

# ATTACHMENT F

## Introduction

In 1959, the California Legislature enacted the Unruh Act, prohibiting discrimination in public accommodations, to promote equality and “eliminat[e] . . . antisocial discriminatory practices” while encouraging “socially beneficial ones.”<sup>1</sup> The Unruh Act has since expanded its enumerated protected categories to include sex (including gender, gender identity, gender expression, and pregnancy), color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, immigration status, and genetic information.<sup>2</sup> These protections have furthered California’s public policy goals of banning discriminatory behavior and empowering marginalized populations.

Recently, men’s rights groups have abused the Unruh Act’s protections by targeting organizations and events seeking to uplift women and non-binary people. These groups have successfully used the Unruh Act to sue women’s empowerment groups and events, claiming discrimination on the basis of sex and gender. Such abuse of the Unruh Act contravenes its purpose and undermines the steady progress women and non-binary people have made in California.

Recognizing that some activities may permissibly focus on uplifting certain groups, courts have consistently found that activity that furthers a “compelling societal interest” is not “arbitrary” and therefore not a violation of the Unruh Act. Numerous cases have been decided including permitting a golf course to offer a promotion to women during breast cancer awareness month and permitting a baseball team to give away tote bags to women on Mother’s Day. However, most lawsuits from men’s rights organizations intentionally target small businesses that cannot afford litigation costs. Without an attorney to interpret the case law or explicit direction from the statute or regulations, these small businesses are forced to settle and end their activities that uplift women and non-binary people. Clear guidance from the Fair Employment and Housing Council expressly supporting activities that further a “compelling societal interest” would empower small businesses to continue their work supporting women and non-binary people while ensuring that Unruh remains a robust anti-discrimination law targeted at arbitrary and invidious discrimination.

Accordingly, we herein request that the Fair Employment and Housing Council issue regulations expressly sanctioning and guiding the “compelling societal interest” analysis such that business establishments and non-profits can continue to hold events promoting the empowerment of women and non-binary people, without fear of legal liability.

This memo is organized as follows:

- The Problem: Stories from Impacted Businesses and Organizations
- The Importance of Women Empowerment Events
- Case Law Analyzing Practices that Further of “Compelling Societal Interest”
- The Solution: Proposed Regulation

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<sup>1</sup> *Javorsky v. Western Athletic Clubs, Inc.*, 242 Cal. App. 4th 1386, 1394–95 (2015) (citing *Sargoy v. Resolution Trust Corp.*, 8 Cal. App. 4th 1039, 1049 (1992)).

<sup>2</sup> CAL. CIV. CODE § 51(e)(5) (defining the protected categories under the Unruh Act).

## **The Problem: Stories from Impacted Businesses and Organizations**

The rise of women-focused organizations promoting women's equity and empowerment is confronting a backlash: lawsuits from men who say they are being unfairly discriminated against in violation of civil rights laws. In California, a primary driver of these lawsuits is the National Coalition for Men (NCFM), a San Diego-based men's rights organization that has filed more than 300 lawsuits against organizations that promote women's empowerment. Ladies Get Paid, Eagle Rock Brewery, and Pez Cantina are three organizations that have been sued by NCFM.

### *Claire Wasserman and Ashley Louise, Ladies Get Paid*

Ladies Get Paid is an organization that works to educate women and nonbinary people about how to advocate for a more equitable workplace, a conversation that has grown to encompass everything from equal pay to fighting harassment in the wake of #MeToo. Hundreds of women have used the platform online and in person to network, recount their experiences with harassment, find mentors, and share job opportunities.

In 2017, two men were denied entry to two separate Ladies Get paid events in California that were open to women and nonbinary people only. The two men, members of the National Coalition for Men, sued Ladies Get Paid for sex discrimination under the Unruh Civil Rights Act. Ladies Get Paid decided to settle rather than pay for the high cost of litigation. The organization had to start a crowdfunding page with a \$100,000 goal to defray the cost of legal fees.

Claire Wasserman, a co-founder of Ladies Get Paid, reflected, "What's really disappointing and disturbing, from our perspective, is that we are working to make men and women have an equal place in the workforce, and yet we're being sued under civil rights law."

### *Ting Su, Eagle Rock Brewery*

In 2009, I opened Eagle Rock Brewery with my husband, Jeremy Raub, and my father-in-law, Steven Raub. During those evenings behind the bar, I began to notice a pattern that struck me as bizarre: many women would defer to their male counterparts when deciding what to drink. In 2011, I started hosting a monthly educational series with the aim of making women feel comfortable learning more about beer. So how do you foster an event that places diversity at the fore, and is aimed beyond primarily white, bearded, cisgendered men? We began with the name: the Women's Beer Forum. When men want to attend, they may. However, its name clearly states the intended audience, and works towards the goal of creating a beer event where individuals who identify as women are not in the minority.

Unfortunately, despite our best plans and intentions, the Women's Beer Forum ran into trouble. There are numerous anti-discrimination laws on the books that preclude groups from discrimination on the basis of race, color, religion, sex, and national origin, as well as other factors. Those laws were created to protect minority groups, though, owing to lack of specificity in the legal language, excluding men from a beer event could actually be construed as

discriminatory. We experienced that situation firsthand when a discrimination claim was filed against the Women's Beer Forum (ironically naming only my male business partners as defendants). Although men had historically attended these events, the name of the event was enough to earn unwanted attention.

In November of 2017, we received an email from a men's rights activist claiming that we had committed sex discrimination and demanding \$8,000. At the time, I felt it was a preposterous claim—the event had never been discriminatory, and was in fact created to combat that very notion. However, we had failed to *explicitly* state that men were not prohibited from attending. When we refused to pay, the claimant filed a formal complaint of discrimination through the California Department of Fair Employment and Housing (DFEH), and a process was started. At the time, we could find no description of said process, nor was there any explanation from the DFEH about how cases were determined. In a panic, we lawyered up and prepared to defend ourselves, knowing full well that the accusations were without merit. After our attorney responded with all the evidence in an extensive document to DFEH, we received radio silence for seven months, with the exception of one correspondence falsely accusing us of having missed the deadline to submit our response.

