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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

WILLIAM A. SASSMAN,

Plaintiff,

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. 2:14-cv-01679

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

As part of its effort to address a state-wide prison overcrowding crisis, the California Department of Corrections and Rehabilitation ("CDCR") operates and promotes a family reunification program allowing certain prisoners to serve the last 24 months of their sentences in the community 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 particular low-level offenders are eligible to participate. However, the great majority of CDCR's low-level offender population will never participate in the ACP because Defendants unconstitutionally restrict access to females only. Since its inception, CDCR's message regarding the ACP has been unequivocal: women are welcome; men need not apply.

Defendants' discriminatory practices deprive male prisoners of the ability to foster stronger connections with their families while serving their time in the community. Plaintiff William Sassman yearns to be reunited with his two minor daughters and to provide care to his ill mother. Mr. Sassman sought to apply for the ACP; he was rejected solely on account of his sex. Other than not being female, none of the ACP exclusionary criteria applies to Mr. Sassman. The 24-month window in which Mr. Sassman could participate in the ACP is rapidly approaching.

Each day that Mr. Sassman spends in prison is a missed opportunity in his family's life. Time spent caring for one's child or 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 To deny these fundamental rights and opportunities to men but not women perpetuates outdated notions that only women are adequate caregivers.

Because the State's explicit exclusion of men from the ACP violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, a preliminary injunction enjoining Defendants from continuing to exclude Plaintiff and other

male prisoners from the ACP should be granted. As demonstrated below, Plaintiff is likely to succeed on the merits of this action, the violations to Plaintiff's constitutional rights are causing irreparable harm, the balance of hardships strongly weighs in Plaintiff's favor, and an injunction serves the public's interest. Without a preliminary injunction, Plaintiff Sassman will lose forever his opportunity to participate in the ACP.

FACTUAL BACKGROUND

I. DEFENDANTS UNCONSTITUTIONALLY EXCLUDED MR. SASSMAN FROM THE ACP SOLELY BECAUSE HE IS MALE

Plaintiff William Sassman has two minor daughters whom he loves dearly. *See* Decl. of William A. Sassman ("Sassman Decl."), filed herewith, ¶ 4. He is presently incarcerated at Valley View Conservation Camp, a Level 1 facility cooperatively run by CDCR and the California Department of Forestry and Fire Protection to provide inmate crews for fire suppression and flood control activities. *See id.* ¶ 3. Despite his incarceration, Mr. Sassman has endeavored to maintain a strong bond with his daughters through regular visits, phone calls, and letters. *See id.* ¶ 6. He dreams of being more present in their lives and providing for their well-being. *See id.* ¶ 8. It is painful to him to think of all of the events, milestones, and bonding time that he misses with his daughters. *See id.* ¶ 17.

Mr. Sassman is also concerned for his mother, who has been diagnosed with stage IV colon cancer. *See id.* ¶ 7. She used to visit him frequently, but the long drive from her home to Valley View Conservation Camp is no longer tolerable given her deteriorating health. *See id; see* Decl. of Van Swearingen in Supp. of Pl.'s Motion for Preliminary Inj. ("Swearingen Decl."), filed herewith, ¶ 2 & Ex. B (letter from Mrs. Sassman's treating physician stating that she is "under a regimen that does not allow her to travel long distance due to her medical condition"). She has difficulty taking care of herself at home, and is unable to complete basic errands and tasks. *See* Sassman Decl. ¶ 7. Mr. Sassman longs to be closer to his mother so that he can provide assistance to her as a caregiver. *See id.* ¶ 8.

Mr. Sassman wants to participate in the ACP so that he can spend the last two years of his CDCR sentence in the community, rather than in prison. *See id*. As authorized and implemented, participants in the ACP are allowed to spend the last 24 months of their prison sentence earning one-for-one participation day credits 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 membership/affiliation, a criminal or immigration hold, and certain types of in-custody misconduct. *See id.* §§ 3078.2(c), 3078.3(a)(4)-(16). Upon receipt of a prisoner's ACP application, Defendant CDCR conducts a screening process to determine whether the prisoner is eligible for the program. *See id.* § 3078.4(a). CDCR then prepares an Individualized Treatment and Rehabilitation Plan and identifies an appropriate housing placement for each prisoner. *See id.* § 3078.4(b). Each participant in the ACP is monitored by an agent from CDCR's Division of Adult Parole Operations while in the community, and is subject to electronic monitoring and searches of the prisoner and his or her residence at any time. *See id.* § 3078.5. Participants in the ACP may be returned to state prison at any time, with or without cause. *See id.* § 3078.6.

