COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

LUZ VILLAFANA AND UHMBAYA LAURY Plaintiffs and Appellants, v. COUNTY OF SAN DIEGO, Defendant and Respondent.	4th Civil No. D076120 (San Diego Superior Court Case No. 37-2018-00031741-CU-MC-CTL)

Appeal from a Judgment of the Superior Court,
County of San Diego, State of California
Honorable Ronald L. Styn, Judge

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(California Rules of Court, Rule 8.208(e)(3))

The County of San Diego is not an "entity" as defined by Rule 8.208(c)(2). Nevertheless, the County of San Diego knows of no entity or person that must be listed under Rule 8.208(e) subsection (1) or (2).

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I. INTRODUCTION

Plaintiffs' disparate impact claim fails as a matter of law because the Project 100% home visits impact people of all genders and races the same. Indeed, plaintiffs specifically acknowledge that Project 100% applies equally to all applicants for CalWORKs benefits, and that all applicants are treated the same. They do not contend that Project 100% reduces minorities' or women's access to benefits. Nor do they claim that any of Project 100%'s alleged harms (such as stigma) fall more heavily on minority or female applicants.

Instead, plaintiffs allege that women and certain minorities **apply** for CalWORKs benefits in greater proportions than others, and thus receive home visits in greater proportions than would be expected based on the population of those groups in the general population of San Diego County. But this theory is not a challenge to the County's actions. Rather, it seeks to hold the County liable for income disparities in the general population that result in higher CalWORKs eligibility rates for women and certain minorities. The County did not cause these disparities, and cannot be held liable for them.

In reality, plaintiffs pursue a "disparate impact" theory because the Ninth Circuit has found the Project 100% home visits to substantively legal. The American Civil Liberties Union ("ACLU") filed an earlier lawsuit against the County challenging the home visit program for CalWORKs[1] applicants. In that

[1] CalWORKs "is the state's cash-assistance welfare program. It supports families in making a transition to the work force and

lawsuit, filed in federal court, the ACLU alleged that the home visits were illegal searches that violated the federal and state constitutions as well as state regulations. The first lawsuit also alleged that the home visits violated the applicants' constitutional right to privacy. The district court granted summary judgment in favor of the County and the Ninth Circuit affirmed. (*Sanchez v. County of San Diego* (9th Cir. 2006) 464 F.3d 916).

Even though the ACLU lost the first case, plaintiffs attempt to leave the misimpression that the home visits are somehow illegal searches, and that they violate applicants' privacy rights. Those claims have been thoroughly rejected by the federal courts. Indeed, plaintiffs do not allege in this lawsuit that the Project 100% home visits are unconstitutional.

Because any constitutional challenge to the Project 100% home visits has been foreclosed by the *Sanchez* decision, plaintiffs improperly attempt to distort disparate impact beyond recognition. They allege that the County's home visits discriminate against women, African-Americans and Hispanics in violation of Government Code section 11135Plaintiffs concede that they have no evidence that the County intended to discriminate against women, African-Americans or Hispanics by requiring all applicants for CalWORKs benefits to have a home visit to confirm eligibility for benefits. Instead, they contend that

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provides a safety net for persons who may become income-eligible, including those who suffer a catastrophic loss of income due to job loss or otherwise." (Clerk's Transcript ("CT"), at 91, ¶ 2; First Amended Complaint ("FAC"), at ¶ 2.)

the home visits have a "disparate impact" on women, African-Americans and Hispanics in violation of Section 11135.

Plaintiffs admit, however, that every applicant for CalWORKs benefits is impacted in exactly the same way. Every applicant receives a home visit irrespective of their gender or race. Every applicant is subject to the same alleged harm, irrespective of gender or race. This is fatal to their disparate impact claim. (*Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 822 ["[T]here was no showing that the County's policies had a disproportionate adverse impact on the class members because they are minorities and thus members of a protected group. Instead, **the evidence established that the County's policies were to pay the class members, Caucasian and minority alike**, less because they were members of the County police rather than the LASD."].)

Plaintiffs argued below and argue in this Court that they have properly stated a "disparate impact" claim merely because a larger percentage of women/African-Americans/Hispanics apply for CalWORKs benefits and therefore receive home visits when compared to the percentages of those groups in the County's general population as a whole. The trial court properly rejected plaintiffs' claim. All that plaintiffs' statistics show is that a higher percentage of women/Hispanics/African-Americans need financial assistance and apply for CalWORKs benefits than would be expected based on their presence in the general population of the County. The County, however, is not responsible for this disparity – it results from factors (education,

language proficiency, etc.) far beyond the County's control. In effect, plaintiffs seek to hold the County liable for this pre-existing disparity even though the County did nothing to create or advance it. Moreover, plaintiffs do not allege that the County created the Project 100% program more than 20 years ago in order to somehow punish or discriminate against women/Hispanics/African-Americans. (*See Baluyut v. Superior Court* (1996) 12 Cal. 4th 826, 837 [In order to allege a disparate treatment claim, the plaintiff must show a discriminatory purpose. "Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."] [citations and internal quotation marks omitted].)

Under disparate impact law, a plaintiff must show that the facially neutral practice causes a separate harm and that this harm falls disproportionally on a specific gender or race. The FAC alleges that the home visits are the facially neutral practice and the adverse impact, all rolled into one. This is inconsistent with established disparate impact law. Moreover, the trial court correctly held that in order to state a disparate impact claim the plaintiff must compare two groups who are subject to the facially neutral practice and allege that one group was impacted more harshly by the practice than the other group. Here, plaintiffs compare two groups – one subject to the practice (women/African-Americans/Hispanics who applied for CalWORKs benefits) and

another group not subject to the practice (the general population of San Diego County). The trial court correctly found that this comparison was not sufficient to state a disparate impact claim.