In September 2018, our attorney received a phone call from a staff services analyst at the DFEH who essentially asked if we would like her to mediate the matter to expedite the closure of the case. She proceeded to tell our attorney that the claimant would like \$6,000, and that if we didn't make a counter-offer, the case would proceed to legal action. We were essentially given the option to pay out or spend more money than we could afford to defend ourselves against litigation. It felt like the government was brokering a deal for an extortionist, and that we were at the losing end. In order to mitigate any additional legal fees, we ultimately had to settle to avoid losing our business (and potentially our home, which was used as collateral for the loans needed to start the business). Eventually, he settled for \$1,500, and while I'm thankful that he accepted our first counter-offer, we had already incurred substantial legal fees during the year-long process.

#### *Brett and Lucy, Pez Cantina*

In 2019, Pez Cantina hosted a female winemaker event to lift up women winemakers in California, as winemaking is notoriously a male-dominated industry. The event was open to everyone, but was advertised as an event for women to support women. Though the event was open to all genders, a member of the National Coalition for Men sued Pez Cantina for sex discrimination.

Because the cost of litigation exceeded the cost of settlement, Pez Cantina reluctantly decided to settle the lawsuit.

## **The Importance of Women Empowerment Events**

Even though women make up nearly half of the U.S. labor force, outnumber men in earning bachelor's and master's degrees, and are nearly on par in getting medical and legal degrees, men are still more likely than women to “rise to the highest paying and most prestigious leadership roles.”<sup>3</sup> Since 1961,<sup>4</sup> organizations and institutions have utilized affirmative action as a tool to address this inequity.<sup>5</sup> Although some people question the current need and impact of affirmative action programs, a 2013 study determined that ending affirmative action programs led to a significant decrease in diversity.<sup>6</sup> The study found sharp declines in Asian female, Black female, and Hispanic male representation in states that banned affirmative action. These findings indicate the importance of continuing affirmative action programs.

The California Legislature has also recognized that to create equity, the law must acknowledge that the present-day underrepresentation of women and people of color is caused by centuries of discrimination that will not be remedied without affirmative action. On June 24, 2020, the California Legislature voted to create a November ballot measure to permit “college admissions and government contracting decisions with a focus on race and gender diversity.”<sup>7</sup> This historic shift in policy—a similar ballot measure was defeated in the legislature just six years ago—reflects a new, wider cultural understanding and acceptance of our collective responsibility to affirmatively create and foster opportunities for marginalized peoples. It is critical that the FEHC answer this call and take affirmative steps to ensure that California’s civil rights laws in fact create civil rights and do not unwittingly stymie efforts to create equity.

## **Case Law Analyzing Practices that Further of “Compelling Societal Interest”**

The Unruh Civil Rights Act (“Unruh Act”) proclaims that “[a]ll persons within [California] are free and equal” and prohibits business establishments and public accommodations from discriminating on the basis of “sex [(including gender, gender identity, and gender expression)], race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status.”<sup>8</sup> The history and language of the Unruh Act “disclose a clear and large design to” prohibit discrimination by a business enterprise.<sup>9</sup> The Unruh Act should be “liberally

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<sup>3</sup> American Association of University Women, *Barriers & Bias: The Status of Women in Leadership*, AAUW (2016), <https://www.aauw.org/resources/research/barrier-bias/>.

<sup>4</sup> *More History of Affirmative Action Policies From the 1960s*, American Association for Access, Equity and Diversity, [https://www.aaed.org/aaed/History\\_of\\_Affirmative\\_Action.asp](https://www.aaed.org/aaed/History_of_Affirmative_Action.asp) (last visited July 20, 2020).

<sup>5</sup> Tonia Wellons, *Affirmative Action Is Still an Effective and Necessary Tool*, *Contexts* 18(1), 80 (2019).

<sup>6</sup> Fidan Ana Kurtulus, *The Impact of Eliminating Affirmative Action on Minority and Female Employment: A Natural Experiment Approach Using State-Level Affirmative Action Laws and EEO-4 Data*, (Nov. 21, 2013), <https://gap.hks.harvard.edu/impact-eliminating-affirmative-action-minority-and-female-employment-natural-experiment-approach>.

<sup>7</sup> John Myers, *California voters will be asked to restore affirmative action in November*, *LA Times* (June 24, 2020), <https://www.latimes.com/california/story/2020-06-24/california-voters-will-be-asked-to-restore-affirmative-action-in-november>.

<sup>8</sup> See CAL. CIV. CODE § 51(b).

<sup>9</sup> *In re Cox*, 3 Cal. 3d. 205, 212 (1970) (emphasis added).

construed”<sup>10</sup> to “prohibit businesses from engaging in unreasonable, arbitrary or invidious discrimination.”<sup>11</sup>

Cases interpreting the Unruh Act have found that practices that further a compelling societal interest are not illegally discriminatory, as they are not unreasonable, arbitrary, or invidious. As explored in further detail, California courts have found that practices are justified as furthering a compelling societal interest when they conform to state or federal public policy, serve a legitimate business interest, or exclude disruptive individual behavior. Practices violate the Unruh Act when they are based on stereotypes and class-based generalizations, or profit.

## **A. Practices that Further a Compelling Societal Interest Do Not Violate the Unruh Act.**

### **1. Practices that conform to state and federal public policy further a compelling societal interest.**

State statutes, including the Unruh Act, serve as robust declarations of state public policy, particularly against race-based discrimination.<sup>12</sup> Accordingly, businesses that refuse to rent homes to Black applicants,<sup>13</sup> or who discriminate against white tenants who sublease to Black subtenants,<sup>14</sup> violate California public policy and the Unruh Act. Conversely, because California law allows rental car companies to impose minimum age requirements, claims that rental car agencies violate the Unruh Act by refusing to rent vehicles to people under the age of 25 are unavailing.<sup>15</sup>

Practices that conform to federal statutes also conform with public policy. It is permissible for bars and adult bookstores to exclude children because federal law makes it “illegal to serve alcoholic beverages or to distribute ‘harmful matter’ to minors.”<sup>16</sup> (sex-based discounts) In a specific example, federal regulations require banks to collect “taxpayer identification numbers” (*i.e.*, social security numbers<sup>17</sup>) from U.S. citizens who open bank accounts<sup>18</sup> but permit non-U.S. citizens to offer different forms of identification, such as passports.<sup>19</sup> Therefore, a court held that a national bank did not engage in arbitrary discrimination when it required U.S. citizens to provide their social security numbers when applying for a particular type of credit card but allowed non-U.S. citizens to provide a different form of identification to apply for the same credit card.<sup>20</sup>

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<sup>10</sup> *Rotary Club of Duarte v. Bd. of Directors*, 178 Cal. App. 3d 1035, 1046 (1986), *aff'd*, 481 U.S. 537 (1987).

