

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

_____)
[REDACTED] [REDACTED])
)
Complainant,)
)
v.)
)
The R.O.S.E. Fund, Inc.,)
)
Respondents,)
_____)

Docket No. 09-BPA-00597

BRIEF OF *AMICI CURIAE* IN SUPPORT OF COMPLAINANT [REDACTED] [REDACTED]

Amici curiae The American Civil Liberties Union, the Boston Area Rape Crisis Center, the Elizabeth Stone House, Fenway Health, Harbor Communities Overcoming Violence, Healing Abuse Working for Change, the Massachusetts Chapter of the National Organization of Women, Massachusetts LGBTQ Bar Association, MassEquality, the National Coalition of Anti-Violence Programs, Renewal House, the Second Step, and Transforming Ourselves through Dialogue, Organizing & Services, respectfully submit this brief in support of the Complainant, [REDACTED]
[REDACTED]

I. INTEREST OF AMICI

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. Its Women’s Rights Project, founded in 1972 by Ruth Bader Ginsburg, works to advance gender equality and the civil liberties of women and girls. The ACLU has advocated at the local, state, and national levels for the rights of survivors of domestic and sexual violence and litigated many cases involving explicit gender-based classifications and gender stereotyping on behalf of women and men. *See,*

e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977) (concluding that male widowers should be subject to same eligibility requirements as widows to qualify for Social Security survivor's benefits); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (overturning policy requiring servicewomen to prove their husbands' dependency in order to obtain military spousal benefits). The ACLU of Massachusetts (ACLUM) is the state affiliate of the national ACLU and it too has worked for gender equality and an end to gender stereotyping which harms both females and males. *See, e.g.*, *Commonwealth v. Bernardo B.*, 453 Mass. 158 (2009) (reasonable inference raised of selective prosecution of male minor); *Jones v. Roe*, 33 Mass. App. Ct. 660 (1992) (traditional notions of sex roles infected lower court decision to change child's last name to father's).

The Boston Area Rape Crisis Center ("BARCC") was one of the first rape crisis centers in the United States to advocate for and support survivors of sexual assault. Initiated as a grassroots, activist endeavor, the organization has spearheaded model programs that have been replicated nationwide. The agency is a national leader in providing comprehensive, free services, including a 24-hour hotline, 24-hour medical advocacy, individual and group counseling, and legal advocacy and case management. BARCC also provides community awareness and prevention services through partnerships and training with organizations and communities. BARCC's staff of 27 and more than 140 volunteers serve the twenty-nine cities and towns of greater Boston and helps approximately 4,000 victims and their families each year.

The Elizabeth Stone House helps homeless and at-risk individuals and families heal from trauma, remain clean and sober, address their mental illness, and increase self-sufficiency so that they will be able to find safe, stable housing and keep it. To that end, it provides an emergency

shelter for survivors of domestic violence and their children, a transitional housing program for individuals and families, support groups and classes, financial assistance, housing counseling, services for the children of our adult clients, and intensive case management directed toward helping clients find, enroll in and complete GED, adult education, and job training programs.

The mission of Fenway Health is to enhance the wellbeing of the lesbian, gay, bisexual and transgender community and all people in our neighborhoods and beyond through access to the highest quality health care, education, research and advocacy. The Violence Recovery Program at Fenway Health was founded in 1986 and provides counseling, support groups, advocacy and referral services to victims of bias crime, domestic violence, sexual assault and police misconduct.

Harbor Communities Overcoming Violence (“HarborCOV”), founded in 1998, is a nonprofit community-based organization that provides emergency and supportive services to families and individuals that have been affected by domestic violence. HarborCOV is committed to creating access for all survivors, and specializes in serving survivors who face additional barriers to accessing services and improving their lives and prospects. While HarborCOV recognizes the global issue of violence against women, it also recognizes that victims and survivors are not only women, and it welcomes all victims and survivors in its programs and services.

Healing Abuse Working for Change (“HAWC”), formerly known as Help for Abused Women and their Children, was founded in 1978. The purpose of HAWC is to create social change by taking action against personal and societal patterns of violence and oppression. HAWC provides services and support to victims of domestic violence residing in 23 cities and

towns on Massachusetts' North Shore in order that they may make informed, independent decisions about their futures. HAWC's services include: a 24-hour hotline; support groups; legal advocacy; hospital advocacy; children's services; and a shelter program.