Therefore, the trial court's order sustaining the County's demurrer to plaintiffs' FAC should be affirmed.

II. STATEMENT OF THE FACTS

A. All CalWORKs Applicants, Regardless of Race or Gender, Receive A Home Visit.

"In 1997, the San Diego County District Attorney ("D.A.") initiated a program whereby all San Diego County residents who submit welfare applications under California's welfare program . . ., and are not suspected of fraud or ineligibility, are automatically enrolled in Project 100%." (*Sanchez v. County of San Diego*, *supra*, 464 F.3d at 918).

"Under Project 100%, all applicants receive a home visit from an investigator employed by the D.A.'s office.[2] The visit includes a 'walk through' to gather eligibility information that is then turned over to eligibility technicians who compare that information with information supplied by the applicant. Specifically, the investigator views items confirming that: (1) the applicant has the amount of assets claimed; (2) the applicant has an eligible dependent child; (3) the applicant lives in California; and (4) an 'absent' parent does not live in the residence." (*Id.* at 918-19.)

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[2] At the time *Sanchez* was decided, the investigators were employed by the D.A. The investigators are now employed by the Department of Child Support Services. (CT, at 96, ¶ 31; FAC, at ¶ 31.)

"When applicants submit an application for welfare benefits, they are informed that they will be subject to a mandatory home visit in order to verify their eligibility. Applicants are also informed that the home visit must be completed prior to aid being granted, but are not given notice of the exact date and time the visit will occur. The visits are generally made within 10 days of receipt of the application and during regular business hours, unless a different time is required to accommodate an applicant's schedule. The home visits are conducted by investigators from the Public Assistance Fraud Division of the D.A.'s office, who are sworn peace officers with badges and photo identification. The investigators wear plain clothes and do not carry weapons." (*Id.* at 919.)

"[W]hen an applicant is not home, the investigator will leave a card asking the applicant to call the number indicated to schedule an appointment and will visit the residence a second time if no appointment is made. If after the second visit, the applicant fails to call the investigator to schedule an appointment, this information is reported to the responsible eligibility technician who then denies the application." (*Sanchez v. County of San Diego* (S.D. Cal. Mar. 7, 2003, No. 00 CV 1467 JM (JFS)) 2003 U.S. Dist. LEXIS 27538, at *7.)

"The actual home visit consists of two parts: an interview with the applicant regarding information submitted during the intake process, and a 'walk through' of the home. The visit takes anywhere from 15 minutes to an hour, with five to 10 minutes generally allocated to the 'walk through.' If the applicant refuses

to allow a home visit, the investigator immediately terminates the visit and reports that the applicant failed to cooperate. This generally results in the denial of benefits. The denial of welfare aid is the only consequence of refusing to allow the home visit; no criminal or other sanctions are imposed for refusing consent." (*Sanchez*, 464 F.3d at 919, fn. omitted.)

"The 'walk through' portion of the home visit is also conducted with the applicant's consent. The applicant is asked to lead the 'walk through' and the investigator is trained to look for items in plain view. The investigator will also ask the applicant to view the interior of closets and cabinets, but will only do so with the applicant's express permission." (*Id.* at 919, fn. omitted.) "The Project 100% investigators only ask to view the contents of closets or drawers for verification-related purposes, and will do so only with the homeowner's explicit consent. For example, investigators may verify that children live in the home by asking to see the children's clothing. Similarly, if the applicant is a single mother, investigators may verify that no males live in the home by asking to see the contents of the medicine cabinet." (*Id.* at 924, fn. 13.)

"While the investigators are required to report evidence of potential criminal wrongdoing for further investigation and prosecution, there is no evidence that any criminal prosecutions for welfare fraud have stemmed from inconsistencies uncovered during a Project 100% home visit." (*Id.* at 919, fn. omitted.)

B. Project 100% Impacts Female and Minority Applicants in the Same Way It Impacts Male and Caucasian Applicants.

Plaintiffs allege that "[b]ecause applicants are typically not notified when the investigation will occur, they must often remain effectively confined to their homes awaiting an unannounced and unscheduled visit. As a result, they **may be** effectively required to postpone job searches, skip medical appointments, and stop taking children to and from school for fear of suffering denial of income necessary to feed their families." (CT, at 103, ¶ 38; FAC, at ¶ 38, emphasis added.) They do not allege that this purported impact falls more heavily on women or minorities.

Plaintiffs further allege that "[a]pplicants often experience significant stress and anxiety waiting for the investigator to conduct an unannounced inspection, fearing the County will refuse assistance desperately needed to support their families if they are not home when the investigator arrives." (CT, at 103, ¶ 39; FAC, at ¶ 39.) Again, plaintiffs do not allege that this impact falls more heavily on women or minorities.

Plaintiffs allege that "[t]he requirement for families to endure an unannounced home inspection by a law enforcement investigator is significantly invasive, stigmatizing, and traumatizing, especially for low-income women and people of color." (CT, at 105, ¶ 42; FAC, at ¶ 42.) They do not allege any facts, however, in support of their conclusory allegation.

Plaintiff Luz Villafana owns a home in Escondido and, "within the one year before the commencement of this action, has

paid property taxes to the County of San Diego and the State of California, and is currently assessed and liable to pay additional taxes therein." (CT, at 98, ¶ 6; FAC, at ¶ 6.) Plaintiff Uhmbaya Laury received a Project 100% home visit at some unspecified time and her application for benefits was approved. (CT, at 98, ¶7; FAC, at ¶ 7.)