<sup>11</sup> *Pizarro v. Lamb’s Players Theatre*, 135 Cal. App. 4th 1171, 1174 (2006).

<sup>12</sup> *Winchell v. English*, 62 Cal. App. 3d 125, 128 (1976).

<sup>13</sup> *Burks*, 57 Cal. 2d at 468.

<sup>14</sup> *Winchell*, 62 Cal. App. 3d at 127.

<sup>15</sup> *Lazar*, 69 Cal. App. 4th at 1502–03, 1504 (1999). The court cites CAL. CIV. CODE § 1936 which was repealed in 2017, but CAL. CIV. CODE § 1939.01(e)(2) states that “authorized drivers” may be subject a minimum age requirement by the rental car company.

<sup>16</sup> *Koire*, 40 Cal. 3d at 31.

<sup>17</sup> *Howe v. Bank of Am. N.A.*, 179 Cal. App. 4th 1443, 1452 (2009).

<sup>18</sup> 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(i).

<sup>19</sup> *Id.* at § 1020.220(a)(2)(i)(A)(4)(ii).

<sup>20</sup> *Howe*, 179 Cal. App. 4th at 1453. The court cited to 31 C.F.R. § 103.121 to support its analysis, but § 103.121 was reorganized under 31 C.F.R. § 1020.220 through the Transfer and Reorganization of Bank Secrecy Act Regulations, 75 Fed. Reg. 65806 (Oct. 26, 2010).

Admission to retirement communities on the basis of age serves the social public policy of providing facilities designed for the elderly and their particular needs, and therefore does not violate the Unruh Act.<sup>21</sup> Accordingly, children may be excluded from retirement communities.<sup>22</sup> However, excluding children from regular housing developments does not serve a compelling societal interest because families with children are in need of housing just as much as, if not more than, families without children.<sup>23</sup>

2. Differential pricing underlined by public policy furthers a compelling societal interest.

Permissible differential pricing schemes (typically based on age) are usually found to be supported by public policy (and not in violation of the Unruh Act) unless based on generalizations that perpetuate harmful stereotypes. A theater company that produced a musical titled “Boomers” about the baby boomer generation was justified in offering half-priced tickets to members of that generation to promote boomers’ attendance to a musical about them.<sup>24</sup> The court found that this sort of distinction did not perpetuate any stereotypes and instead served to honor the generation about whom the show was written.<sup>25</sup> But such a particularized benefit is not necessary to establish pricing differentials that serve a compelling societal interest. A movie theater is justified in offering discounted ticket prices to children under the rationale that child labor laws prevent children from earning income with which to pay for tickets.<sup>26</sup> Similarly, discounted ticket prices for seniors is supported by public policy because the Legislature has mandated other price discounts for seniors.<sup>27</sup> Additionally, banks may offer higher interest rates to seniors because public policy, as gleaned from federal statutes, supports retirement and entitlement to adequate income in retirement.<sup>28</sup>

3. Practices that serve a “legitimate business interest” does not violate the Unruh Act.

Businesses may use “legitimate business interests” to justify refusing to serve individuals.<sup>29</sup> In particular, businesses may exclude customers in the interest of “maintaining order, complying with legal requirements, and protecting a business reputation or investment.”<sup>30</sup> Businesses “have an obvious and important interest in obtaining full and timely payment of the goods and services they provide.”<sup>31</sup> This is why a policy requiring a minimum income as a prerequisite to renting an apartment serves the legitimate business interest of ensuring that

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<sup>21</sup> *Marina Point*, 30 Cal. 3d at 742–43.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 743.

<sup>24</sup> *Pizarro*, 135 Cal. App. 4th at 1173.

<sup>25</sup> *Id.* at 1176.

<sup>26</sup> *Starkman*, 227 Cal. App. 3d at 1499–1500.

<sup>27</sup> *Id.*; see, e.g., CAL. PUB. RES. CODE § 5011 (providing passes to California state parks at a reduced rate to seniors); CAL. EDUC. CODE § 89330 (providing a Cal. State University application fee waiver to people over the age of 60).

<sup>28</sup> *Sargoy v. Resolution Trust Corp.*, 8 Cal. App. 4th 1039, 1045 (1992) (citing 42 U.S.C. § 3001(1), (6)).

<sup>29</sup> *Harris*, 52 Cal. 3d at 1162.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

customers will be able to pay rent in the future.<sup>32</sup> Barring a patron from a casino who previously cashed bad checks at the casino to fund her gambling and owed money to the casino was not “arbitrary but instead would constitute good business and social practice. Such a restriction is reasonably related to the operation of the premises.”<sup>33</sup> Nor is it unreasonable or in violation of the Unruh Act for a developer to refuse to sell new homes to an investor-speculator who previously sued the developer.<sup>34</sup>

4. Practices excluding disruptive individual behavior—rather than an entire class of people—do not violate the Unruh Act.

The Unruh Act does not prohibit businesses from excluding “customers who damage property, injure others or otherwise disrupt [the] business” and allows businesses to create “reasonable department regulations that are rationally related to the services performed.”<sup>35</sup> For example, “[g]iven the sensitive nature of the services offered by a cemetery,” a court held that a cemetery’s policy excluding individuals who are not invited to private funerals was “a reasonable regulation rationally related to the services performed.”<sup>36</sup>

However, grooming practices are generally not a sufficient basis for a business to exclude individuals, barring any improper conduct.<sup>37</sup> In a prime example, two friends were asked to leave a shopping mall because they “wore long hair and dressed in an unconventional manner.”<sup>38</sup> The friends were arrested for trespass after a security guard repeatedly asked them to leave despite the fact they were patronizing the mall.<sup>39</sup> The court held that the fact the friends wore long hair and “unconventional dress” did not by itself warrant their exclusion.<sup>40</sup>

**B. Discrimination Based on Stereotypes, Class-Based Generalizations, and Profit Violate the Unruh Act.**

1. Discrimination based on stereotypes and class-based generalizations violates the Unruh Act.

Class-based price discounts are not permissible under the Unruh Act if the discounts are based on “arbitrary class-based generalization[s].”<sup>41</sup> Discrimination justified by class-based

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<sup>32</sup> *Id.* at 1163.

