidivism").

II. PLAINTIFFS WILL BE IRREPARABLY HARMED IN THE ABSENCE OF PRELIMINARY RELIEF

A. The Window for Plaintiffs to Join the ACP is Closing Daily, Depriving Plaintiffs of Irreplaceable Time With Their Families

Mr. Berman seeks to participate in the ACP to become reunited with his daughter, who is a source of tremendous importance and love in his life. *See* Berman Decl. ¶¶ 3-4. He wants to be her father again; to bond with her as she grows up and be present as she reaches important life milestones. *Id.* at ¶¶ 4, 8. He yearns to return to his family responsibilities, including providing "much-needed financial, emotional, and practical support." *Id.* ¶ 4. The current separation is painful to Mr. Berman and he will continue to suffer real emotional and psychological harms due to CDCR's refusal to consider him for ACP placement solely because of his gender. *Id.* at ¶ 8.

Mr. Stapp similarly is eager to return home to care for a family member. It would be "very meaningful" for him to help his elderly mother with tasks she finds physically painful and emotionally frustrating, such as making meals and cleaning the house. *See* Stapp Decl. ¶ 3. He is emotionally injured by the Defendants' actions, and feels judged as "less capable of helping my family because I am male, not female." *See id.* ¶ 7.

Time is essential for Mr. Berman and Mr. Stapp, whose windows for applying to the ACP are rapidly closing. *See* Swearingen Decl. ¶ 12 & Ex. K at 29 (prisoners must have at least six months left to serve when they apply); Berman Decl. ¶ 2 (stating EPRD is June 24, 2016); Stapp Decl. ¶ 2 (stating EPRD is August 23, 2016). The time to love a child or an elderly parent is precious and finite. Plaintiff William Sassman sought to participate in the ACP in part to help his elderly mother, who died of colon cancer during the pendency of his lawsuit challenging the ACP's exclusion of men. *See* Swearingen Decl. ¶ 11 & Ex. J. Given that both Plaintiffs applied to the ACP with less than two years remaining on their sentences, both Mr. Berman and Mr. Stapp could have been already

placed in the community with their families—if they were female. *See* Cal. Code Regs. tit. 15 § 3078.2 (allowing participants to spend up to the last 24 months of their sentence in the ACP); *see also* Stapp Decl. ¶ 7 ("If I was female, I could already be participating in the ACP, helping my mother with her daily needs"); Berman Decl. ¶¶ 2, 6. A preliminary injunction is necessary now because by the time the merits of this action are litigated, both men will have likely lost their opportunity to participate in the ACP. *See* Swearingen Decl. ¶ 12 & Ex. K at 29 (prisoners must have at least six months left to serve when they apply); *see also Enyart v. National Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011) (affirming finding of irreparable harm where plaintiff would lose the opportunity to pursue her chosen profession because she would not be able to complete a lengthy exam without injunctive relief); *Alvarez ex rel. Alvarez v. Fountainhead, Inc.*, 55 F.Supp.2d 1048, 1051 (N.D. Cal. 1999) (finding "immediate and irreparable harm" where absence of preliminary junction would result in student having lost his opportunity to attend preschool "by the time this action is decided on the merits").

B. Defendants' Unconstitutional Discrimination Is Irreparable Harm

Defendants' violation of Plaintiffs' constitutional rights is irreparable injury. *See, e.g.*, *Rodriguez*, 715 F.3d at 1144 ("It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury") (quotation marks and citation omitted); *Nelson v. Nat'l Aeronautics & Space Admin*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm"); *Toussaint v. Rushen*, 553 F. Supp. 1365, 1370, 1383-84 (N.D. Cal. 1983) *aff'd in part sub nom. Toussaint v. Yockey* (9th Cir. 1984) 722 F.2d 1490 (finding prisoner plaintiffs likely to suffer irreparable harm having "raised serious questions as to the constitutionality of their confinement"); *Perez v. Westchester Cnty. Dep't of Corr.*, No. 05 CIV. 8120 (RMB), 2007 WL 1288579, at *7 (S.D.N.Y. Apr. 30, 2007) ("Plaintiffs satisfy the irreparable harm requirement with their showing that their constitutional rights-particularly the Fourteenth Amendment right to equal protection-may

have been violated"); Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed. 2015) ("When an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary").

Discrimination constitutes irreparable injury, and Defendants' blatant discriminatory practices will continue to harm Mr. Berman and Mr. Stapp by violating their equality interests. *See, e.g., Silver Sage Partners, Ltd. v. City of Desert Hot Springs* (9th Cir. 2001) 251 F.3d 814, 827 ("We have held that where a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation"); *Cupolo v. Bay Area Rapid Transit*, 5 F.Supp.2d 1078, 1084 (N.D. Cal. 1997) ("Injuries to individual dignity and deprivations of civil rights constitute irreparable injury"); *Leiken v. Squaw Valley Ski Corp.*, 1994 WL 494298, at *11 (E.D. Cal., June 28, 1994, S-93-1622) ("Every day that a facially discriminatory policy excludes a member of a protected group, irreparable harm is caused to the individual's equality interests"). Defendants' denial of Plaintiffs' ACP application on account of their sex is "profoundly unfair," Berman Decl. ¶ 8, and being discriminated against solely on account of one's sex is "emotionally and psychologically difficult to experience," Stapp Decl. ¶ 7. The "[d]ignitary wounds [endured by Plaintiffs here] cannot … be healed with the stroke of a pen," *Obergefell*, 2015 WL 2473451 at *21, or by monetary compensation. *See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("intangible injuries" that cannot be adequately compensated through monetary damages qualify as irreparable harm).