Mr. Sassman is an ideal candidate for the ACP, as his participation would facilitate reunification with his daughters and mother, and help him become reintegrated into the community he left. *See* Sassman Decl. ¶ 8. Aside from his sex, none of the ACP's exclusionary criteria apply to Mr. Sassman. *See id.* ¶ 9. Mr. Sassman is serving time for non-violent, non-serious, non-sex commitment offenses, and had previously never been arrested for or convicted of any other offense. *See id.* ¶ 2. Mr. Sassman demonstrated good behavior while jailed. *See* Swearingen Decl. ¶ 25 & Ex. X (Jail Sergeant's letter stating that "[s]ince his incarceration Mr. Sassman has displayed role model inmate

behavior"). He has obtained certifications from numerous educational courses during his CDCR incarceration, including but not limited to an Impact of Crime on Victims Program, Fire Fighting Training Course, and Operation of Wastewater Treatment Plants (I and II); completed programs from the Stratford Career Institute and the Worldwide Bible Broadcasters; and has enrolled in a Masters of Business Administration program at the Edinburgh Business School at Heriot-Watt University in Edinburgh, United Kingdom. *See id.* ¶ 26 & Ex. Y. Mr. Sassman's earliest possible release date is October 13, 2016. *See* Sassman Decl. ¶ 3. Accordingly, if Defendants did not exclude him because of his sex and instead timely processed his application, Mr. Sassman could be living in his home community as an ACP participant as early as October 13, 2014.

Mr. Sassman applied to the ACP on June 3, 2013. *See id.* ¶ 10 & Ex. A. After waiting over two weeks for a response, a CDCR Correctional Counselor notified Mr. Sassman that he could not participate in the program because "[s]ubject is a male." *See id.* & Ex. A. CDCR provided no other reason for denying Mr. Sassman access to the ACP.

Shocked that he was excluded from the ACP solely on account of his sex, Mr. Sassman filed an inmate appeal. *See id.* ¶ 11 & Ex. B. CDCR again denied Mr. Sassman's first-level appeal solely on the basis of his sex. *See id.* ¶ 12 & Ex. C. Mr. Sassman timely appealed that decision; CDCR denied his second-level appeal for the same reason, despite the reviewer's "acknowledg[ement]" of Mr. Sassman's "concerns regarding the equality of men and women." *See id.* ¶¶ 13-14 & Exs. B, D. Mr. Sassman timely further appealed; CDCR denied his third-level appeal on the grounds that "State law only allows female inmates to participate in the ACP." *See id.* ¶¶ 15-16 & Exs. B, E. Having exhausted his appeals, no additional administrative remedies are available to Mr. Sassman within CDCR. *See id.* ¶ 16 & Ex. E; *see also* 42 U.S.C. § 1997e(a).

Other men are similarly affected. CDCR projects there will be over 14,000 low risk (Level I) male offenders incarcerated in California during Fiscal Years 2013-2014 and 2014-2015, many of whom could be eligible for ACP. *See* Swearingen Decl. ¶ 4 & Ex. C,

at 8, 20 (CDCR Office of Research Spring 2014 Population Projections for low-risk, Level I prisoners).[1]