<sup>33</sup> *Wynn v. Monterey Club*, 111 Cal. App. 3d 789, 798 (1980).

<sup>34</sup> *Frantz v. Blackwell*, 189 Cal. App. 3d 91, 96 (1987).

<sup>35</sup> *O’Connor*, 33 Cal. 3d at 794.

<sup>36</sup> *Ross v. Forest Lawn Memorial Park*, 153 Cal. App. 3d 988, 993 (1984). In this case, a mother, whose deceased daughter was a “punk rocker,” sought to exclude individual punk rockers from her daughter’s funeral because she believed they would disrupt the service. *Id.* at 991–92. Forest Lawn refused to exclude the punk rockers who did attend and disrupted the service by drinking alcohol, using drugs, and verbally and physically abusing members of the decedent’s family. *Id.* The court found that Forest Lawn would have been justified in excluding the punk rockers. *Id.* at 993.

<sup>37</sup> *See In re Cox*, 3 Cal. 3d at 224.

<sup>38</sup> *Id.* at 209–10. No further details were provided about how the friends were dressed.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 224.

<sup>41</sup> *Pizarro*, 135 Cal. App. 4th at 1174.

generalizations violates the Unruh Act because those generalizations tend to perpetuate harmful stereotypes about the class.<sup>42</sup> Gender-based discounts are typically founded in stereotypes of “irrelevant differences between men and women,” which are banned under the Unruh Act.<sup>43</sup> “Ladies’ Night” promotions that offer discounts to women simply because they are women are an example of discounts based on class-based generalizations and stereotypes.<sup>44</sup> Such discounts violate the Unruh Act because they do not serve a compelling societal interest and instead are designed to increase sales.<sup>45</sup>

Courts have found that mandatory gendered dress codes are based on sex stereotypes and therefore violate the Unruh Act. In 2006, the Fair Employment and Housing Commission found that a Salinas nightclub had violated the law when it denied entrance to a transgender woman because she was wearing a skirt.<sup>46</sup> The club had enacted a dress code that required men and transgender women to wear pants, allegedly in response to fights among club patrons and sex work on the premises. The FEHC found unpersuasive the night club’s assertion that the dress code was necessary to prevent fighting and criminal activity because it was based upon sex stereotypes of how men and women should appear and bore no rational relationship to the safety and security of the business.<sup>47</sup>

Conversely, courts have upheld differential treatment if it does not perpetuate harmful stereotypes *and* serves a compelling societal interest. For example, a professional baseball team honoring mothers at a home game by giving away tote bags to all adult women in attendance was not unlawful under the Unruh Act because the giveaway “d[id] not emphasize an irrelevant difference” between men and women but instead sought to “honor[] mothers as a group of individuals.”<sup>48</sup> A different district of the California Court of Appeal similarly held that a discount offered only to women in the interest of promoting breast cancer awareness “did not emphasize ‘irrelevant differences’ between men and women or ‘perpetuate’ any kind of stereotype” because breast cancer impacts women at a far higher rate than men.<sup>49</sup> The court held that the promotion supported public awareness of breast cancer and such public awareness “is sufficiently strong public policy” to justify a golf course offering discounted golf fees to women.<sup>50</sup>

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<sup>42</sup> *Koire*, 40 Cal. 3d at 34.

<sup>43</sup> *Id.* at 34–36.

<sup>44</sup> *See id.* at 34.

<sup>45</sup> *Id.* at 39. The court notes that “encourag[ing] more women to attend [bars with Ladies’ Night promotions], thereby promoting more interaction between the sexes” is not sufficient social policy to justify discriminatory pricing differences. *Id.* at 33.

<sup>46</sup> *Dept. Fair Emp’t. & Hous. v. Marion’s Place*, Case Nos. U-200203 C-0008-00-s, C 03-04-070, 06-01- P, 2006 WL 1130912 (Cal. Fair Employment & Housing Comm’n, Feb. 1, 2006).

<sup>47</sup> *Id.* at \*9–10.

<sup>48</sup> *Cohn v. Corinthian Colleges, Inc.*, 169 Cal. App. 4th 523, 528–529 (4th Dist. 2008). The court reprimanded the plaintiffs for inventing injuries under the Unruh Act in prior cases and the present case for the sole purpose of “shak[ing] down” organizations for engaging in harmless behavior. *Id.* at 529.

<sup>49</sup> *Frye v. VH Prop. Corp.*, No. B246991, 2014 WL 69126, at \*3–4 (Cal. Ct. App. 2d Dist. Jan. 8, 2014).

<sup>50</sup> *Id.* at \*4.



2. Discrimination justified by profit or economic reasons violates the Unruh Act.

One basis that is “insufficient to justify discrimination based on an individual’s personal characteristics” is “a business’s interest in maximizing profits.”<sup>51</sup> “An entrepreneur’s discriminatory practice based upon . . . economic self-interest still violates public policy as codified in” the Unruh Act.<sup>52</sup> For instance, the fact that a bar will be forced to close its nightclub business if it eliminates a discriminatory gender-based pricing scheme where women are charged a lower cover charge one evening per week<sup>53</sup> does not justify discrimination.<sup>54</sup>

### **C. Conclusion**

California courts interpreting the Unruh Act have steadily permitted practices that are not based on stereotypes, generations, and profits, and that further a compelling societal interest. However, because the “compelling societal interest” language is contained in case law and not within the statute or implementing regulations, small businesses that are sued by men’s rights groups have shied away from incurring the expense of litigation, and chosen settlement, even when their practices clearly further a compelling societal interest.

### **The Solution: Proposed Regulation**

We propose that the FEHC adopt a new regulation under the Unruh Act that embraces the courts’ interpretation that the Unruh Act does not prohibit activities that further a compelling societal interest. Without such a regulation, small businesses will continue to be bullied into ceasing events that empower women and non-binary people and will continue to pay legal settlements to men’s rights groups suing for gender discrimination of men, enriching the coffers of a recognized hate group.

Our proposed regulation facilitates the same careful balancing used by the courts, considering whether the practice effectively carries out a compelling societal interest and whether there are alternative practices that the business could use to better carry out that interest. If a business’s practice effectively carries out a compelling societal interest and there are not feasible alternatives to better accomplish that interest, then the practice is in accordance with the law and does not violate the Unruh Act.