C. Defendants Further Harm Mr. Berman and Mr. Stapp by De-Legitimizing and Diminishing Their Roles in the Family Structure

Families need each other both materially and emotionally, and no amount of money can compensate for missed involvement in a loved one's life. As the President of the United States has recognized: "Being a dad is one of the most important jobs a man can have." *See* Swearingen Decl. ¶ 10 & Ex. I (Executive Office of the President of the United States, *Promoting Resonsible Fatherhood* (June 2012)); *cf.* SB 1266 § 1(g) ("a father's

involvement in his child's life greatly improves the child's chances for success … [and] can have positive effects for children"). The President's report describes the administration's "commit[ment] to improving outcomes for formerly incarcerated individuals reentering society through a number of strategies, including helping reconnect these individuals to their families." Swearingen Decl. ¶ 10 & Ex. I at 25. Defendants harm Mr. Berman and Mr. Stapp by depriving them the ability to reenter society and participate in their families solely because they were born men and not women.

III. THE BALANCE OF EQUITIES TIPS SHARPLY IN PLAINTIFFS' FAVOR

The balance of equities weighs heavily in Plaintiffs' favor, given their likelihood of success on the merits, as well as the profound and irreparable harms they will suffer if a preliminary injunction does not issue. Defendants, by contrast, cannot credibly argue that they will experience significant harm from the issuance of a preliminary injunction requiring them to allow Mr. Berman and Mr. Stapp to participate in the ACP. Plaintiffs' proposed solution is not likely to burden prison staff or resources, as the cost of placing a CDCR prisoner in the ACP pales in comparison to the amount of money and staff time California expends to incarcerate each person within prison walls. *See* Swearingen Decl. ¶ 13 & Ex. L ("California is expected to spend approximately $60,000 per inmate in 2013-14"). This is especially true here, where each Plaintiff has a private residence from which to be supervised. CDCR has admitted that any administrative cost associated with opening the program to men would be more than offset by the anticipated cost-savings. *See id.* ¶ 9 & Ex. H (CDCR spokesperson predicting that including men in the ACP would save the Department money). Even if the expenditure of such administrative resources proved to be substantial, those costs would fail to justify the discriminatory practice of excluding men from the program. *See Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (concluding that presumed savings in time, money, and effort do not justify sex-based discrimination).

IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

Given that ACP participation promotes family reunification and community reintegration, the "public interest prong[ ] tip[s] in Plaintiff[s'] favor." *Sassman*, 2014 WL

5242591 at *3. The findings of the legislature further explain how participation in the ACP by male prisoners facilitates public goals. *See* SB 1266, § 1(g) ("Strong family connections help to ensure that fathers stay out of prison once they are released."); *id.* § 1(h) ("[t]o break the cycle of incarceration, California must adopt policies that facilitate parenting and family reunification.").

Allowing men to participate in the ACP would also help achieve the public goal of reducing overcrowding in California prisons. "[T]he public interest lies in the state's making progress towards resolving its prison crisis." *Coleman v. Schwarzenegger*, No. 90-0520, 2009 WL 2851846 at *2 (E.D. Cal. Sept. 3, 2009); *see also Brown v. Plata*, 131 S. Ct. 1910, 1945-46 (2011) (upholding three-judge court order to reduce prison overcrowding). In furtherance of these prison population reduction goals, the Three-Judge Court ordered that "[t]o the extent that any state statutory, constitutional, or regulatory provisions, except the California Public Resources Code, impede the implementation of this order …all such laws and regulations are waived." Swearingen Decl. ¶ 8 & Ex. G at 5. CDCR therefore has the power to open ACP participation to men, but has chosen to underutilize the program as a resource to address overcrowding.

Rather than serve the public interest, Defendants' categorical exclusion of all male inmates from the ACP harms the public interest by exacerbating the overcrowding of California's state prisons; increasing the risk of recidivism to male prisoners denied the benefits of rehabilitative programming; denying otherwise eligible male prisoners the ability to care for their families; denying children the benefits that attend the presence and participation of fathers in their lives; perpetuating outdated and damaging stereotypes suggesting that only mothers care for children, and that children can only benefit from reunification with their mothers; and denying low-risk male offenders the opportunity to reintegrate with their communities. In furtherance of the public interest, Plaintiffs and other male prisoners should be allowed to participate in the ACP effective immediately, despite the statutory and regulatory language unconstitutionally excluding men from the program. *See* Cal. Penal Code § 1170.05(a); Cal. Code Regs. tit. 15, § 3078.2(a).

V. DEFENDANTS' DISCRIMINATORY POLICY SHOULD BE ENJOINED IN FULL

Defendants' policy of excluding male prisoners from ACP participation should be enjoined in full, not just as to Plaintiffs. *See Obergefell*, 2015 WL 2473451 at *22 (directing every State to license and recognize marriages between same-sex couples, notwithstanding statutes defining marriage as a union between a man and a woman, because the "Constitution [ ] does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex"). The Supreme Court has instructed that when claims are presented vigorously and resolution of the merits would be an efficient use of judicial resources, the claims of third parties should not wait for another day. *See Craig*, 429 U.S. at 193-94 ("[A] decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence."). The parties and the Court here will have expended significant resources analyzing the constitutionality of the Defendants' female-only ACP program. A preliminary injunction limited to Plaintiffs Berman and Stapp would be contrary to judicial economy and interfere with the interests of non-party low-risk male prisoners who could benefit from court-ordered relief now. Plaintiffs' proposed order enjoining the enforcement of the unconstitutional gender restriction is filed herewith.