For example, CDCR prisoner and father Aaron Pleasant was present at his daughter's birth in 2013, and cherished the time they spent together prior to his incarceration later that year. *See* Decl. of Aaron C. Pleasant ("Pleasant Decl."), filed herewith ¶¶ 2-3. While in CDCR custody, Mr. Pleasant regularly requested and received photographs of his infant daughter and updates about her life. *See id.* ¶ 4. After learning about the ACP, Mr. Pleasant sought to be reunited with his daughter and transition back into her life. *See id.* ¶¶ 7, 14. Aside from his sex, none of the exclusionary criteria applied to Mr. Pleasant. *See id.* ¶ 7. On October 23, 2013, Mr. Pleasant requested an ACP application from a CDCR Correctional Counselor. *See id.* ¶ 8. The Correctional Counselor refused to even provide him with an application, stating that the program is not offered to men. *See id.* After Mr. Pleasant filed a second-level appeal, *see id.* ¶¶ 8-11, an Appeals Coordinator visited Mr. Pleasant and instructed him to withdraw his appeal because the ACP does not allow male prisoners to participate. *See id.* ¶ 12 & Ex. E. Similarly, Daniel Hurd, another male CDCR prisoner in the final year of his sentence with two minor daughters, asked his counselor about the program, whose response was to laugh at him. *See* Swearingen Decl., ¶ 21 & Ex. T.

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

Throughout its history, the ACP has been promoted by Defendants as a program intended to reunite low-level California offenders with their families and transition those prisoners back into their communities. However, the program has consistently been implemented and administered unconstitutionally to discriminate against male prisoners.

[1] Plaintiff's Request for Judicial Notice ("RJN"), filed herewith, requests judicial notice of this document and other supporting documents.

A. Certain Male Prisoners Were Theoretically 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* Swearingen Decl. ¶ 5 & Ex. D (SB 1266, Cal. 2009-10 Reg. Sess.) ("SB 1266"). This section authorized CDCR to "offer a program under which female inmates, pregnant inmates, or inmates who, immediately prior to incarceration, were primary caregivers of dependent children … who have been committed to state prison may be allowed to participate in a voluntary alternative custody program … in lieu of confinement in state prison." SB 1266 § 2. 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 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 Subsequently Announced the ACP Would Exclude Men

On or about September 12, 2011, CDCR announced the formal launch of the ACP. While touting 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. ¶ 7 & Ex. F. 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 CDCR's court-ordered obligations to reduce the inmate population. *See id.* ¶ 8 & Ex. G.

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

Following CDCR's exclusionary implementation, the Legislature subsequently 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* sentenced to state prison for a determinate term of imprisonment pursuant to Section 1170, *and only those persons*, shall be eligible to participate in the Alternative Custody Program authorized by this section." Cal. Penal Code § 1170.05(c) (2014) (West) (emphasis added); *see* Swearingen Decl. ¶ 9 & Ex. H, at 65-69 (relevant portions of SB 1021). Despite barring men from program participation, SB 1021 did not withdraw, alter, or otherwise amend the legislative findings in SB 1266 regarding the importance of facilitating family reunification and fostering relationships between fathers and their children.

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

On or about 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. ¶ 10 & Ex. I (Final Statement of Reasons, Comments and Responses 1 through 5C). CDCR acknowledged that the ACP discriminates based on sex but asserted that this was 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.' [citation omitted] The finding [sic] of the Legislature as set forth in SB 1266 enacting ACP serve [sic] as evidence that male and female inmates are not 'similarly situated' for the purposes of ACP. Therefore, male inmates are statutorily ineligible to participate in ACP."). No "finding of the Legislature" exists that would "serve as evidence that male and female inmates are not similarly situated …." *Id.* CDCR's regulations excluding men from the ACP became permanent on February 25, 2013. *Id.*

CDCR continues to promote family reunification as the ACP's primary goal. 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.* ¶ 11 & Ex. J. CDCR nonetheless excludes a significant portion of eligible prisoners from ACP; the in-custody male prison population is approximately 120,659, whereas the female in-custody population is approximately 6,244 (roughly one twentieth the size). *See id.* ¶ 12 & Ex. K (CDCR Monthly Report of Population as of Midnight May 31, 2014).

LEGAL STANDARD

A preliminary injunction should issue where a plaintiff demonstrates "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citation omitted). The Ninth Circuit "has adopted and applied a version of the sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (internal citation and quotation marks omitted). Accordingly, where the balance of hardships weighs heavily in the plaintiff's favor, there is a likelihood of irreparable injury, and the injunction is in the public interest, then a preliminary injunction should be granted where the plaintiff shows there are

"serious questions going to the merits." *Id.* at 1135.