#### **Unruh Act – Compelling Societal Interest**

Statement of purpose: the purpose of the Unruh Act is to prevent discrimination that is arbitrary, invidious, and unreasonable. A policy or practice is not arbitrary, invidious, or unreasonable if it furthers a compelling societal interest.

<sup>51</sup> *Candelore*, 19 Cal. App. 5th at 1154 (emphasis deleted).

<sup>52</sup> *Easebe Enters.*, 141 Cal. App. 3d at 987; *see Rotary Club*, 178 Cal. App. 3d at 1061.

<sup>53</sup> *Koire*, 40 Cal. 3d at 39.

<sup>54</sup> *Easebe Enters.*, 141 Cal. App. 3d at 987.

A business establishment can show that there is no violation of the Act if there is a compelling societal interest for the policy or practice. To show that the policy or practice furthers a compelling societal interest, the business establishment must demonstrate by a preponderance of the evidence, all the following elements:

- (1) The policy or practice furthers a compelling societal interest;
- (2) The policy or practice effectively carries out the identified purpose; and
- (3) There is no feasible alternative policy or practice the business establishment could use to better accomplish the identified compelling societal interest.

### Hypothetical 1

A business decides to hold a “ladies’ night” where they provide discounted drink coupons for women. The stated reason is that they want more women to be present at the bar.

#### Hypothetical 1 – Application

- (1) The business will not establish Element 1 because wanting more women to be present at the bar is not a compelling societal interest.
- (2) NA
- (3) NA

The California Supreme Court has already held that gender-based price discounts do not address a “compelling” societal interest. In *Koire v. Metro Car Wash*,<sup>55</sup> the Supreme Court held that the Unruh Act prohibits sex-based price discounts. A man filed suit after he did not receive the same discounted car wash price as were given to female customers on “Ladies’ Day” and was refused free admission to a night club on “Ladies’ Night” when women were admitted for free. The court rejected the businesses’ asserted “societal interests” of profitability and increased interaction between men and women.

More recently, in *Angelucci v. Century Summer Club*,<sup>56</sup> male night club patrons sued a club where they were charged higher admission than female patrons. The Supreme Court held that the male patrons were not required to demonstrate that they affirmatively requested and were refused nondiscriminatory treatment. Instead, as in *Koire*, the Court “held that a business establishment’s policy of affording price discounts to female patrons purely on the basis of gender” is alone unlawful gender discrimination under the Unruh Act.<sup>57</sup>

### Hypothetical 2

A sporting goods store holds a Girls at Play event and hosts a basketball clinic for customers in the store. To encourage girls to participate, it holds a shooting contest that is only open to girls, and the winners get a free basketball.

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<sup>55</sup> 40 Cal. 3d 24, 33 (1985).

<sup>56</sup> 41 Cal. 4th 160 (2007).

<sup>57</sup> *Id.* at 173.

### Hypothetical 2 – Application

- (1) The business will establish Element 1 because creating space for girls, who are underrepresented in youth athletics, to participate and learn more about basketball is a “compelling societal interest.”
- (2) The business will establish Element 2 because teaching girls how to play basketball and shoot baskets eliminates barriers to access for girls’ sports. Encouraging girls to attend the event through holding a contest with prizes carries out the purpose of increasing girls’ participation in sports.
- (3) The business will establish Element 3 because there is no feasible practice that the business could use to better encourage more girls to participate in sports than teaching girls how to play sports. There is no better way to bring girls in the door to participate in the classes than a give-away through a contest.

The California legislature has enacted several laws to encourage and support girls’ participation in youth athletics and recreation as an acknowledgment that girls are underrepresented in these activities.<sup>58</sup> Thus, the business’s practice further the same compelling societal interest that California has already taken steps to address. Furthermore, this business’s policy is different than the gender-based price discounts that the California Supreme Court held to violate the Unruh Act in *Koire v. Metro Car Wash*.<sup>59</sup> Here, the business is not charging any customers entry to the classes; instead it is encouraging girls to participate in the free classes by offering the chance to win a give-away. As the California Court of Appeal explained, “While price differentials are specifically prohibited . . . , no such prohibition exists for promotional gifts . . . where the intent is for the item to be a gift, rather than an attempt to circumvent the ban on gender based discounts.”<sup>60</sup> Furthermore, the intention of the business is not to increase profitability or interaction between men and women but rather to encourage girls to play sports.

### Hypothetical 3

A business decides to hold a breast cancer awareness event and gives out free mammograms to the first 100 women who attend.

### Hypothetical 3 – Application

- (1) The business will be able to establish Element 1 because addressing breast cancer awareness is a compelling societal interest.
  - The California Court of Appeal has held that “Breast cancer awareness is a sufficiently strong public policy to warrant the differential treatment.”<sup>61</sup>
- (2) The business will be able to establish Element 2 because mammogram screening is directly tied to breast cancer awareness. By giving out free mammogram screenings for the first 100 women, the business raises awareness about early screening opportunities and resources for all attendees.

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<sup>58</sup> See CAL. GOV’T. CODE § 53080 (declaring a need to expand girls’ participation in park and recreation activities); CAL. EDUC. CODE § 221.7(a) (stating that girls are not afforded the same opportunities in school-sponsored athletics as their male counterparts).

<sup>59</sup> *Koire*, 40 Cal. 3d at 33.

<sup>60</sup> *Cohn v. Corinthian Colleges, Inc.*, 169 Cal. App. 4th 523, 530 (2008).

<sup>61</sup> *Frye v. VH Prop. Corp.*, 2014 WL 69126, at \*4 (Cal. Ct. App. Jan. 8, 2014).

- Contrast this with a promotion that gave out pink ribbons only to women. This promotion would not establish Element 2 because giving out pink ribbons only to women is not directly tied to the identified purpose. Further, giving ribbons to all attendees would better accomplish the purpose (Element 3) because this alternative would raise awareness for an even larger number of participants.
- (3) The business will be able to establish Element 3 because there is no better alternative to mammograms for achieving awareness.