C. Plaintiffs Allege Only a Disparity in the Levels of CalWORKs Applications by Women and Minorities.

"According to recent data, 50.33 % of San Diego County CalWORKs recipients are Hispanic, while 14.11% are African Americans." (CT, at 105, ¶ 48; FAC, at ¶48.) "Recent data show that 33.5% of the County's general population is Hispanic, and only 5.5% is African-American." (CT, at 105; FAC, at ¶ 49.)

"Recent data show adult women represent 72.73% of enrollees in San Diego County's CalWORKs Welfare-to-Work ("WTW") program." (CT, at 105, ¶ 50; FAC, at 50.)

Plaintiffs allege "[o]n information and belief, because nearly all CalWORKs recipients are required to participate in the WTW program, with very narrow exemptions, the WTW program's demographics mirror or closely resemble those of the CalWORKs recipient pool." (CT, at 105, ¶ at ¶ 52; FAC, at ¶ 52.) "Recent data show adult women represent 39% of the County's general population." (CT., at 105, FAC, at ¶ 51.)

Plaintiffs allege in the FAC that "[i]n carrying out CalWORKs and P100, the County is violating § 11135 by causing a disproportionate adverse effect on the basis of race, color, national origin, ethnic group identification, or sex." (CT, at 107,

¶ 67; FAC, at ¶ 67.) The FAC does not allege how the Project 100% home visits have a disproportionate adverse effect on any race, gender, or any other protected characteristic.

III. PROCEDURAL HISTORY

On June 26, 2018, plaintiffs filed their original complaint against the County seeking declaratory and injunctive relief. (CT, at 7-21.) Plaintiffs alleged a single cause of action against the County for illegal expenditure of public funds, alleging that funds spent on Project 100% were unlawful because the Project 100% home visits violate Government Code section 11135. (*Id.*)

The County demurred to plaintiff's original complaint. (RT, at 22-48.) The trial court issued an order sustaining the County's demurrer, with leave to amend. (CT, at 91-95.) The trial court found that "none of the authorities Plaintiffs rely on allow for a facially neutral practice to also establish the adverse impact." (RT, at 88, citations omitted.) In addition, the trial court found that "[i]n this case there are no allegations that P100 imposes a 'significantly harsher burden' on any protected group of CalWORKs recipients. Rather, as pled, P100 affects all CalWORKs recipients equally." (*Id.* at 88.) The trial court further found that "[a]s pled the complaint relies on a comparison of CalWORKs recipients and the general population of San Diego County to show disparate impact. However, the complaint fails to allege facts establishing that the general population of San Diego County is 'a reliable indicator of disparate impact.' . . . Based on *Darensburg* [*v. Metro. Transp. Comm'n*, (9th Cir. 2011) 636 F.3d 511], the population base affected by the facially neutral

practice cannot be the general population of San Diego County." (*Id*. at 88.) The trial court gave plaintiffs leave to file an amended complaint. (*Id*. at 89.)

On December 7, 2018, plaintiffs filed the FAC. (CT, at 96-110.) The FAC largely repeated the allegations of the original complaint. The County again demurred to the FAC. (CT, at 111-141.) On March 22, 2019, the trial court issued an order sustaining the County's demurrer, without leave to amend. (CT, at 182-186.) The trial court found that "Plaintiffs fail to raise any new argument or point to any newly-added allegations that cause the court to alter its analysis. To the extent Plaintiffs rely on allegations of the stress, anxiety and stigma associated with the P100 home inspections, none of the allegations support a finding that such challenged consequences affect a protected group of CalWORKs applicants/recipients more than others." (RT, at 179.)

IV. ARGUMENT

A. The Home Visits Are Constitutional.

In an obvious effort to unduly prejudice the Court, plaintiffs go to great lengths to make it appear that the home visits are illegal searches that violate the United States and California constitutions, even though the Ninth Circuit held that the home visits are not searches and even if they are, they are reasonable and therefore legal. Plaintiffs have not alleged in the FAC that the home visits are illegal searches, but you would never know that from their opening brief.

Plaintiffs assert that applicants for CalWORKs benefits "must endure unannounced searches of their homes . . . ." (Appellant's Opening Brief ("AOB"), at 10.) Similarly, plaintiffs contend in several places in their opening brief that the home visits treat CalWORKs applicants like "criminals." (AOB, at 10, 11, 18, 27.) The ACLU and its attorneys made the identical arguments to the Ninth Circuit, which flatly rejected them. In *Sanchez*, the Ninth Circuit noted that "Appellants contend that the home visits are searches because they are highly intrusive and their purpose is to discover evidence of welfare fraud. The Supreme Court, however, has held that home visits are not searches under the Fourth Amendment." (*Sanchez*, 464 F.3d at 920-21, citing *Wyman v. James* (1971) 400 U.S. 309, 317-18.)

The Ninth Circuit explained that "[h]ere, as in *Wyman*, all prospective welfare beneficiaries are subject to mandatory home visits for the purpose of verifying eligibility, **and not as part of a criminal investigation**. The investigators conduct an in-home interview and 'walk through,' looking for inconsistencies between the prospective beneficiary's application and her actual living conditions. As in *Wyman*, the home visits are conducted with the applicant's consent, and **if consent is denied, the visit will not occur**. Also as in *Wyman*, there is no penalty for refusing to consent to the home visit, other than the denial of benefits. The fact that the D.A. investigators who make the Project 100% home visits are sworn peace officers does not cause the home visits to rise to the level of a 'search in the traditional criminal law context' because the visits' underlying purpose

remains the determination of welfare eligibility. . . . [W]e conclude that the Project 100% home visits do not qualify as searches within the meaning of the Fourth Amendment." (*Id.* at 921-22, citations and footnote omitted, emphasis added.)