ARGUMENT

I. PLAINTIFF SASSMAN IS LIKELY TO SUCCEED ON THE MERITS

Mr. Sassman states a claim under Section 1983, as he alleges that the State violated his 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

The State's 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. The clause requires that all persons similarly situated be treated alike. *See, e.g.*, *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, for example, "[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., ¶ 23 & Ex. V.

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.

"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 & Cnty. of San Francisco*, No. 11-16746, — F.3d —, 2014 WL 2959634 at *9 (9th Cir. July 2, 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. The Supreme Court, however, noted 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 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.

The fact that this program involves prisoners does not change the level of scrutiny applied. This case does not implicate methods of prison administration, and even if it did, the Supreme Court has held that correctional authorities must 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*, this Court concluded that "the right to be free of gender discrimination is a 'right that need [not] necessarily be compromised for the sake of proper prison administration.'" *Greene v. Tilton*, Case No. 2:09-CV-0793 JAM JFM (FC), 2012 WL 691704, at *8 (E.D. Cal. Mar. 2, 2012), *report and recommendation adopted*, 2012 WL 1130602 (E.D. Cal. Mar. 29, 2012). There, the Court applied intermediate scrutiny to strike down CDCR regulations distinguishing between "the type and amount of personal property that male inmates could possess compared to the type and amount of personal property that female inmates could possess." *Id.* at *1; *see also Leinweber v. Tilton*, Case No. 1:09-cv-00793 SKO PC, 2010 WL 3521869, at *3 (E.D. Cal. Sept. 8, 2010) (holding that intermediate scrutiny should be used to analyze prisoner's sex discrimination claim).

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). 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. *Id.* For example, whether the applicant has a history of escape has nothing to do with the prisoner's sex. *See id.* at subsection (a)(5).

The ACP's explicit and irrational exclusion of male prisoners results in vastly different treatment of similarly-situated prisoners—*i.e.*, eligible prisoners serving time for non-violent, non-sexual, non-serious, offenses—solely on account of their sex. *See* Cal. Penal Code § 1170.05(a); Cal. Code Regs. tit. 15 § 3078.2(a). The ACP excludes a male prisoner from the program but a female prisoner with an identical commitment offense and security classification is allowed to apply. Even the sponsor of the enacting legislation has told Mr. Sassman that the ACP is available only to similarly-situated women. *See* Swearingen Decl. ¶ 27 & Ex. Z.

Here, Mr. Sassman is similarly situated to female program-eligible prisoners because he meets all other program eligibility criteria related to his commitment offense, criminal history, and in-custody conduct record. *See* Sassman Decl. ¶ 9. Indeed, Mr. Sassman has demonstrated good behavior, has participated in numerous educational programs, and has been selected by CDCR for transfer to a low-level fire camp where he works to assist the California Department of Forestry and Fire Protection. *See Id.*, ¶ 3; Swearingen Decl. ¶¶ 24-25 & Exs. X-Y. Nevertheless, CDCR has denied him access to the ACP while allowing female inmates of identical (or less sterling) records to apply. Nothing in the statute or implementing regulations purports to justify this blatant and illegal discrimination.

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

Defendants' discriminatory requirement that ACP participants be female serves no objective. *See, e.g.*, *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"). To date, Defendants have failed to assert any penological objective served by categorically excluding men from the ACP. Nor can they.

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. ¶ 11 & Ex. J. Excluding male prisoners with identical commitment offenses and risk criteria as eligible female prisoners advances neither goal. Rather, barring men is plainly contrary to those objectives, and also to the legislative findings emphasizing the importance of fathers in their children's lives. *See* SB 1266, §§ 1(g), 1(h). Mr. Sassman exemplifies this interest, as he has a family that could benefit from his presence in the community. *See* Sassman Decl. ¶¶ 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 caregivers cannot stand. 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 parenting. In *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 730 (2003), for example, 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.