According to the World Health Organization (WHO), Breast Cancer Awareness Month (October) is important to “increase attention and support for awareness, early diagnosis, and treatment” for women with breast cancer.<sup>62</sup> As the most common cancer for all women worldwide, early diagnosis “remains the cornerstone of breast cancer control.”<sup>63</sup> According to the National Cancer Institute, mammograms allow early detection of breast cancer, permitting women to get treatment earlier in the course of the disease.<sup>64</sup> Studies show that mammograms can save lives<sup>65</sup>, especially for women between the ages of 40 and 74.<sup>66</sup>

#### Hypothetical 4

A non-profit dedicated to fighting discrimination against women and girls decides to combat the well-established gender-based pay gap by holding an empowerment event to teach women and girls how to negotiate for higher salaries.

#### Hypothetical 4 – Application

- (1) The non-profit will be able to establish Element 1 because eliminating (or narrowing) the gender-based pay gap is a “compelling societal interest.”
- (2) The non-profit will be able to establish Element 2 because teaching salary negotiation to women and girls is the type of practice that “effectively carries out the identified purpose.”
- (3) The non-profit will be able to establish Element 3 because there is no feasible alternative that would better accomplish the purpose.

In 2017, full-time working women in the United States were paid 80% of what men were paid.<sup>67</sup> For every dollar white men made, white women make 79 cents, Black women make 62 cents, Latinx women make 54 cents, and indigenous women make 57 cents.<sup>68</sup> The cumulative impact of this wage disparity can be immense. Over her lifetime, a woman’s lost earnings add up to \$700,000 for high school graduates, \$1.2 million for college graduates, and \$2 million for

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<sup>62</sup> *Breast Cancer Awareness Month: Increased Awareness, Equitable Access to Early Diagnosis and Timely, Effective, and Affordable Treatment Needed Globally*, World Health Organization, [https://www.who.int/cancer/breast\\_cancer\\_awareness/en/](https://www.who.int/cancer/breast_cancer_awareness/en/) (last visited July 8, 2020).

<sup>63</sup> *Id.*

<sup>64</sup> *Mammograms*, National Cancer Institute, (Dec. 7, 2016), <https://www.cancer.gov/types/breast/mammograms-fact-sheet>.

<sup>65</sup> *Eight Ways to Prevent Breast Cancer*, Siteman Cancer Center at Washington University (2017), <https://siteman.wustl.edu/prevention/take-proactive-control/8-ways-to-prevent-breast-cancer/>.

<sup>66</sup> *Mammograms*, supra note 74.

<sup>67</sup> K. Fontenot et al., *Income and Poverty in the United States: 2017*. U.S. Census Bureau (2018).

<sup>68</sup> Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, Center for American Progress (March 24, 2020), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/>.

professional school graduates.<sup>69</sup> According to research by the American Association of University Women, current projections show that equal pay will not occur until 2106.<sup>70</sup> A variety of articles<sup>71</sup> and tools exist to help women negotiate a higher salary to help individual women close this gap.

### Hypothetical 5

An organization has a mentorship program that is exclusively for women. The mentorship program is explicitly intended to help young women who are interested in STEM (Science, Technology, Engineering, and Mathematics), since STEM is a male-dominated field.

### Hypothetical 5 – Application

- (1) The organization will be able to establish Element 1 because eliminating (or narrowing) the gender gap in STEM is a “compelling societal interest.”
- (2) The organization will be able establish Element 2 because providing mentorship to young women in STEM effectively works toward the stated purpose.
- (3) The organization will be able to establish Element 3 because there is no practice that would better accomplish this interest.

Women continue to be underrepresented in science and engineering fields, with the greatest disparities existing in engineering, computer science, and the physical sciences.<sup>72</sup> While women make up half of the total U.S. college-educated workforce, they are only 28% of the science and engineering workforce.<sup>73</sup> Some organizations believe that the gender gap is getting larger; by 2027, it is estimated that only 22 percent of computer scientists will be women, down from 37 percent in 1995 and 24 percent in 2017.<sup>74</sup>

Male-dominated fields often deter women from entering.<sup>75</sup> The gender gap begins in elementary school and is particularly significant for women of color.<sup>76</sup> Mentorship programs can help cultivate interest and open opportunities for girls and young women in STEM.<sup>77</sup> For

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<sup>69</sup> National Committee on Pay Equity, *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, Pay Equity (2018), <https://www.pay-equity.org/info-time.html>.

<sup>70</sup> American Association of University Women, *The Simple Truth About the Gender Pay Gap*, AAUW (Fall 2018), available at <https://www.aauw.org/app/uploads/2020/02/AAUW-2018-SimpleTruth-nsa.pdf>; see also Liz Frazier, *On Women’s Equality Day, How To Fight The Gender Pay Gap*, Forbes (Aug. 26, 2019), <https://www.forbes.com/sites/lizfrazierpeck/2019/08/26/on-womens-equality-day-how-to-fight-the-gender-pay-gap/#6ac00d04660b>.

<sup>71</sup> See Kristin Wong, *A Woman’s Guide to Salary Negotiation*, N.Y Times, <https://www.nytimes.com/guides/working-womans-handbook/salary-negotiation-woman>; Kim Elsesser, *4 Key Strategies Women Need To Negotiate A Higher Salary*, Forbes (Apr. 24, 2018), <https://www.forbes.com/sites/kimelsesser/2018/04/24/4-key-strategies-women-need-to-negotiate-a-higher-salary/#25f7abe015d9>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Shawna De La Rosa, *Mentorship Programs Help Bridge STEM Gender Gap*, Education Dive (Apr. 5, 2019), <https://www.educationdive.com/news/mentorship-programs-help-bridge-stem-gender-gap/552097/>.

<sup>75</sup> Bridget McCrea, *Can Mentorships Get More Girls Into STEM Subjects?*, EdSurge (Apr. 3, 2019), <https://www.edsurge.com/news/2019-04-03-can-mentorships-get-more-girls-into-stem-subjects>.

<sup>76</sup> National Science Board, *Science & Engineering Indicators 2018*, National Science Foundation (2018), <https://nsf.gov/statistics/2018/nsb20181/report>.

<sup>77</sup> *Id.*

example, “when it comes to the percentage of girls who understand the relevance of STEM and the possible jobs within it,” there is a 20% difference between girls who know a woman in STEM and those who do not.<sup>78</sup> An article in *The Atlantic* stated that women mentors in STEM act as a “social vaccine that protects female students against negative stereotypes and gives them a sense of belonging.”<sup>79</sup>

### Hypothetical 6

A golf course promotes a women-only Golfing 101 event to teach women how to golf. The intended purpose of the event is to allow women to engage in business conversations and informal networking that often occurs on male-dominated golf courses.