The Ninth Circuit also held that even if the home visits were searches, they are reasonable. It explained that "[h]ere as in *Wyman*, the home visits serve the important governmental interests of verifying an applicant's eligibility for welfare benefits and preventing fraud. As the Court acknowledged in *Wyman*, the public has a strong interest in ensuring that aid provided from tax dollars reaches its proper and intended recipients. While the visits in this case differ from those in *Wyman* in that they are conducted by peace officers, this distinction does not transform a Project 100% visit into a 'search in the traditional criminal law context.' The investigators are not uniformed officers and will only enter the applicant's home with consent. Although the investigators will report any evidence of criminal activity for potential prosecution, this is not the underlying purpose of the visit, and no criminal prosecutions have stemmed from inconsistencies uncovered during a Project 100% home visit since the program's inception in 1997." (*Id.* at 923-24, citations and fn. omitted.)

The Ninth Circuit also explained that "[t]he Project 100% home visits also have many of the same procedural safeguards that the *Wyman* Court found significant. Applicants are given notice that they will be subject to a mandatory home visit and visits generally occur only during normal business hours. When

the investigators arrive to conduct the visit, they must ask for consent to enter the home. If the applicant does not consent to the visit, or withdraws consent at any time during the visit, the visit will not begin or will immediately be terminated, as the case may be." (*Id.* at 924, citations and fn. omitted.)

According to the Ninth Circuit, "because the Project 100% visits serve an important government interest, are not criminal investigations, occur with advance notice and the applicant's consent, and alleviate the serious administrative difficulties associated with welfare eligibility verification, we hold that the home visits are reasonable under the Supreme Court's decision in *Wyman*." (*Id.* at 925.)

In explaining why the home visits are justified under the special needs exception to the warrant requirement, the Ninth Circuit rejected the ACLU's argument that "the home visits are virtually unlimited in scope." (*Id.* at 927.) The Ninth Circuit explained that "the record demonstrates that the procedures used in conducting the home visits are designed to reduce the intrusion on the applicant's privacy. Investigators only examine areas of the home that they believe will provide relevant information pertaining to the applicant's welfare eligibility. If at any point before or during the visit, the applicant refuses to consent or withdraws consent, the visit ends immediately. Additionally, inspections are completed in a reasonable amount of time and there is no evidence that any of the applicants have been subjected to abusive behavior during the home visits." (*Id.*)

The Ninth Circuit also rejected the ACLU's argument that the home visit program was ineffective and a waste of money:

> Appellants argued that there is no statistically significant evidence that Project 100% has actually reduced welfare fraud. The County, however, produced data showing that, during the five-year period during which Project 100% was implemented, the overall denial rate increased from 40.6% to 47.7%, and there was an additional 4-5% increase in application withdrawals. While it is difficult to measure the precise efficacy of Project 100%, these empirical observations support the logical connection between the home visits and their intended purpose. Moreover, the visits are an effective method of verifying eligibility for benefits, and, at a minimum, the visits provide an important deterrent effect.

(*Id.* at 928.)

In direct conflict with the Ninth Circuit's holding, plaintiffs argue: "[b]y shattering CalWORKs applicants' privacy, P100 violates the sanctity of the home, which the Supreme Court has long recognized is paramount." (*Silverman v. United States* (1961) 365 U.S. 505, 512, fn. 4.) The 'privacy interest' invaded by P100 'is significant' because the home is 'a traditionally protected area of personal privacy.'" (AOB, at 25-26, citing *Sanchez*, 464 F.3d at 927 and *Lebron v. Secretary of Florida Department of Children and Families* (11th Cir. 2014) 772 F.3d 1352, 1364).

Plaintiffs neglect to disclose, however, that the Ninth Circuit in *Sanchez* held that the Project 100% home visits **do not violate the applicants' right to privacy**. According to the Ninth Circuit, "a person's relationship with the state can reduce the person's expectation of privacy even within the sanctity of the home. When eligibility depends, in part, upon a person's physical

residence in the state and actual presence at the place designated as their residence, verification of eligibility may be reasonably required in the form of the home visit under review here in order to ensure that funds are properly spent." (*Sanchez*, 464 F.3d at 927.)

The Ninth Circuit likewise rejected plaintiffs' privacy claim under the California Constitution: "Appellants' contention that Project 100% violates Article I § 1 of the California Constitution also fails because, as we have held, Project 100% searches are reasonable under the Fourth Amendment and Article I § 13 of the California Constitution." (*Id.* at 930.)

This Court should reject plaintiffs' attempt to imply that the Project 100% home visits are illegal searches or violate the CalWORKs applicants' right to privacy.

B. The Trial Court Correctly Sustained The County's Demurrer To Plaintiffs' Disparate Impact Claim Under Government Code Section 11135.

1. In order to state a disparate impact claim, a plaintiff must allege a "policy," a distinct "disparate impact," and a causal connection between the two.

In the FAC, plaintiffs admit that **all applicants** for CalWORKs benefits who are "not denied outright" receive a home visit in order to confirm eligibility for benefits. (CT, at 102, ¶ 32; FAC, at ¶ 32.) Thus, the home visit program, on its face, does not discriminate on the basis of gender or race. Every applicant for CalWORKs benefits—regardless of gender or race—receives a home visit. Indeed, plaintiffs admit that the home visits are "indiscriminate." (CT, at 97, ¶ 5, FAC, at ¶ 5.) Moreover,

plaintiffs allege that the home visits impose the same harms on CalWORKs' applicants regardless of their gender, race, ethnic origin, etc. (CT, at 103-104, ¶¶ 38, 39, 43, 45, 46; FAC, at ¶¶ 38, 39, 43, 45, 46.)