Other courts have also repeatedly 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) (quoting *In re Dubreuil,* 629 So. 2d 819, 828 (Fla. 1993); *see also Orr v. Orr,* 440 U.S. 268, 283 (1979) ("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.").

The State's blanket exclusion of male prisoners also fails to advance public safety; 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. By reuniting fathers with their families, expanding ACP access to low-risk male prisoners could lead to enhanced public safety. 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."). Contrary to the Legislature's findings and public safety, CDCR recently reported that it is considering expanding access to female prisoners previously excluded under the Penal Code, while continuing to exclude men with commitments for non-serious and non-violent offenses. *See* Swearingen Decl., ¶ 19 & Ex. R (State's March 17, 2014 report to Three-Judge Court on overcrowding noting that the state could "consider and screen female offenders who were previously excluded from this program pursuant to the penal code. The State is evaluating whether there are eligible women who were previously excluded based on a prior conviction for a serious or violent offense.").

Further, the State's explicit exclusion of men from the ACP is inconsistent with Court orders aimed at reducing overcrowding through, *inter alia*, expansion of the ACP. *See id.* ¶ 13 & Ex. L (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-cv-00520-LKK-DAD, Dkt. No. 5060 (Feb. 10, 2014)) (the "February 10, 2014 Order") at ¶ 4(h). Excluding men from the ACP is contrary to the February 10, 2014 Order because overcrowding would be further reduced if the program were offered to men as well. CDCR reported that it is "working to identify eligible [female] inmates" and that it "expects to bring an 82 bed facility in San Diego on line in July [2014] and is searching for additional sites for the alternative custody program for females"— but it nevertheless ignores a large pool of otherwise-eligible inmates simply because of their sex. *See id.*, ¶ 22 & Ex. U. Still, CDCR itself has acknowledged that expanding ACP participation to men would be consistent with its court-ordered responsibility to reduce prisoner overcrowding. *See id.* ¶ 8 & Ex. G (report that a CDCR spokesperson "said men could one day be included in the 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. PLAINTIFF WILL BE IRREPARABLY HARMED IN THE ABSENCE OF PRELIMINARY RELIEF

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. ¶ 14 & Ex. M (White House report titled "Promoting Responsible Fatherhood"). The President's report describes his 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." *Id.* at 25.

The time in a father's life to be a parent to his minor children is precious, and it is finite. Each day that passes while a father is in prison is missed and cannot be relived. As acknowledged in the legislative findings supporting the ACP's enactment, "a father's involvement in his child's life greatly improves the child's chances for success … [and] can have positive effects for children." SB 1266 § 1(g); *see also* Promoting Responsible Fatherhood at 2 ("The presence and involvement of a child's parents protects children from a number of vulnerabilities. More engaged fathers—whether living with or apart from their children—can help foster a child's healthy physical, emotional, and social development."). "Families need each other both materially and emotionally …." *See* Donald Braman, *Families and Incarceration* (May 2002), Ex. A to Swearingen Decl. (discussing the feelings of loss associated when a male family member is incarcerated). No amount of money can compensate for missed involvement in a child's life.

Mr. Sassman seeks to participate in the ACP to become reunited with his daughters, who are a source of tremendous importance and satisfaction in his life. *See* Sassman Decl. ¶ 8. He wants to return to his caregiving responsibilities; to cook meals, participate in important events, and provide for their financial well-being. *Id.* ¶ 5. In short, he wants to be there as they grow up. The current separation is painful to Mr. Sassman and he will continue to suffer real emotional and psychological harms by further deprivation of access to his children. *See, e.g.*, Creasie Finney Hairston, *Fathers in Prisons: Responsible*

Fatherhood and Responsible Public Policies (March 2002), Ex. N. to Swearingen Decl. (discussing the embarrassment, hurt and grief experienced by incarcerated fathers, and in turn, how those emotions may lead to disengagement from their families); Gwyneth Boswell & Peter Wedge, *Imprisoned Fathers and their Children* (2002), Ex. O to Swearingen Decl. (reporting that in a study of 181 incarcerated fathers, when asked "how he felt about being a father in prison[,] "[a]lmost all their replies expressed inmates' sense of guilt and helplessness"). Likewise, Mr. Sassman's children will also experience irreparable trauma from the continued separation from their father. *See generally* Nancy G. La Vigne et al., *Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents* (Feb. 2008), Ex. P. to Swearingen Decl. (reporting that trauma to children of incarcerated parents includes "chronic sleeplessness, difficulties concentrating, and depression" and that "many scholars have likened the experience of losing a parent to incarceration to that of losing a parent to death or divorce"). In the absence of an injunction, these irreparable harms not only are likely; they are certain.