### Hypothetical 6 – Application

- (1) The golf course will be able to establish Element 1 because a well-established gender gap exists in corporate America. Closing this gender gap by providing opportunities for women to engage in informal networking and business meetings is a “compelling societal interest.”
- (2) The golf course will be able to establish Element 2 because teaching Golf 101 to women would make women feel more welcome and comfortable on the golf course, a setting that has been noted for being both male-dominated and instrumental for business.
- (3) The golf course will likely be able to establish Element 3 because there is no feasible alternative that would better accomplish the purpose. An event for all business-people new to golf (regardless of gender) does not address the gender inequities that exist in corporate America and in informal settings where business is conducted.

Companies spend billions of dollars each year on “corporate golf” or “business golf” events.<sup>80</sup> In a 2018 interview, executive vice president and deputy chief financial officer at American Express Linda Zukauckas noted, “The golf course is where professionals build camaraderie and often hear about under-the-radar opportunities.”<sup>81</sup> Since women only comprise 24 percent of golfers, women miss out on valuable opportunities to network in this setting.<sup>82</sup> One article in the *Stanford Journal of Law, Business, and Finances* titled, “The Link Among Golf, Networking, and Women’s Professional Advancement” explains “how golf is an important networking tool in the fields of law and business and how the inequality women face on the links limits their opportunity to participate in this valuable networking activity, thereby hindering their advancement in these professions.”<sup>83</sup>

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<sup>78</sup> De La Rosa, *supra* note 84.

<sup>79</sup> Ed Yong, *How Women Mentors Make a Difference in Engineering*, *The Atlantic* (May 22, 2017), <https://www.theatlantic.com/science/archive/2017/05/women-mentors-engineering/527625/>.

<sup>80</sup> See Geoffrey Colvin, *Why Execs Love Golf*, *Fortune*, Apr. 30, 2001, at 46.

<sup>81</sup> Vicki Salemi, *Women Should Head to the Golf Course for a Networking Hole-in-One*, *N.Y. Post* (Apr. 29, 2018), <https://nypost.com/2018/04/29/women-should-head-to-the-golf-course-for-a-networking-hole-in-one/>.

<sup>82</sup> *Id.*

<sup>83</sup> Carolyn M. Janiak, *The Links among Golf, Networking, and Women's Professional Advancement*, 8 *Stan. J.L. Bus. & Fin.* 317 (2003).

# Unruh Act – Compelling Societal Interest

By: Aditi Fruitwala, ACLU SoCal; Nora Cassidy, Legal Aid at Work;  
Elizabeth Kristen, Legal Aid at Work; Ting Su, Eagle Rock Brewery; Claire  
Wasserman and Ashley Louise, Ladies Get Paid

**LEGAL  
AID AT  
WORK**

**ACLU**  
SoCal

## Stats on Gender Equity in the US

- Less than 5% of CEOs at S&P 500 companies are women
- Less than 25% of congressmembers are women
- 25% of women have experience sexual harassment in the workplace
- Women of color are 50% of the low-wage workforce
- Women earn about 20% less than men on average





## Unruh Act

- Prohibits business establishments and public accommodations from discriminating on the basis of “sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status”
  - Purpose: promote equality and “eliminat[e] . . . antisocial discriminatory practices” while encouraging “socially beneficial ones.”
-



Ladies Get  
Paid

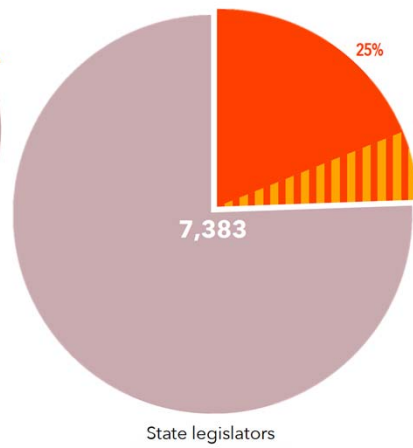
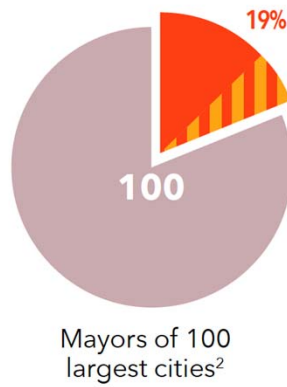
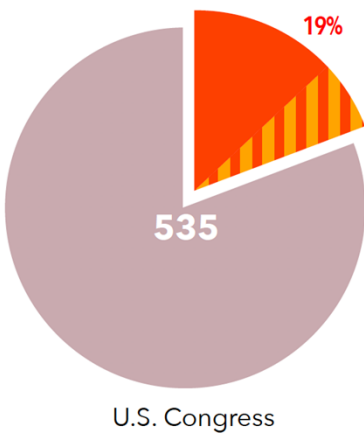




# Eagle Rock Brewery



# Affirmative Action



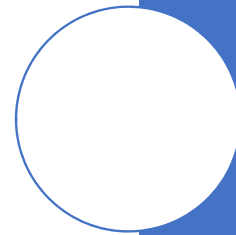
- Men
- All women
- Women of color
- xx** Total number of political officials
- xx%** Percentage of women in role

# Affirmative Action in California: Proposition 16

Y Allen	Y Dodd	Y Jackson	Y Pan
Y Archuleta	Y Durazo	N Jones	Y Portantino
Y Atkins	Y Galgiani	Y Leyva	Y Roth
N Bates	Y Glazer	Y McGuire	Y Rubio
Y Beall	Y Gonzalez	N Melendez	Y Skinner
N Borgeas	N Grove	Y Mitchell	Y Stern
Y Bradford	Y Hertzberg	Y Monning	Y Umberg
Y Caballero	Y Hill	N Moorlach	Y Wieckowski
N Chang	Y Hueso	N Morrell	Y Wiener
N Dahle	Y Hurtado	N Nielsen	Y Wilk

**YES: 30**      **NO: 10**

**ACA 5**      Item #: 79  
**Weber et al.**



## Unruh Act

- Prevents discrimination that is arbitrary, invidious, and unreasonable.
- Practices that further a compelling societal interest ≠ unreasonable, arbitrary, or invidious