Nonetheless, plaintiffs alleged that the home visit program violates Government Code section 11135. Section 11135 provides, in relevant part:

> No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, **be unlawfully denied full and equal access to the benefits of, or be unlawfully subject to discrimination under**, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. . . . (Emphasis added.)

Plaintiffs allege that "[s]ection 11135 and its implementing regulations prohibit **disparate impact** discrimination in the operation of any program or activity that is funded directly by the state, or receives any financial assistance from the state." (CT, at 107, ¶ 66; FAC, at ¶ 66, emphasis added.) According to plaintiffs, "the administration and operation of P100 cause a **disproportionate adverse effect** on the basis of race, color, national origin, ethnic group identification, or sex." (CT, at 106, ¶ 58; FAC, at ¶ 58, emphasis added.) Similarly, plaintiffs allege that "[i]n carrying out CalWORKs and P100, the County is violating § 11135 by causing a **disproportionate adverse effect** on the basis of race, color, national origin, ethnic group

identification or sex." (CT, at 107, ¶ 67 ; FAC, at ¶ 67, emphasis added.)

"Prohibited discrimination may . . . be found on a theory of '**disparate impact**,' i.e., that regardless of motive, **a *facially neutral*** . . . practice or policy . . . *in fact* had a **disproportionate adverse effect** on members of the protected class." (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1321, citations omitted and emphasis added.); *City & County of San Francisco v. Fair Employment & Housing Comm'n* (1987) 191 Cal.App.3d 976, 985 ["To establish a prima facie case of discrimination, a plaintiff must show that **the facially neutral . . . practice had a significantly discriminatory impact**."] (emphasis added); *Darensburg v. Metro. Transp. Comm'n* (9th Cir. 2011) 636 F.3d 511, 519 [under California Government Code section 11135, "a plaintiff establishes a prima facie case if the defendant's facially neutral practice causes a disproportionate adverse impact on a protected class . . . ."].)[3]

2. The home visits cannot be both the facially neutral practice and the adverse impact at the same time.

Under existing law and common sense, the home visits cannot be both the facially neutral practice and the adverse impact all rolled into one. Rather, the facially neutral practice must cause a **separate** adverse impact. *Darensburg*, 636 F.3d at

[3] "In light of the parallel language of state and federal law, federal law provides important guidance in analyzing state disparate impact claims." (*Darensburg*, (9th Cir. 2011) 636 F.3d at 519, citing *City & County of San Francisco*, 191 Cal. App. 3d at 985).)

520 ["[W]e must analyze the **impact of the plan** on minorities in the population base **affected by the facially neutral policy**."] (internal quotation marks, citations and ellipses omitted; emphasis added.); *Johnson v. Metro. Gov't* (M.D. Tenn. Aug. 4, 2008, No. 3:07-097) 2008 U.S. Dist. LEXIS 59663, at *11 ["A disparate impact claim must allege that the practice itself **is the cause of the adverse effect.** It is the challenged practice that, while facially neutral, **works to eliminate one group of employees from eligibility for promotion.**"] (internal citations, quotation marks and brackets omitted; emphasis added); *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1405 ["It is well settled that valid statistical evidence is required to prove disparate impact discrimination, that is, that a facially neutral policy has **caused** a protected group to suffer **adverse effects**. Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question **has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.** Statistical disparities must be sufficiently substantial that they raise such an inference of causation."] (internal quotation marks, citations and brackets omitted; emphasis added); *Long v. First Union Corp*. (E.D. Va. 1995) 894 F. Supp. 933, 941 [requirement that all employees speak English at work did not have a disparate impact on Spanish speaking employees because they "are not adversely affected by the speak English-only policy"]. *See also Garcia v.*

Spun Steak Co. (9th Cir. 1993) 998 F.2d 1480, 1485 [in order to state a disparate impact cause of action based on a English-only workplace rule, plaintiff must show that "policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace . . . ."]; *EEOC v. Beauty Enterprises, Inc.* (D. Conn. Oct. 25, 2005, No. 3:01CV378 (AHN)) 2005 U.S. Dist. LEXIS 25869, *8 [judge found that jury should be instructed that it "must determine if Beauty's English-only policy has a substantial and adverse impact on Beauty's Hispanic employees that is different than its impact on the general employee population at Beauty."], citing *Garcia,* 998 F.2d at 1486.)

In *Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969, 982-83, African-American school children alleged a disparate impact discrimination claim based on "IQ tests" that were "used by the California school system to place children into special classes for the educable mentally retarded (E.M.R.) . . . ." (*Id.* at 972, emphasis added.) Unlike plaintiffs in this case, the plaintiffs in *Larry P.* did not argue that the IQ test itself was a facially neutral practice and an adverse impact at the same time. Rather, the plaintiffs in *Larry P.* showed that African-American students scored lower on the IQ tests than white children and thus were more likely to be placed in classes for the educable mentally retarded: "It is undisputed that black children as a whole **scored ten points lower than white children on the tests**, and that **the percentage of black children in E.M.R.**

classes was much higher than for whites. As discussed previously, **these test scores were used to place black schoolchildren in E.M.R**. **classes** and to remove them from the regular educational program." (*Id.* at 983, emphasis added.) Unlike *Larry P.*, plaintiffs do not allege that the facially neutral policy (the I.Q. tests/Project 100% home visits) led to a separate adverse impact (placement in E.M.R classes/denial of benefits or some other adverse impact).

Indeed, plaintiffs did not cite (and the County has been unable to locate) **any** case holding that a generally applicable practice/requirement can itself be the adverse impact sufficient to state a disparate impact discrimination claim. Indeed, if this were true, it would lead to absurd results. A few examples will illustrate this point.