VI. THE BOND REQUIREMENT SHOULD BE WAIVED

Under Federal Rule of Civil Procedure 65(c), district courts have discretion in granting a preliminary injunction to set no bond or only a nominal bond. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005). Waiving the bond requirement is appropriate here because Mr. Berman and Mr. Stapp are prisoners without employment and unable to post a bond. *See, e.g., Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (requiring alien plaintiffs to post only a nominal bond because the vast majority were "very poor"); *see also Hernandez v. County of Monterey*, __ F.

Supp. 3d __, No. 5:13-2354, 2015 WL 3868036, at *16 (N.D. Cal., Apr. 14, 2015) ("[s]entenced inmates lack any source of income by virtue of their incarceration"). Courts may require no bond where there is no likelihood of harm to defendant from enjoining its conduct. *See, e.g., Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003). Here, a bond requirement would effectively deny access to judicial review for Plaintiffs Berman and Stapp, which is especially harmful because they allege violations of fundamental rights under the Constitution. *See Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009).

CONCLUSION

Defendants' discriminatory statute deprives Plaintiffs of their families, home communities, and rehabilitative programs solely because they are men—fathers not mothers, sons not daughters. For Mr. Berman and Mr. Stapp, each day in which they are deprived of these opportunities is a day irrevocably lost. A preliminary injunction should issue forthwith to allow Mr. Berman and Mr. Stapp full and equal access to the ACP.

DATED: July 16, 2015

Respectfully submitted,

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By: */s/ Gay Crosthwait Grunfeld*
Gay Crosthwait Grunfeld

Attorneys for Plaintiffs

Appendix A

VERMONT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

MICHAEL CARPENTER Plaintiff v. ANDREW PALLITO Defendant	FILED Docket No. 531-9-13 Wncv

RULING ON THE MERITS

Plaintiff Carpenter is an inmate in the custody of the Vermont Department of Corrections (DOC). He is currently housed in a Kentucky correctional center. He brings this suit against the Commissioner of Corrections, arguing that his out-of-state incarceration violates his right to Equal Protection and the Common Benefits Clause of the Vermont Constitution. Trial took place on June 11. Post-trial memoranda were complete July 10. Dawn Matthews, Esq. represents Carpenter. David R. McLean represents Pallito.

Findings of Fact

The witnesses at trial were Carpenter, his fiancée Dee Morse, an expert witness named Kerry Lynn Kazura, and DOC employees Cullen Bullard and Jill Evans.

The court finds the following facts to be established by a preponderance of the evidence. Carpenter has been incarcerated for over three years. He is serving sentences for violation of an abuse prevention order, driving under the influence, violation of probation, and attempted escape. He has twin boys who are four and a half years old, Aiden and Brendan. He was at their birth, and with them daily until his incarceration. He fed them every day, and got up at night to

feed them so their mother – Dee Morse – could get some sleep. Morse testified that they were very focused on their father: "they wanted him more than me." She said he was a good father, a "natural parent" who was very bonded with the boys. He would rock them both to sleep in his arms. The children have no grandparents, and Morse has no family around except an eighteen-year-old daughter. She described her relationship with Carpenter as "close to perfect."

When Carpenter was first incarcerated, and was in Vermont, Morse brought the children to see him every week. He was able to hold them at those visits. Then Carpenter was sent by Corrections to Kentucky to serve his sentence. Morse cannot afford to travel to Kentucky so the boys can see their dad. There is no transportation subsidy offered to assist families to make visits to Kentucky. The Kentucky facility provides no video conferencing for families, such as through Skype or Facetime.

Although he was able to see his children at the courthouse on the day of trial, until that day Carpenter had not seen these four-year-old boys since they were a year old. Carpenter desperately wishes to see his children and would participate in any visitation program he was offered. Morse will bring the children to see him if he returns to Vermont.

Corrections sends inmates to Kentucky because they do not have enough space in Vermont correctional facilities. Instate capacity is for 1,600-1,700 inmates, and the average daily population is now 2,100. In the last two years, about 150 of those have been women. Currently there are 230 women.

In 1998, Corrections started sending inmates out of state to relieve the overcrowding and the related security concerns. At the time the out-of-state program began, there were sometimes three and four people in a two-person cell, and holding cells designed to hold five might at times hold twenty. It created security issues, although no details were proffered as to what those issues

were. There was also a lawsuit filed by the ACLU concerning living conditions, although no details were provided about that suit.

DOC sends only men out of state because of the numbers: there are more men to send. Even if they sent all the women out of state, it would not be a sufficient number to address the problem – and not all of the women have a sentence that qualifies them to be sent out of state. Once issues of medical concerns, release eligibility, pending court proceedings and mental health issues are taken into account, there are currently only 6 to 12 women eligible to be sent out of state. There is no formal policy that only men will be sent out of state, but DOC does not consider it "financially feasible" to send women elsewhere. Testimony of Cullen Bullard, Director of Classification and Facility Designation, DOC. Some women were sent out of state at some point in the past, but the current policy is to send only men. Even if some women were sent now, it would not address the overcrowding because the spaces would be in the women's facility and would not open up slots for men. Mr. Bullard testified that there are currently twenty to thirty people sleeping on cots that slide under other beds "because we don't have enough space."