Further delay in allowing Mr. Sassman to participate in the ACP will also result in his inability to care for his ill mother who has difficulty caring for herself. *See* Sassman Decl. ¶ 7. This deprivation is a separate and distinct harm felt by Mr. Sassman and his mother. *See, e.g.*, Swearingen Decl. ¶ 2 & Ex. A (discussing how the incarceration of a man who previously provided routine assistance for his elder aunt "made life significantly more difficult for his family"). Participation in the ACP will allow Mr. Sassman to provide needed assistance to his mother during her very serious illness. *See* Sassman Decl. ¶ 8.

Mr. Sassman is eligible to submit his application for the ACP now because he has less than thirty months left on his sentence. *See* Swearingen Decl., ¶ 20 & Ex. S at 29. Mr. Sassman could be in the community attending to the needs of his mother and daughters in October 2014 (*see* Cal. Code Regs. tit. 15 § 3078.2)—if he were female. Mr. Sassman must receive relief now in order to be released in October 2014 because CDCR generally takes months to process ACP applications. The Associate Warden

overseeing the ACP has stated that, based on experience, it can take over half a year to process some applications: "a case takes approximately 60-90 days to complete the review when all case factors are addressed and included in the central file. If additional research is required (i.e., arrest report, temporary restraining orders, etc.), the average length of time to complete the review process is 120-150 days. If a victim is required to be notified, an additional 45 days is required for this notification." *See* Swearingen Decl. ¶ 28 & Ex. AA (September 4, 2013 e-mail); *id.* ¶ 20 & Ex. S at 29 (prisoners must have at least six months left to serve when they apply).

Absent relief from this Court from CDCR's unconstitutional discrimination, Mr. Sassman will be unable to reconnect with his daughters and mother until October 2016. Plaintiff will thus suffer irreparable harm for each additional day spent in prison facilities rather than in the community, close to his family members. *See, e.g.*, *Brodheim v. Veal*, Case No. CIV S-06-2326 LKK GGH, 2010 WL 4878816, at *1 (E.D. Cal. Nov. 17, 2010) (finding continued incarceration to be irreparable injury in context of denying Parole Board's motion for stay); *see generally* Swearingen Decl. ¶ 18 & Ex. Q (Craig Haney, Ph.D., J.D., discussing how "prolonged adaptation to the deprivations and frustrations of life inside prison—the "pains of imprisonment"—carries certain psychological costs").

The need for urgent relief is amply demonstrated by the example of Mr. Pleasant discussed *supra* in Section I of the factual background. Because Mr. Pleasant is due to parole in July 2014, any relief in this case is too late for him. CDCR's discrimination already cost Mr. Pleasant his chance to participate in the program and be reunited with his family for the final months and years of his sentence. Other male prisoners should not continue to suffer similar irreparable harm.

III. THE BALANCE OF EQUITIES TIPS SHARPLY IN PLAINTIFF'S FAVOR

The balance of equities weighs heavily in Plaintiff's favor, given the profound and irreparable harms he will suffer if a preliminary injunction does not issue. Defendants, by contrast, cannot credibly argue that they will suffer significant harm from the issuance of a preliminary injunction requiring them to allow Mr. Sassman to participate in the ACP.