The Massachusetts Chapter of the National Organization for Women (“Mass. NOW”) is the only multi-issue, multi-strategy feminist organization in the Commonwealth. Mass. NOW works to advance the equal status of women and girls in all aspects of their lives. Its six priority areas are: ending violence against women; racial justice; reproductive rights and health; economic equality and labor rights; LGBTQ equality; and civil and constitutional rights.

The Massachusetts LGBTQ Bar Association is a statewide professional association of LGBT and queer lawyers and allies providing a visible LGBTQ presence within the Massachusetts legal community. It is committed to preventing, combating, and redressing discrimination, and protecting the equal rights of members of the LGBTQ community.

MassEquality is the leading statewide grassroots advocacy organization in Massachusetts working to ensure that everyone across Massachusetts can thrive from cradle to grave without discrimination and oppression based on sexual orientation, gender identity, or gender expression. It works to achieve the full equality of LGBT people in all spheres of society through advocacy in the legislative and executive branches and through public education.

The National Coalition of Anti-Violence Programs (“NCAVP”) addresses the pervasive problem of violence committed against and within the lesbian, gay, bisexual, transgender, and queer and HIV-affected communities. NCAVP is a coalition of programs that document and advocate for victims of anti-LGBT and anti-HIV/AIDS violence and harassment, domestic violence, sexual assault, police misconduct and other forms of victimization. NCAVP is

dedicated to creating a national response to the violence plaguing these communities. NCAVP supports equal access to services offered by places of public accommodation for all survivors of domestic violence.

Renewal House, a program of the Unitarian Universalist Urban Ministry, offers shelter, education, outreach and training to all survivors of domestic violence/abuse. For over five years Renewal House has been partnering with LGBTQ organizations in Boston to provide fully inclusive services. It has also housed heterosexual male survivors of domestic violence in its shelter program. Renewal House agrees that those who are male/male-identified should be given access to the same services as all survivors of abuse/violence. As such, it believes that the ROSE Fund's services should be nondiscriminatory while also recognizing that the majority of those who reach out to the ROSE Fund are female.

The Second Step, in partnership with survivors of domestic violence, creates a safe, supportive community, identifies choices, and builds foundations to transcend abuse. Founded in 1992, The Second Step is a community outreach and transitional living program that provides long-term support for survivors of domestic violence and their children. For those who have taken the courageous first step away from abuse, The Second Step offers an opportunity for enduring change. It provides safety planning, advocacy, transitional housing, children's programs, legal case management, and an array of services for families transitioning away from abuse.

Transforming Ourselves through Dialogue, Organizing & Services ("TOD@S") is an inter-agency collaboration of The Network/La Red, The Hispanic Black Gay Coalition, The Violence Recovery Program at Fenway Health, and Renewal House, a program of the Unitarian

Universalist Urban Ministry. Together TOD@S works to improve and increase access to intervention and prevention services for Black and Latin@ lesbian, gay, bisexual, queer and/or transgender people affected by partner abuse.

II. INTRODUCTION

This case offers the Commission an opportunity to confront and remedy harmful gender stereotypes that pervade the subject of domestic violence. Notwithstanding Respondent's laudable goal of providing treatment to women who suffer domestic violence, it indisputably denied services to the Complainant, a domestic abuse victim, solely because he is a man. The Commission has a compelling interest to prevent unique evils resulting from acts of invidious discrimination in the distribution of publicly available goods, services and other advantages. G.L. c. 151B § 2. Because the Legislature has empowered the Commission to "forcefully" eliminate discrimination at its root level, the Commission should reject Respondent's reliance on gender stereotypes that produce unfair distinctions based on sex alone. *Cuddy v. The Stop and Shop Supermarket*, 434 Mass. 521, 536 (2001). Respondent cannot justify its discrimination under the language and legislative history of the Public Accommodations Act ("the Act") without at once systemically and paradoxically diluting the protection against sex discrimination and perpetuating stereotypes which disadvantage men and women in Massachusetts. See G.L. c. 272, §§ 92A, 98.