The criteria to be sent out of state are that you must be serving a sentence, cleared medically, cleared for mental health issues, not be involved in any programming, and not be eligible for the work camp. There was no evidence that these criteria are statutorily mandated. It appears that they are criteria that DOC has established internally.

It is DOC's policy to try to keep inmates as close to their families as possible. In doing the screening, however, Corrections does not ask whether the inmate has minor children. Bullard testified that if Corrections took into account the inmates' desire to see their children, they would not have enough men to send out of state because they are already struggling to find more men to transfer. However, Bullard did not know how many of the inmates in Kentucky (or

other out-of-state facilities) are fathers of minor children or how many would seek visitation if it was available. He does not know how many men have made requests for contact with their children.

There is no current move towards building another correctional facility in Vermont, although that would appear to be the obvious solution. There was no evidence – other than a general statement about it being politically challenging – about what efforts have been made to build a new facility in Vermont. DOC has looked for out-of-state facilities that are closer geographically, but without success.

Jill Evans is the Director of Women and Family Services for Corrections. She focuses on issues related to children and families impacted by incarceration. She is familiar with the programs within Corrections for parents. She oversees a program at the Chittenden facility for women and children called Kids Apart. The program for mothers is aimed at building healthy bonds with children and trying to decrease the negative impacts of incarceration on the children. In Governor Shumlin's 2011 budget address he stated that moving the women from elsewhere in the state to the Chittenden County facility – a county in which "roughly one third" of them live – would "help mothers bond with their children" and "learn better parenting skills for when their time is up and they are reunited with their families." Exhibit 2. Because all female inmates are currently housed at the Chittenden facility, all female inmates have access to visitation programs.

The Nurturing Fathers Program run for fathers by Prevent Child Abuse Vermont is a parenting skills program available in some of the other Vermont facilities. It is a popular program. In addition, volunteers have offered father-child visitation in some of the facilities, separate from the standard visitation that is available. There is no standard program for men throughout Vermont; each facility sets up its own programs.

According to Evans, children with a mother in prison are at greater risk than children with a father in prison. She draws this conclusion from the fact that fewer children live with their fathers while mom is in jail than live with their mothers while dad is in jail. Children are twice as likely to be placed in foster care when a mother goes to prison as when a father goes to prison. Most of the women in jail in Vermont were single mothers, so the children are separated from their only caregiver.

However, Corrections keeps no statistics on how many inmates are parents. They just completed a study entitled Vermont Inmate Family Survey, dated April 2014. Ex. A. The goal was to learn how families are impacted by incarceration. Only in-state inmates were surveyed, however, and only 25 percent of them. Evans plans to do a similar survey of out-of-state inmates. The report shows that for 83 percent of male inmates in Vermont, the children live with their mother while the father is in jail, whereas for only 32 percent of female inmates are the children living with their father.

The report also states, among other things, the following: 64 percent of the inmates interviewed were parents of minor children; before incarceration, 41 percent of the children were living with the incarcerated parent; prior to incarceration, 81.6 percent of the children either lived with or regularly visited with the incarcerated parent; "a released inmate is much less likely to recidivate with a strong family connection and support system"; "contact between incarcerated parents and their children during incarceration and immediately following release has been linked to reductions in recidivism"; about 20 states have or are planning to have video-conferencing for families of inmates. Report at 33, 37, 38, 9, 3, 68.

Visitation with fathers can be complicated, because they are more likely than the women to be incarcerated for violent crimes such as domestic assault. Thus, victim advocates and others

concerned with the children need to be involved. However, Evans sees visitation in the correctional setting as a perfect time to provide safe, supervised contact and a way for such men to learn new skills. In addition, contact with their children can be a great motivator to participate in programming.

Evans testified that there is supposed to be a program set up to allow men in Kentucky to have contact with their families through Skype. She does not know why that has not happened yet, except that she understands there have been "technical issues."

DOC does not know how many male inmates who are currently out of state have minor children or how many would choose to have visitation if they were in Vermont. Evans guesses that about half the men in Kentucky are fathers, which is the percentage in-state. She did not address whether that referred to minor children or not. She would like to see parenting programs for all inmates. She believes that children should have contact with their incarcerated parents if it is in the children's best interests.

Dr. Kerry Lynn Kazura is the Chair of the Department of Family Studies at the University of New Hampshire. Her thesis was on the topic of father-child attachment, and she teaches child development. In addition to attachment, she specializes in the issue of visitation with incarcerated parents. She has done research through the Family Connection Center, which has programs in all New Hampshire prisons. The program provides parenting classes, records CDs of incarcerated parents reading books for their children, and runs visitation programs that include Skype visitation. Kazura has published articles in the journals Incarceration Today, Offender Rehabilitation Journal, and Children of Incarcerated Parents.