Plaintiff's 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 California spends incarcerating each person within prison walls. Indeed, the Associate Warden overseeing the ACP has stated that it costs CDCR over $60,000 per year to incarcerate a prisoner. *See* Swearingen Decl. ¶ 29 & Ex. BB (November 18, 2013 e-mail); *see also id.* ¶ 24 & Ex. W at 5 ("California is expected to spend approximately $60,000 per inmate in 2013-14"). 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.* ¶ 8 & Ex. G (CDCR spokesperson predicting that including men in the ACP would save the Department millions in reduced prison costs). 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

"[T]he public interest lies in the state's making progress towards resolving its prison crisis, which includes the undisputed crowding that led the Governor to declare a state of emergency in 2006 that remains in effect to date." *Coleman v. Schwarzenegger*, No. 90-0520 LKK JFM, 2009 WL 2851846 at *2 (E.D. Cal. Sept. 3, 2009); *see also Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding three-judge court cap of 137.5% of design capacity). In furtherance of these still unmet prison population reduction goals, earlier this year the Three-Judge Court directed Governor Brown and CDCR to "immediately" "[i]mplement an expanded alternative custody program," and 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." Feb. 10, 2014 Order at 3, 5. Rather than expand ACP access to male prisoners, CDCR has sought to expand access to female prisoners previously excluded under the Penal Code. *See* Swearingen Decl. ¶ 19 & Ex. R (CDCR's March 17

Update to the Three-Judge Court in *Coleman*). Public safety would undoubtedly be better served if CDCR utilized the Three-Judge Court's waiver to expand access to low-level male prisoners rather than releasing female prisoners convicted of more serious and violent felonies.

By limiting ACP participation to women, CDCR has underutilized the program as a resource to address its overcrowding crisis. Nearly two years after the ACP's 2011 rollout, CDCR had released only about 290 women into the program, some of whom came not from prison but from other community-based programs. *See id.* ¶ 28 & Ex. AA. By mid-November 2013, the Associate Warden overseeing the ACP reported that only "approximately 133 [female] inmates ha[d] transferred to ACP to date this year." *See id.* ¶ 29 & Ex. BB. The Associate Warden for the ACP estimated that, going forward, perhaps 175 inmates would be placed in the ACP per fiscal year for the next two years. *See id.*

The public interest is also served by prison policies that promote family reunification and prevent recidivism. As highlighted by the findings in the implementing legislation, participation in the ACP by male prisoners facilitates these public interests. *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."). Consistent with the Legislature's findings, expanding ACP access to male prisoners could be a powerful tool in reducing California's excessively high recidivism rate of 61%. *See* Swearingen Decl. ¶ 6 & Ex. E (CDCR Office of Research 2013 Outcome Evaluation Report). Moreover, the Associate Warden overseeing the ACP has stated that "[t]he majority of ACP participants succeed once transferred to the program." *See id.* ¶ 29 & Ex. BB.

In contrast, Defendants' categorical exclusion of all male inmates from the ACP harms the public interest by exacerbating the overcrowding of California's state prisons; continuing California's unacceptably high recidivism rates; denying low-risk male offenders the opportunity to pursue reintegration with their communities and their families;

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 children the benefits that attend the presence and participation of fathers in their lives. In furtherance of the public interest, Plaintiff 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 Plaintiff. 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 v. Boren*, 429 U.S. 190, 193-94 (1976) ("[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 expend significant resources analyzing the constitutionality of the Defendants' female-only ACP program. A preliminary injunction limited to Plaintiff Sassman would be contrary to judicial economy and interfere with the interests of non-parties who could benefit from court-ordered relief now.

Enjoining Defendants' exclusionary policy in full is necessary to protect non-parties such as Mr. Pleasant and other low-risk male prisoners from further sex discrimination.

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. Sassman is a prisoner 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"). 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 Mr. Sassman, which is especially harmful because he alleges 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

The ACP unequivocally and unconstitutionally discriminates against men, preventing Mr. Sassman from family reunification in his community. Defendants' discrimination deprives Mr. Sassman and his family of these precious opportunities solely because he is a man—a father rather than a mother, a son rather than a daughter. For Mr. Sassman and his family, each day that passes locked in prison is irrevocably lost. A preliminary injunction should issue forthwith to allow Mr. Sassman full and equal access to the ACP.

DATED: July 16, 2014

Respectfully submitted,

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