The California Bar exam is a facially neutral practice – it applies to anyone who wishes to practice law in the State of California. As anyone who has taken it knows, the bar exam itself imposes adverse impacts. The bar exam is held twice a year over two days (it used to be held over three days). During those two days, applicants are "confined" to a room where they must answer questions and write essays for eight hours a day if they want to pass the bar and practice law in the State of California (i.e., make a living as a lawyer). During those 16 hours and the hours necessary to commute to and from the testing site, applicants cannot "conduct job searches," "transport children to school" or attend "medical appointments." Most people also have to spend countless hours and in most cases substantial sums of

money to study for the bar examination. There can be no doubt this causes a severe "disruption to applicants' lives."

Before an applicant even sits for the bar examination, the applicant must submit an application. Applicants are required to provide "intimate details" about their lives including their (1) criminal history, (2) history of drug and alcohol abuse, (3) debt and (4) violations of schools' honor codes. (*See* http://www.calbar.ca.gov/Admissions/Moral-Character.)

If plaintiffs' position were accepted, Caucasians[4] could state a disparate impact claim under California Government Code section 11135 simply based on the fact that they are required to submit an application and sit for the bar examination. Indeed, if plaintiffs' argument were accepted, this would be sufficient to establish a prima facie case of discrimination, shifting the burden to the defendant. This is obviously not the law. The generally

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[4] More Caucasians sit for the bar examination than their percentages in the general public. (*See* http://www.calbar.ca.gov/Portals/0/documents/July2019-CBX-Statistics.pdf.) Further, on its face, Government Code section 11135 does not prohibit discrimination against only women or Hispanics/African Americans. Rather, it prohibits discrimination on the basis of sex and race/national origin. Thus, individuals of either sex or any race/ethnic origin could bring a claim for violation of section 11135. (*See Woods v. Horton* (2008) 167 Cal.App.4th 658, 678 ["We have found that the programs funded by Penal Code section 13823.15 and Health and Safety Code section 124250, limiting the services provided by such programs to only women and their children, do violate equal protection. Since such restrictions are unconstitutional, it adds nothing to plaintiffs' case to also find they violate Government Code section 11135. Nor can they be saved by Government Code section 11139 because, to the extent the programs are implemented in a gender-restrictive manner, they are unconstitutional and not 'lawful programs.'"].)

applicable practice (all applicants must submit an application and sit for the bar examination) cannot also be the adverse impact necessary to state a disparate impact cause of action. Rather, the generally applicable practice must cause a separate adverse impact. Otherwise, any requirement that applies to all applicants for a license, job, government benefits, etc., that itself has an adverse impact on the applicant would be sufficient to state a disparate impact claim under section 11135.

Similarly, the military requires new recruits to undergo basic training, and many public safety departments impose similar requirements. The process is far from pleasant. It is physically grueling, emotionally exhausting, and many find the process humiliating. If a disproportional number of African-Americans enlist and are thus subjected to basic training (and the exhaustion and humiliation that goes with it), can they establish a prima facie case that the practice caused a disparate impact based on race? The law, of course, would not support such a theory. A disparate impact claim is viable only if a practice **causes** a separate disparate impact on a protected group. It is not sufficient that a practice itself is unpleasant or undesirable.

Other common neutral practices would also fall victim to plaintiffs' logic:

- A requirement that a job applicant submit to a physical examination or a drug test as a condition of obtaining employment. (Such practices requires a time commitment and also requires the applicant reveal intimate details about their physical condition and off-duty practices.)

- A requirement that all applicants for a drivers' license take a driving test. (Such a requirement requires the applicant's time, and likely money as well.)

- A requirement that students take standardized tests to be considered for admission to public universities. (Such a requirement requires time, and likely money as well).

Under plaintiffs' logic, all of these requirements would be sufficient to establish a prima facie case of discrimination by whatever group was overrepresented when compared to their numbers in the general population.

Indeed, any requirement or policy that applies across the board to CalWORKs applicants (application must be filed, applicant must have assets less than a specified amount to qualify for program, applicant must attend training programs, etc.) would constitute a prima facie section 11135 violation given the fact that the majority of CalWORKs applicants are women and Hispanics/African Americans and these groups are overrepresented when compared to the County's population as a whole.

The reason why the law requires that a facially neutral practice must cause a **separate** adverse impact is simple – if the rule were otherwise, there would be no way of showing that the adverse impact fell more harshly on one group (*e.g.*, African Americans) when compared to another group (*e.g.* Caucasians). This is true because if the practice and the impact are functionally equivalent, any harm is necessarily borne equally by all people (men, women, Caucasians, African-Americans, Hispanics, Asians, etc.) subject to the practice. In this case,

plaintiffs contend that all of the harms allegedly caused by the home visits (stigma, missed interviews/school obligations, impairment of ability to care for children) **fall equally on all applicants for CalWORKs benefits who receive the home visits**, regardless of gender, race or ethnic origin. (CT, at 103-104, ¶¶ 38, 39, 43, 45, 46; FAC, at ¶¶ 38, 39, 43, 45, 46.)

It is only possible to show that a protected group was disproportionately affected by the facially neutral practice if the practice causes a separate adverse impact. (*Jumaane*, 241 Cal.App.4th at 1405 [Plaintiff bringing a disparate impact claim must show that a facially neutral employment practice that applied to all job applicants or promotion seekers "**caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.** Statistical disparities must be sufficiently substantial that they raise such an inference of causation."] (internal quotation marks, citations and brackets omitted; emphasis added); *Riles*, 793 F.2d at 982-83 [all children received the same IQ test, but test results led to more black children being placed in classes for the educable mentally retarded than their white counterparts]; *Spun Steak Co.*, 998 F.2d at 1485 [English-only work rule applied to all employees – Hispanic employees who speak Spanish and employees of other races/ethnic origins who do not; in order to state a disparate impact claim, the Hispanic employees had to show that the English-only rule imposed "significantly harsher burdens on a protected group than on the employee population in general"].)