In Kazura's view, although there may well be a higher number of women who are children's primary caretakers, "because more men are incarcerated, there's actually more men

who were single fathers and the primary caregivers that are incarcerated and more children who are impacted from that than [from women being incarcerated]." When incarcerated parents maintain connection with their children it leads to greater self-esteem for the children and less aggressive behaviors at school. Having fathers involved in a child's life in general – not just when incarcerated – reduces the risk of teenage pregnancy and increases self-esteem.

National data shows that when inmates have visitation with their children, they behave better in prison, are more likely to get a fulltime job upon release, are less likely to commit new crimes, and are less likely to use illegal drugs.

In the New Hampshire program, inmates have to go through a four to six week parenting program and then four sessions of a support group before visitation starts. The visitation is through Skype. Only a small percentage of the inmates, male or female, actually get to the Skype portion of the program. Out of 500 inmates, Kazura would expect ten to actually get to the Skype sessions. Some parents decline visitation – whether Skype or in person – because they do not want their children to see them in prison.

Other states have various types of visitation programs. Oregon and California have special visitation centers. Virginia uses Skype. Pennsylvania buses families for visits. New York has family centers in all facilities similar to New Hampshire. Even at Sing-Sing, they have a children's playroom. Most states started with programs only for women but have moved to both men and women.

Conclusions of Law

Carpenter asserts that because his incarceration in Kentucky effectively prohibits him from any contact with his young children, it violates the federal Equal Protection Clause and the Vermont Common Benefits Clause. He argues that DOC is treating fathers differently from

mothers, and that this gender-based distinction requires DOC to prove an "exceedingly persuasive" justification for the differing treatment. United States v. Virginia, 518 U.S. 515, 533 (1996). He also argues that under the Common Benefits Clause, DOC must show an "appropriate and overriding public interest" to support its policy. Baker v. State, 170 Vt. 194, 206 (1999) (citation omitted). He seeks a declaration that the DOC policy is in violation of law, and an order returning him to Vermont.

DOC responds that the out-of-state transfers are not discrimination on the basis of gender, and that men and women are not similarly situated. It further argues that the differences in the impact on families when men and women are incarcerated, as well as the need to manage the prison population, justify the different treatment. Finally, DOC argues that there is no constitutionally protected right to visitation. It takes the position that "by violating the law, Plaintiff has lost whatever protections the Common Benefits [Clause] may provide to the extent they are incompatible with his status as an inmate." Response at 6 (filed July 10,2014).

It is worth noting here that Carpenter is not presenting a due process claim. Rather, his focus is on how he has been treated relative to other inmate parents of a different gender. Although what is at issue here is not a regulation per se, the DOC policy of sending only men out of state is, for all practical purposes, equivalent to a regulation barring all contact with the inmates' minor children. The court sees no reason to analyze it differently merely because it stems not from a "regulation" but an apparently unwritten "policy." *Accord*, Johnson v. California, 543 U.S. 499, 508 (2005) (analyzing prison's unwritten policy).

Equal Protection

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Safley, 482 U.S. 78, 84 (1987). "It is settled that a prison inmate 'retains

those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" Id. at 95 (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974).

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike" by the government. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The standard applied by the courts in determining whether this directive has been violated depends upon the nature of the classification between groups. "For a gender-based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Tuan Anh Nguyen v. I.N.S, 533 U.S. 53, 60 (2001)(citations and quotation marks omitted). *See also*, State v. George, 157 Vt. 580, 585 (1991)("Where the alleged discrimination is based on gender, courts scrutinize the . . . classification by the higher standard of whether it is 'substantially related' to an important and legitimate state interest.")(citation omitted); Ashann-Ra v. Com. of Virginia, 112 F. Supp. 2d 559, 570 (W.D. Va. 2000)(discussing the various analyses to be applied depending on the nature of the classification).[1]

Although historically it has more often been women who were denied the same benefits as men, it is no less a violation of the law to unjustifiably deny benefits to men. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)(excluding men from nursing school violated equal protection); Orr v. Orr, 440 U.S. 268, 279 (1979)(imposing alimony obligation

[1] This is in comparison to the four-part test used to analyze inmates' equal protection claims that are *not* based upon race or gender. That test asks (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether there is an "absence of ready alternatives" to the policy or regulation. Turner v. Safly, 482 U.S. 78, 89-90 (1987).

on husbands but not wives violated equal protection). Thus, for example, another court has ruled that strip-searching male inmates in front of other detainees, while giving female detainees privacy, was an equal protection violation. Young v. County of Cook, 616 F. Supp. 2d 834, 852-54 (N.D.Ill. 2009)("logistics" cannot justify such a policy).

The court begins with what the facts show. The court rejects DOC's argument that male and female inmates are not "similarly situated." The evidence demonstrates that in Vermont, male inmates who are parents of minor children[2] are treated differently from female inmates who are parents of minor children, in that some of those men are sent to locations where visitation with their children is, for all practical purposes, impossible.[3] No female inmates are being treated in this manner. Not all men are either, but the result of DOC's policy of not considering parental status at all is that only male parents are sent hundreds of miles away from their children.

The proffered reason for this policy of treating men and women differently is that it is the easiest way to reduce the overcrowding in the prisons, and that there are just not enough "qualified" women to fill the needed number of out-of-state beds. To a lesser extent, DOC seeks to explain the differences between how it treats men and women on the basis of statistics about how many fewer men are likely to be the sole custodians of their children than are women.