## Age Requirements for Renting a Car

- Facts: rental car company refused to rent a car to people under 25
- Q: Age discrimination?
- Holding: California law allows rental companies to impose minimum age requirements → NO VIOLATION

## Children Excluded from Retirement Communities

- Facts: Retirement community prohibited children
- Q: Age discrimination?
- Holding: Retirement communities are designed for the particular needs of the elderly and that furthers a compelling societal interest → NO VIOLATION





## Discounts for Children

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- Facts: Movie theater offered price discounts to children
- Q: Age discrimination?
- Holding: Children can't work because of child labor laws, so offering discounts furthers a societal interest → NO VIOLATION



## Ladies' Night Discount

- Facts: "Ladies' Night" promotion at a bar offered discounts to women
- Q: sex discrimination?
- Holding: promotion is based on generalizations and stereotypes, and does not further a compelling societal interest  
→ VIOLATION



## Mandatory Gendered Dress Codes

- Facts: Nightclub denied entrance to a trans woman because she was wearing a skirt
- Q: Sex discrimination?
- Holding: Dress code based on irrational stereotypes → VIOLATION



## Mothers' Day Giveaway

- Facts: baseball team gave away free tote bag to all women on Mothers' Day
- Q: Sex discrimination?
- Holding: promotion not based on irrelevant differences and sought to "honor mothers as a group"  
→ NO VIOLATION



## Proposed Regulation

A business establishment can show that there is no violation of the Act if there is a compelling societal interest for the policy or practice. To show that the policy or practice furthers a compelling societal interest, the business establishment must demonstrate by a preponderance of the evidence, all the following elements:

- (1) The policy or practice furthers a compelling societal interest;
- (2) The policy or practice effectively carries out the identified purpose; and
- (3) There is no feasible alternative policy or practice the business establishment could use to better accomplish the identified compelling societal interest.

## Hypothetical 1

A business decides to hold a “ladies’ night” where they provide discounted drink coupons for women. The stated reason is that they want more women to be present at the bar.

## Application of Proposed Regulations

- (1) The business will not establish Element 1 because wanting more women to be present at the bar is not a compelling societal interest.
- (2) N/A
- (3) NA





## Hypothetical 2

A sporting goods store holds a Girls at Play event and hosts a basketball clinic for customers in the store.

To encourage girls to participate, it holds a shooting contest that is only open to girls, and the winners get a free basketball.



Application of  
Proposed  
Regulations:  
Hypothetical 2

(1) The business will establish Element 1 because creating space for girls, who are underrepresented in youth athletics, to participate and learn more about basketball is a "compelling societal interest."

(2) The business will establish Element 2 because teaching girls how to play basketball and shoot baskets eliminates barriers to access for girls' sports. Encouraging girls to attend the event through holding a contest with prizes carries out the purpose of increasing girls' participation in sports.

(3) The business will establish Element 3 because there is no feasible practice that the business could use to better encourage more girls to participate in sports than teaching girls how to play sports. There is no better way to bring girls in the door to participate in the classes than a give-away through a contest.



## Hypothetical 3

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A business decides to hold a breast cancer awareness event and gives out free mammograms to the first 100 women who attend.



## Application of Proposed Regulations: Hypothetical 3

- (1) The business will be able to establish Element 1 because addressing breast cancer awareness is a compelling societal interest.
- (2) The business will be able to establish Element 2 because mammogram screening is directly tied to breast cancer awareness. By giving out free mammogram screenings for the first 100 women, the business raises awareness about early screening opportunities and resources for all attendees.
  - Contrast this with a promotion that gave out pink ribbons only to women. This promotion would not establish Element 2 because giving out pink ribbons only to women is not directly tied to the identified purpose. Further, giving ribbons to all attendees would better accomplish the purpose (Element 3) because this alternative would raise awareness for an even larger number of participants.
- (3) The business will be able to establish Element 3 because there is no better alternative to mammograms for achieving awareness.

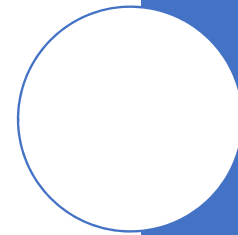


## Hypothetical 4

A non-profit dedicated to fighting discrimination against women and girls decides to combat the well-established gender-based pay gap by holding an empowerment event to teach women and girls how to negotiate for higher salaries.

## Application of Proposed Regulations: Hypothetical 4

- (1) The non-profit will be able to establish Element 1 because eliminating (or narrowing) the gender-based pay gap is a “compelling societal interest.”
- (2) The non-profit will be able to establish Element 2 because teaching salary negotiation to women and girls is the type of practice that “effectively carries out the identified purpose.”
- (3) The non-profit will be able to establish Element 3 because there is no feasible alternative that would better accomplish the purpose.





## Hypothetical 5

An organization has a mentorship program that is exclusively for women. The mentorship program is explicitly intended to help young women who are interested in STEM (Science, Technology, Engineering, and Mathematics), since STEM is a male-dominated field.



## Application of Proposed Regulations: Hypothetical 5

(1) The organization will be able to establish Element 1 because eliminating (or narrowing) the gender gap in STEM is a “compelling societal interest.”

(2) The organization will be able establish Element 2 because providing mentorship to young women in STEM effectively works toward the stated purpose.

(3) The organization will be able to establish Element 3 because there is no practice that would better accomplish this interest.

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## Hypothetical 6

A golf course promotes a women-only Golfing 101 event to teach women how to golf. The intended purpose of the event is to allow women to engage in business conversations and informal networking that often occurs on male-dominated golf courses.

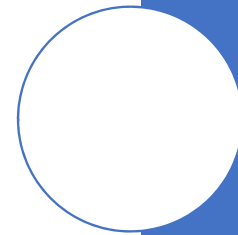


## Application of Proposed Regulations: Hypothetical 6

(1) The golf course will be able to establish Element 1 because a well-established gender gap exists in corporate America. Closing this gender gap by providing opportunities for women to engage in informal networking and business meetings is a “compelling societal interest.”

(2) The golf course will be able to establish Element 2 because teaching Golf 101 to women would make women feel more welcome and comfortable on the golf course, a setting that has been noted for being both male-dominated and instrumental for business.

(3) The golf course will likely be able to establish Element 3 because there is no feasible alternative that would better accomplish the purpose. An event for all business-people new to golf (regardless of gender) does not address the gender inequities that exist in corporate America and in informal settings where business is conducted.







Questions?