In their opening brief, plaintiffs essentially argue that if the facially neutral practice is particularly "bad," "burdensome," and/or "stigmatizing,"[5] the practice itself can also be the adverse impact necessary to state a disparate impact claim. (AOB, at 26 ["P100 causes a material harm different in kind and principle

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[5] In support of their argument that "dignitary and stigmatic" harm can form the basis of a disparate impact claim, plaintiffs cite a number of disparate treatment cases. (AOB at 28, fn. 4). As an initial matter, disparate treatment cases are not instructive here. (*Turman v. Turning Point of Cent. California, Inc.* (2010) 191 Cal.App.4th 53, 61 ["Disparate treatment and disparate impact are different theories of discrimination, requiring different proof."].) But even if plaintiffs' cases were relevant, none of them hold that stigma, standing alone, is sufficient. Rather, plaintiffs' cases find stigma actionable only where it is accompanied by some tangible denial of benefits, and plaintiffs fail to allege any such denial here. (*See Roberts v. U.S. Jaycees* (1984) 104 S.Ct. 3244, 3254 [Title II aims to "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments"]; *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 266 ["Congress was certainly not blind to the stigmatic harm [of disparate treatment] . . . [but] Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor caused a tangible employment injury of some kind."] (emphasis added); *Hazen Paper Co. v. Biggins* (1993) 113 S.Ct. 1701, 1707 ["Congress promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."] (emphasis added); *Brown v. Board of Education* (1954) 74 S.Ct. 686, 691 ["To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status . . ."] (emphasis added); *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1 ["stigma of inferiority" supports heightened scrutiny of law that barred employment of women as bartenders] (emphasis added).)

from ordinary procedures or requirements, inflicting stigma and trauma by treating CalWORKs applicants as if they are suspected criminals whose homes must be investigated by law enforcement officers, without any reason to suspect ineligibility."].)

On the other hand, plaintiffs admit that if the facially neutral practice is not sufficiently "bad," "burdensome," and/or "stigmatizing," it cannot be the adverse impact necessary to state a disparate impact claim. (AOB, at 26 ["Recognizing the adverse impact caused by P100 would not invite the kinds of frivolous disparate litigation suggested by County. The County relies upon comparisons and hypothetical scenarios containing none of the harm P100 inflicts on CalWORKs applicants. P100 goes far beyond routine requirements that an application must be filed or the applicant must satisfy financial eligibility, attend training programs, or take a driving test physical examination or standardized tests, none of which are inherently stigmatizing."] (internal brackets, quotation marks and ellipsis omitted).)[6]

Plaintiffs cite no cases that supports this artificial line drawing and the Court should decline Plaintiffs' invitation to fundamentally alter disparate impact law. Indeed, the relevant

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[6] Plaintiffs contend that "the stigmatic and dignity harm caused by P100 is qualitatively different from any disruption caused by the County example of sitting for the bar exam. Though arduous, the bar exam process is a badge of honor rather than stigma, signifying educational achievement and opening the door to a professional career." (AOB, at 27.) But, there is no case holding that the facially neutral practice itself can also be the adverse impact if the practice is stigmatizing.

inquiry under well-established disparate impact law is whether the facially neutral practice caused a separate adverse impact and that law should be followed.

Attempting to stoke the prejudicial flames as high as possible, plaintiffs contend that if they must show that the facially neutral requirement caused a separate adverse impact, rules requiring CalWORKs applicants to "wear distinctive red jumpsuits in public" and requiring "CalFRESH recipients to sing and dance for the EBT cards used to purchase ingredient for their suppers" would be legal. (AOB, at 28.) This argument illustrates the problem with plaintiffs' lawsuit. The requirements discussed above would obviously be unconstitutional under the equal protection and due process clauses. The home visit program, however, has been found to be constitutional and plaintiffs do not allege otherwise in the FAC. Plaintiffs are attempting to use Government Code section 11135 to cure all ills, when the statute is limited to addressing discrimination. While the above practices are substantively unconstitutional, they would not violate Government Code section 11135. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1326 ["[T]he mere fact that each person affected by a practice or policy is also a member of a protected group does not establish a disparate impact."].)

For this reason alone, the trial court's order sustaining the County's demurrer to plaintiffs' First Amended Complaint should be sustained.

3. The FAC fails to identify an appropriate comparison group.

Section 11135 prohibits government entities from **unlawfully "subject[ing] [someone] to discrimination."** (Emphasis added.) The trial court correctly sustained the County's demurrer to the FAC because plaintiffs had not alleged that women/Hispanics/African-Americans who have received the home visits suffer greater harm from the home visits when compared to other groups (men/Caucasians/etc.) who also receive the home visits. Nor had they alleged any other disparate impact:

> In this case, there are no allegations that P100 imposes a 'significantly harsher burden' on any protected group of CalWORKs recipients. Rather, as pled, P100 affects all CalWORKs recipients equally.

(RT, at 88.)

Indeed, plaintiffs' FAC expressly acknowledges the **lack** of any disparity – CalWORKs applicants, regardless of gender or race, are allegedly harmed the same by the home visits. (CT, at 103-104, ¶¶ 38, 39, 43, 45, 46; FAC, at ¶¶ 38, 39, 43, 45, 46.) This is fatal to plaintiffs' disparate impact claim. (*Frank*, 149 Cal.App.4th at 822 ["[T]here was no showing that the County's policies had a disproportionate adverse impact on the class members because they are minorities and thus members of a protected group. Instead, **the evidence established that the County's policies were to pay the class members, Caucasian and minority alike**, less because they were members of the County police rather than the LASD."] (emphasis added).)