The Supreme Court has described the analysis a court must apply in analyzing such justifications:

> [T]he reviewing court must determine whether the proffered justification is exceedingly persuasive. The burden of justification

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[2] Although it has not been spelled out, the court interprets the claim here as relating to parents of minor children, not adult children.

[3] In theory, if the family was wealthy enough, and had vacation time enough, to fly to Kentucky and stay in a hotel, visitation might be possible. Likewise, if the children were older teenagers, they might be able to visit on their own. It is also possible that someone incarcerated for a crime in Vermont might be from Kentucky or nearby, and thus have their children close by. However, no evidence was presented that any of the out-of-state inmates have such family members. Thus, the court proceeds based on the facts before it, involving a Vermont resident whose family lives here and cannot afford to travel.

> is demanding and it rests entirely on the State. The State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

U.S. v. Virginia, 518 U.S. 515, 533 (1996) (citations and quotation marks omitted). This is what is elsewhere referred to as "intermediate scrutiny," as opposed to the "strict scrutiny" that is applied to racial classifications. Cohen v. Brown University, 101 F. 3d 155, 183 n.22 (1st Cir. 1996). "[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." J.E.B. v. Alabama, 511 U.S. 127, 139 n.11 (1994).

The "relationship between parent and child is constitutionally protected." Quilloin v. Walcott, 434 U.S. 246, 255 (1978). "[T]he right of a parent to custody and the liberty interest of parents and children to relate to one another in the context of the family, free of governmental interference, are basic rights protected by the United States Constitution." In re S.B.L., 150 Vt. 294, 303 (1988)(quotation marks omitted). The Unites States Supreme Court has noted that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000). "Both the right of a parent to custody and the liberty interest of parents and children to relate to one another in the context of the family, free of governmental interference, are basic rights protected by the due process clause of the Fourteenth Amendment to the United States Constitution." Guardianship of H.L., 143 Vt. 62, 65 (1983).

On the other hand, "[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper

incarceration. And, as our cases have established, freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context." Overton v. Bazzetta, 539 U.S. 126, 131 (2003) (citation omitted). Moreover, courts "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." Id. at 132.

Prisons may restrict inmates' contact with their children when there are "legitimate penological objectives" behind the restrictions. Caraballo-Sandoval v. Honsted, 35 F. 3d 521, 525 (11th Cir. 1994). *See also*, Phillips v. Thurmer, No. 08–cv–286–bbc, 2009 WL 1252002, at *2, *4 (W.D.Wis., April 30, 2009)(Although "prisoners retain a right to familial association during incarceration" and "[o]rdinarily, building strong connections with family members is encouraged as an aid in rehabilitation and reintegration to society," restriction on sex offender's visits with niece "bears a connection to legitimate penological interests in safety and rehabilitation"); Dunn v. Castro, 621 F. 3d 1196, 1205 (9th Cir. 2010) ("[W]e do not hold or imply that incarceration entirely extinguishes the right to receive visits from family members. Nor do we deprecate the value of the relationship between Dunn and his children. The relationship between a father or mother and his or her child, even in prison, merits some degree of protection.") (citation omitted)).

In Overton, the prison had placed restrictions on (although not barred) visitation by inmates' children, because prison resources had been strained by increased visitors and officials had "found it more difficult to maintain order during visitation and to prevent smuggling or trafficking in drugs." 539 U.S. at 129. In addition, "[s]pecial problems were encountered with the increase in visits by children, who are at risk of seeing or hearing harmful conduct during visits

and must be supervised with special care in prison visitation facilities." Id. The Court upheld the restrictions because their purpose was "maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury." Id. at 133. The Court also noted that visitation was "limited, not completely withdrawn." Id. at 135.

The Supreme Court has also held that denying detainees "contact visits" – as opposed to contact where "clear glass panels separated the inmates from the visitors, who visit over telephones" – can be justified by security concerns: "the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility." Block v. Rutherford, 468 U.S. 576, 578 n.1, 589 (1984).

Likewise, prisons may put restrictions on visitation for reasons such as discipline or protection of the visitors. While "courts and commentators have observed that visitation may significantly benefit both the prisoner and his family. . . . the Constitution allows prison officials to impose reasonable restrictions upon visitation." Wirsching v. Colorado, 360 F.3d 1191, 1198 (10th Cir. 2004). In Wirsching, the Tenth Circuit addressed restrictions on Mr. Wirsching's contact with his children. The court acknowledged that "the interests Mr. Wirsching asserts are important ones. The Supreme Court has held that 'parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children.'" Id. (citation omitted). However, the court upheld the admittedly "harsh" restriction barring the inmate from seeing his daughter, which was based on his status as an untreated sex offender. Id. at 1200-02.

Some cases have held that there is no absolute right to visitation in prison, but have noted that if a ban on visitation were permanent, their conclusions might have been different. *See, e.g.*,

Dunn v. Castro, 621 F. 3d 1196, 1203-04 (9th Cir. 2010); Overton, 539 U.S. at 137. *Accord*, Alkebu-Lan v. Kane, No. C 06–5991 CW (PR), 2009 WL 1578722, (N.D. Cal. June 4, 2009)(indefinite ban on visitation raises due process concerns); *see also*, Laaman v. Helgemoe, 437 F. Supp. 269, 322 (D.N.H. 1977)(denying all visitation would violate "First Amendment rights to familial association" as well as Eighth Amendment rights); Valentine v. Englehardt, 474 F. Supp. 294, 302 (D.N.J. 1979)(by denying all visitation, jail denied inmates and their children "one of the most fundamental of all human rights.").