III. BACKGROUND

In October 2006, a male intimate partner of [REDACTED] [REDACTED] brutally attacked him.¹ [REDACTED]'s injuries included a fractured orbital bone, punctured maxillary sinus and persistent blurred

¹ Amended Complaint of [REDACTED] [REDACTED] Massachusetts Commission Against Discrimination.

vision. The bone structure under [REDACTED]'s left eye had degenerated so significantly that during a routine tooth extraction, a piece of the fractured bone was removed while still attached to the tooth.² In 2009, a study published in the Archives of Facial Plastic Surgery suggested that victims of intimate partner abuses consistently presented with distinct fractures around the eye or upper face because the "face is the most meaningful area."³

The Respondent, The R.O.S.E. Fund, Inc. ("Regaining One's Self-Esteem" or "ROSE"), is a 501(c)(3) non-profit corporation located in Wakefield, Massachusetts, which operates and advertises a program that provides medical and reconstructive procedures on a no-fee or a substantially reduced fee basis for female survivors of domestic abuse ("the Program"). Joint Stipulation (hereinafter "JS"), ¶¶ 2, 6. ROSE is not federally funded nor was it chartered by federal law pursuant to Title 36 of the United States Code. JS, ¶5. ROSE partners with leading hospitals and medical providers, but retains sole discretion in screening, selecting and referring candidates to its medical affiliates. JS, ¶¶6, 7. The number of medical providers participating in the program exceeds the number of candidates selected, as eligibility is restricted to a specific population, namely individuals requiring reconstructive surgery to repair injuries resulting from domestic violence. Despite Mr. [REDACTED]'s fulfillment of ROSE's stated restriction, as he could demonstrate a need for facial reconstructive surgery to remedy the injuries he sustained as a survivor of domestic abuse, ROSE excluded Mr. [REDACTED] from participating in the Program because he is male. JS, ¶10.

Mr. [REDACTED] filed a Complaint of Discrimination ("Complaint") on or about March 5, 2009, alleging, *inter alia*, that ROSE violated the Act by excluding him from their services on account

² *Id.*

³ Domestic Violence Victims Have Distinct Facial Injuries, Study Says, Jordan Lite, Scientific American, January 19, 2009. <<http://www.scientificamerican.com/blog/post.cfm?id=domestic-violence-victims-have-dist-2009-01-19>>.

of his sex. In particular, the Act prohibits any distinction, discrimination or restriction on account of...sex ...in any place of public accommodation.” G.L. c. 272, § 98. Section 98 further delineates as a ‘civil right’ the ‘right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation.” *Id.* The scope of its application is outlined in G.L. c. 272, § 92A, which broadly defines the term “place” within the meaning of the statute, and explicitly excludes from its breadth “any corporation or entity authorized, created, or chartered by federal law for the express purpose of promoting the health, social, educational, vocational and character development of a single sex.” G.L. c. 272, §92A.

IV. ARGUMENT

A. Respondent’s Interpretation of the Act, If Accepted, Would Narrow the Act’s Purposefully Broad Protections Against Sex Discrimination for Men and Women Alike.

All parties (including *Amici*) agree that society benefits from charities that serve victims of domestic violence. However, the mere fact that ROSE is a charity does not exclude it from the scope of the Act or otherwise permit it to practice invidious gender discrimination.⁴ Moreover, ROSE’s arguments, if accepted, would significantly weaken the Act’s strong prohibitions against discrimination, which protect women and men alike.⁵

As an antidiscrimination statute, the Act has historically been applied liberally and afforded a broad interpretation by the Commission “to achieve its remedial goal of eliminating

⁴ St. 1953, c. 437; St. 1971, c. 418. The legislature broadened the scope of the Act by eliminating a “place which is operated for charitable or educational purposes” as an exemption.

⁵ Although not at issue in this case, it is worth noting that sex discrimination prohibitions include more than discrimination because of “the anatomical notion of ‘sex,’” but also “because of a broader concept incorporating elements of ‘gender’ and societal expectations.” *See Millett v. Lutco, Inc.*, 23 MDLR 232 (Oct. 10, 2001) (ruling that discrimination against transgender people is sex discrimination and noting that “penalizing those who do not fit stereotypical ideas of who they should be as women or men is illegal sex discrimination”).

and preventing discrimination.” *Local Fin. Co. v. Massachusetts Comm’n Against Discrimination*, 355 Mass. 10, 13 (1968). The language of the Act itself is purposefully broad, granting all persons “the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, subject only to the conditions and limitations established by law and applicable to all persons.” *Currier v. National Bd. Of Medical Examiners*, 462 Mass. 1 (2012). See also G.L. c. 272, §98.