This case, however, is not about whether DOC may place express restrictions on visitation for specific penological reasons.[4] In this case, neither security, nor discipline, nor protection of the children is offered as a justification for cutting off contact with Carpenter's children. Most importantly, the cases above did not involve the issue of gender discrimination that is presented in this case. They addressed the rights to parental contact, or to visitation, but not the right to be treated similarly to the opposite gender in connection with those rights. Thus, the cases above applied the lower level of constitutional scrutiny under Turner.

Nothing specific to Carpenter, his behavior in prison, or his offense is keeping from his children. The only reason he can have no contact with his children, while other inmates can have such contact, is that he is a man. Under the higher level of scrutiny applicable to gender classifications, the court must ask whether "the [challenged] classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Tuan Anh Nguyen v. I.N.S, 533 U.S. 53, 60

[4] It is also not about whether prisoners have a constitutional right to visitation in general. At least one court has expressly held that "there is no constitutional right to prison visitation, either for prisoners or visitors." White v. Keller, 438 F. Supp. 110, 115 (D.Md.1977), *aff'd*, 588 F.2d 913 (4th Cir. 1978) (per curiam). Others disagree. *See, e.g.*, Laaman v. Helgemoe, 437 F. Supp. 269, 322 (D.N.H. 1977)(denying all visitation would violate "First Amendment rights to familial association" as well as Eighth Amendment rights); Valentine v. Englehardt, 474 F. Supp. 294, 302 (D.N.J. 1979)(by denying all visitation, jail denied inmates and their children "one of the most fundamental of all human rights.").

(2001)(quotation marks omitted). The government's justifications must be "exceedingly persuasive." Virginia, 518 U.S. at 533. "The burden of justification is demanding and it rests entirely on the State." Id.

The objective to which DOC points is reducing overcrowding in the Vermont prisons, because of security concerns. This is obviously a valid goal, and the court accepts DOC's general proposition that at some point overcrowding can lead to security problems. However, no evidence was presented beyond that broad generalization: no testimony about the level of overcrowding at which violence increases, or illness begins to spread, or contraband is more easily exchanged, or the like. There was no evidence about research concerning ideal numbers of inmates per cell, or per facility.

Nor was any detailed evidence presented about the level of overcrowding that would exist if the out-of-state transfers stopped, such as how many inmates would be in a cell together. While there was evidence about overcrowding in the 1998 time frame, there was no evidence about how many cells now exist. The only figures given were that the current design capacity in the Vermont facilities is for 1,600 to 1,700 inmates and there are, on average, 2,100. Based on those numbers, there are only 400 to 500 "extra" inmates. If they all remained in Vermont, that would mean adding an extra person to only one of every three or four cells. Even if one subtracts the 150 average yearly number of women from the total cells available, it is still only about an extra inmate for every third male cell.

The court does not suggest that such numbers would be ideal. Nor does the court seek to micromanage the prisons or tell DOC how to do its job. However, the burden here is on DOC to be "exceedingly persuasive." There was just no concrete evidence presented that such numbers would create a real security problem. We know there are currently twenty or thirty inmates

"sleeping on cots," yet there was no evidence that they have caused any security problems. We have no evidence about the number of men that might have to return to Vermont if visitation were considered. With such a dearth of evidence, the court concludes that DOC has failed to meet its burden of proof.

DOC also seeks to justify its distinction between male and female prisoners on the basis of statistics about how many more women tend to be sole custodians of their children before going to prison. The court is not persuaded. First of all, there is no evidence that this was actually considered by DOC when it decided on its policy. It appears instead to be a post hoc justification. "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." Virginia, 518 U.S. at 533.

Second, the data provided to the court by DOC was exceedingly general and unsupported by anything in the way of research papers, expert testimony, or hard numbers. Finally, one cannot help but note that it is just this sort of assumption about women's roles that has, in the past, led to discrimination in the workplace *against* women. The fact that what DOC is doing *favors* women over men does not make it any better. To assume that *this* man is not likely to have a strong role in his children's lives because that is true of *some* men is precisely what is forbidden: the justification offered by the government "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." Id.[5] It appears to be "characteristic of role and gender stereotypes rather than the product of an examination of the actual needs and interests of the [men.]" Glover v. Johnson, 478 F. Supp. 1075, 1082 n.5 (E.D. Mich. 1979). In fact, the clear and undisputed evidence in this case is that

[5] "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." Orr 440 U.S. at 280 (quoting Stanton v. Stanton, 421 U.S. 7, 14-15 (1975).

Carpenter had a close bond with his two young sons from the day of their birth, and was seeing them regularly while he was still incarcerated in Vermont.[6]

Another court has rejected an argument similar to that DOC proffers. In Estate of Hicks, 675 N.E. 2d 89 (Ill. 1996), a law barred unmarried fathers from inheriting from their children. The proffered justification was that fathers of illegitimate children "frequently have no meaningful personal relationship" with those children and fail to support them. Id. at 94. Thus, the theory went, it was "reasonable . . . to presume that illegitimate children bear no affection for parents who fail to support and acknowledge them." Id. The court rejected that explanation, because the result could be reached in a gender-neutral manner, by requiring evidence of a relationship between the particular father and child. Id. at 94-95.[7] The same is true here: individual assessments can be made about an inmate's status as parent of a minor child, or even the role he has played in the child's life, before he (or she) is sent out of state. A categorical line making broad assumptions about the role of men and women as parents is not justified.

Even if the "justification" element of DOC's burden of proof had been established, however, the State must also show that the "discriminatory means employed" to meet the objective are "substantially related to the achievement of those objectives." Tan Anh Ngyuen, 533 U.S. at 60. While sending men out of state does directly address the objective of reducing the population, sending men *who are parents of minor children* does not. DOC does not know how many out-of-state male inmates have minor children, or how many would choose to have visitation if they were in Vermont. It could be only five or ten men for all they know, because

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[6] Surely it is to society's benefit to nurture and support loving bonds between inmates and their children, for the sake of the men, the children, and society as a whole. As witnesses for both sides agreed, contact with families can improve behavior both in prison and upon release. Although there was no specific evidence presented on the issue, and it is thus not a basis for the court's decision today, the court also notes that the lifelong importance to children of creating attachment bonds at an early age is well known.

[7] That court applied the heightened "strict scrutiny" standard of analysis, but its point is nonetheless applicable here.

they have never asked. Yet by not asking, they are barring all such men from seeing their children. There is no evidence that the number of such men, if they were brought back to Vermont, would impact DOC's proffered security concerns. It is just not persuasively established that sending men out of state regardless of their parental status is necessary to achieve DOC's goals.[8]

Common Benefits Clause

The Common Benefits Clause of the Vermont Constitution, Article 7, states as follows:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

"[A]t its core the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage." Baker v. State, 170 Vt. 194, 208-09 (1999). "Article 7 guarantees the right of the people to a government that does not favor any one person or family over another. Government is not for the chosen few. It acts constitutionally only when it benefits and protects all people equally." In re Town Highway No. 20, 2012 VT 17, ¶ 32, 191 Vt. 231.

The Vermont Supreme Court has rejected the multi-tiered analysis used in federal equal protection cases in favor of "a relatively uniform standard." Baker v. State, 170 Vt. 194, 212 (1999). The Court has described the analysis as follows:

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[8] DOC also argues that decisions about where it places inmates are solely within its discretion. *See, e.g.*, Daye v. State, 171 Vt. 475, 479 (2000); Olim v. Wakinekona, 461 U.S. 238, 245-46 (1983). That is true as a general matter, but it does not mean DOC is immune from the mandates of the Constitution. Surely DOC would concede that despite its placement discretion, it could not place all black inmates in one facility and all whites in another. *See* Johnson v. California, 543 U.S. 499 (2005).

> When a statute is challenged under Article 7, we first define that "part of the community" disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the state's protection. . . .
>
> We look next to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others. Consistent with Article 7's guiding principle of affording the protection and benefit of the law to all members of the Vermont community, we examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives.
>
> We must ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose. Consistent with the core presumption of inclusion, factors to be considered in this determination may include: (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive. As Justice Souter has observed in a different context, this approach necessarily "calls for a court to assess the relative 'weights' or dignities of the contending interests."

Id. at 212-14 (citation omitted).

Under this analysis, the court reaches the same conclusions as under the Equal Protection Clause. As noted above, the significance of the benefits of the classification has not been persuasively established; the evidence does not show that making it impossible for male inmates to see their minor children rationally advances any goal of the government; and sending men out of state without considering their parental status is an overinclusive classification. Thus, the court finds that the DOC policy of sending only male inmates out of state violates the Common Benefits Clause.

The Relief Sought

Carpenter asks the court to issue a declaratory judgment, to direct DOC to return him to Vermont, and to order any other relief the court finds appropriate. DOC has not argued that the relief Carpenter seeks is inappropriate in this case. Thus, the court will grant the specific relief requested. The court does not believe it appropriate, however, to go any further – such as to order precisely how DOC should remedy the situation.[9]

Conclusion

"The problems of administering prisons within constitutional standards are indeed complex and intractable, but at their core is a lack of resources allocated to prisons. Confinement of prisoners is unquestionably an expensive proposition." Rhodes v. Chapman, 452 U.S. 337, 357 (1981)(Brennan, J., concurring)(quotation marks omitted). As noted above, it is not this court's role to micromanage or second-guess how DOC runs its prisons. However, when necessary, courts must at times "insist that unconstitutional conditions be remedied, even at significant financial cost." Id. at 359.

DOC has not adequately proved that its differing treatment of male and female inmates meets constitutional requirements. Thus, the court cannot sanction DOC's policy of sending male inmates far from home, regardless of whether they have close bonds with their young children, while keeping all women nearby. The court does not suggest that the solution is necessarily to send women out of state, only that that the current practice of distinguishing between inmates based on gender is legally indefensible.

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[9] DOC might, for example, be able to find a nearby facility in New York, Massachusetts, or New Hampshire that would not be so distant as to cause visitation problems for inmates from certain parts of the state; or screen all inmates based upon the age of their children or their custodial situation. These issues, however, should be left to DOC to determine.

Order

For the reasons stated above, judgment is granted for Carpenter. The court finds that DOC's policy violates the Equal Protection Clause and the Vermont Common Benefits Clause. The court orders DOC to promptly return Carpenter to a Vermont institution where he can see his young children.

Dated at Montpelier this 13th day of August, 2014.

Helen M. Toor
Superior Court Judge