ROSE admits that it excluded Mr. [REDACTED] specifically – and that it bars men generally – from its services. However, ROSE denies that it is a ‘place of public accommodation’ on the grounds that it “has no location accepting or soliciting the patronage of the general public, and that it provides no services at its place of business and conducts substantially all of its business by phone and over the Internet.” ROSE’s argument should be rejected. Since its enactment of the first public accommodation statute in 1865, the Massachusetts legislature has repeatedly broadened its proscription of unlawful conduct and has “materially broadened the scope of the term ‘place’ to extend its protection against discriminatory actions.” *Id.*, at 842 -843. In *Currier v. National Bd. Of Medical Examiners*, for example, the Supreme Judicial Court affirmed the Commission’s broad interpretation of the term ‘place’ in § 92 to include all entities that provide services, regardless of physical accessibility, in extending the protections of the Act to a lactating mother. 462 Mass. 1 (2012),

Here, as in *Currier*, the Act cannot be restricted to a person’s entrance into a physical structure in ensuring equal access to the advantages and privileges of services and service providers. In light of society’s increasing reliance upon the Internet and other technologies to conduct business and transmit service, it is apparent that “to limit the statute’s reach to physical

accessibility would be contrary to the goals of the statute and would allow any number of discriminatory actions that the statute prohibits.” *Id.*, at 842, *citing Carparts Distrib. Cir., Inc. v. Automotive Wholesaler’s Ass’n of New England*, 37 F.3d 12, 20 (1st Cir. 1994). By way of ROSE’s logic, any number of businesses in Massachusetts could discriminate since ROSE is not unlike any other organization in its manner of operation. The Commission should reject the argument that organizations operating exclusively via the Internet or by otherwise ‘non-traditional’ means are excluded from the reach of the Act and therefore are permitted to discriminate against both men *and* women.

Similarly, the explicit and narrow exemption carved into § 92 is inapplicable to ROSE. Subsection 10 of Section 92A provides that “any corporation or entity *authorized, created or chartered by federal law* for the express purposes of promoting the health, social, educational vocational and character development of a single sex” is exempt from the anti-discrimination provisions of the Act. G.L. c. 272, § 92A(10) (emphasis supplied). ROSE is not “authorized, created or chartered by federal law,” and its mere desire to promote the health of members of a single sex, standing alone, is insufficient to place it within Section 92A. While ROSE is admittedly not a traditional place of public accommodation, it is nonetheless appropriate to conclude that ROSE comes within the Act in light of this explicit exemption. The Legislature intended that only *specific* organizations, such as the Boy Scouts and Girl Scouts, which were ‘created or chartered by federal law for the express purpose of promoting the health and character development of a single sex’ be exempt from the statute’s reach by enacting an amendment to the Act carving out exceptions, namely St. 1978, c. 331. The enactment of St. 1978 ensures that even non-traditional places of public accommodation, such as a charitable

organization, fall within the breadth of the statute, since its enactment “would not have been necessary unless, in its absence such organizations would fall within §92A’s definition of “a place of public accommodation.” *Concord Rod and Gun Club, Inc. v. Massachusetts Com’n Against Discrimination*, 402 Mass. 716, 721 (1988).

B. ROSE’s Wholesale Rejection of Male Domestic Abuse Victims Is Based on Harmful Gender Stereotypes

ROSE asserts that “women who are victims of domestic violence are a special group,” uniquely deserving of assistance from domestic violence. *Response of Respondent to Request of Information from Investigator Brian Gnanadt*, dated April 11, 2009. However, ROSE fails to explain why this is so. To be sure, there may be meaningful differences in how *most* men and *most* women experience domestic violence, and such differences would be worthy of better societal understanding. However, the wholesale exclusion of male victims of domestic abuse from ROSE’s services, regardless of the individual circumstances and services provided, on the ground that women are deserving of special protection, effectively relies on gender stereotypes that the Commission and the courts of this country and this Commonwealth have rejected for decades.

In *United States v. Virginia*, for example, the United States Supreme Court struck down the exclusion of women from the Virginia Military Academy in part because “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.” *United States v. Virginia*, 518 U.S. 515, 550 (1996). So here, generalizations about whether women, in general, need more protection from domestic abuse and services as a result of it than male victims of domestic abuse, cannot make ROSE’s discriminatory policy

lawful. ROSE's exclusion of Mr. [REDACTED] in this instance is particularly problematic as ROSE's only stated restriction on eligibility is that applicants must demonstrate that they require reconstructive surgery to remedy injuries resulting from domestic abuse. Because eligible candidates, whether male or female victims of domestic abuse, are similarly situated, ROSE's services to women will not be disrupted or diminished in any way by also providing services to men, particularly where available service opportunities exceed the number of eligible candidates.

In its unique role of administering domestic violence services, ROSE's invidious discrimination against male victims of domestic abuse perpetuates two stereotypes at once: that women are the "weaker sex," and that men should be strong enough to defend themselves from attackers. "The harm of stereotyping men and women in traditional gender roles is that this leads to lack of support for people (both men and women) who do not fulfill traditional roles, as when certain social benefits are denied men or women on the basis of stereotypes."⁶ Even benign or remedial gender classifications "may inadvertently perpetuate outmoded stereotypes." *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 -653 (1975). Valid distinctions between sexes must be rooted in something more than the fact that sexes are different. *Attorney General v. Massachusetts Interscholastic Athletic Association*, 378 Mass. 342, 358-9 quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975). The Commission should not countenance the use of gender stereotypes as a justification for disparate treatment between men and women in the administration of domestic violence services in any place of public accommodation.

⁶ Janet K. Swim and Lauri L. Hyers, "Sexism", in: Todd D. Nelson (ed.), *Handbook of Prejudice, Stereotyping and Discrimination* (New York: Psychology Press, 2009), p. 413.

Such stereotypes may be part of the reason that domestic violence against men, whether heterosexual or homosexual, remains vastly unreported.⁷ The National Coalition Against Domestic Violence estimates that 835,000 men are physically assaulted by an intimate partner annually.⁸ In 2011, the Commonwealth experienced an increase in the killing of gay men by their partners.⁹ Among issues compounding the reluctance of male victims of domestic abuse to seek assistance are society's reluctance to treat domestic violence of men as "serious" and the overuse of mutual restraining orders. Indeed, in confronting domestic violence against men, "all of the steps that would normally be available to someone who is a survivor of domestic violence are bypassed."¹⁰ The Commission should not compound the problem by embracing the stereotypes that are at the heart of this dispute.

⁷ Male Victims of Violence Fact Sheet, National Coalition Against Domestic Violence, accessed September 13, 2013, <<http://www.ncadv.org/files/MaleVictims.pdf>>.

⁸ *Id.*

⁹ Maria Cramer, "Same-Sex Abuse Targeted," *The Boston Globe*, September 5, 2011, accessed September 9, 2013, <http://www.boston.com/news/local/massachusetts/articles/2011/09/05/same_sex_domestic_abuse_targeted/>.

¹⁰ *Id.*

V. CONCLUSION

The broad scope of Chapter 151B, the Commonwealth's progressive legal framework intended to recognize and eradicate domestic violence,¹¹ and fundamental fairness demand that the Commission prevent stereotypes and prejudices from being used as justifications for discrimination in the provision of domestic abuse services. Accordingly, the Commission should find in favor of Mr. [REDACTED] and enjoin The R.O.S.E. Fund, Inc. from continuing to engage in discrimination on the basis of sex.

Respectfully submitted,



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¹¹ Not surprisingly, the Massachusetts' legislature continues to develop broad protections for victims of domestic abuse. By way of example, on January 3, 2013, Governor Deval Patrick signed into law Bill S. 2402, amending G.L. 186 to provide housing rights and protections for victims of domestic violence, rape, sexual assault and stalking. See Bill S.2402, "An Act Relative to Housing Rights for Victims of Domestic Violence, Rape, Sexual Assault, and Stalking." Additionally, Massachusetts has always included same-sex couples within the scope of the Massachusetts Abuse Prevention Act. See G.L. c. 209A. See also, Lundy, *supra* FN 18.