On appeal, plaintiffs argue that a plaintiff alleging a disparate impact claim under section 11135 need only show that the facially neutral practice (home visits) applies to a higher percentage of women/minorities when compared to the general population of those groups in the County as a whole. In other words, plaintiffs contend that a disparate impact claim can be based on a comparison between two groups – one group that has received the home visits and another group that has not received them. Plaintiffs have misinterpreted disparate impact case law.

In *Darensburg*—one of the few cases interpreting Government Code section 11135—the Ninth Circuit stated "to make out a prima facie case of disparate impact, plaintiffs must employ an **appropriate measure for assessing disparate impact."** (636 F.3d at 519 (internal brackets, ellipses and citations omitted; emphasis added).) The Ninth Circuit found that a "court may not find the existence of disparate impact on the sole basis of a statistic unless it reasonably finds that the statistic would be a reliable indicator of a disparate impact." (*Id.*, internal brackets and citation omitted.)

Plaintiffs acknowledge that in *Darensburg*, the Ninth Circuit stated "[t]he basis for a successful disparate impact claim involves a comparison between two groups – those affected and those unaffected by the facially neutral practice." (*Id.* (internal quotation marks and citations omitted); AOB, at 37.) Plaintiffs interpret this phrase to mean a comparison between two groups –

one subject to the facially neutral practice and a second group not subject to the practice.[7] Plaintiffs are mistaken.

Throughout the *Darensburg* opinion, the court made it plain that the proper comparison is between two groups that are both subject to the facially neutral practice – one group affected in a negative way by the practice and the other group not affected in a negative way by the practice. There, the plaintiffs alleged that a public transportation expansion plan had a disparate impact on minorities because it favored rail expansion projects over bus expansion projects, and more minorities use buses than trains. Shortly after the "comparison between two groups" quotation noted above, the Ninth Circuit stated: "Plaintiffs would have us analyze the impact of [the transportation expansion plan] on the minority population of AC [rail] users or on minority bus riders. But the plan does not affect solely bus riders or solely AC [rail] users – it affects an entire integrated transit system's users. Thus, we must analyze the impact of the plan on minorities **in the population base affected by the facially neutral practice**. The appropriate inquiry is into the impact **on the total group to which a policy or decision applies**." (*Id.* at 520, internal brackets, quotations and citations omitted; emphasis added.) This language makes it clear that the proper comparison is between two groups who are both subject to the facially neutral practice (the transit expansion plan) – minority transit users and non-minority transit users.

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[7] Plaintiffs contend that it is appropriate to compare those who receive the Project 100% home visits with the County's general population who do not receive the home visits.

Additional language in *Darensburg* confirms this. In that case, the plaintiffs alleged that the "disproportionate emphasis on rail expansion projects over bus expansion projects in the Regional Transit Expansion Plan, also know as RTEP, illegally discriminates against minorities, who constitute 66.3% of San Francisco Bay Area bus riders – even though 51.6% of rail riders are also members of racial minority groups." (*Id* at 514.) The Ninth Circuit held:

> The statistical measure upon which Plaintiffs relied to establish a prima facie case is unsound, and their claim rests upon a logical fallacy. Although Plaintiffs' statistical evidence shows that minorities make up a greater percentage of the regional population of bus riders than rail riders, it does not necessarily follow that an expansion plan that emphasizes rail projects over bus projects will harm minorities . . .
>
> What is key is that these statistics say nothing about the particular ridership of the planned expansions. Simply because minorities represent a greater majority of bus riders as opposed to rail riders, the rejection of a particular new bus expansion project will not necessarily work to the detriment of minorities. It is a real possibility that a particular bus project . . . will serve a largely white ridership. On the other hand, a rail expansion project . . . may benefit minority riders more than white riders by serving areas with high concentrations of minorities, and integrating them more fully into the regional rail system.

(*Id.* at 514, 520.)

In *Darensburg*, the Ninth Circuit also relied on *Robinson v. Adams* (9th Cir. 1997) 847 F.2d 1315, 1318, a discriminatory hiring case. In *Robinson*, just like in *Darensburg*, the court

required the plaintiff to come forward with a meaningful comparison group, and strongly rejected reliance on general population statistics. As *Darensburg* explained:

> [T]he plaintiff filed a disparate impact claim against Orange County for its alleged discriminatory hiring practices, contending he established a prima facie case of discriminatory impact by citing statistics which all allegedly show that the percentage of Blacks in Orange County and in surrounding counties is higher than the percentage of Blacks employed by Orange County. We rejected the plaintiff's claim, however, holding that **he failed to establish that these general population statistics represent a pool of prospective applicants qualified for the jobs for which he applied. We have consistently rejected the usefulness of general population statistics as a proxy for the pool of potential applicants where the employer sought applicants for positions requiring special skills.**

(*Darensburg*, 636 F.3d at 521, internal quotation marks, citations and footnote omitted; emphasis added.)

The *Darensburg* court concluded:

> Plaintiffs' regional-level population statistics fail to explain with any precision the effect that the [plan] will have on minority transit users. **Under Plaintiffs' theory, so long as the population of bus riders contains a greater percentage of minorities than the population of rail riders, any [plan] that emphasizes rail expansion over bus expansion, even where such a plan may confer a greater benefit upon minorities than whites, would be subject to legal challenge.**

(*Id.* at 521, emphasis added.)

The Ninth Circuit's holding is unambiguous. A plaintiff bringing a disparate impact claim must offer a comparison **between two groups that are both subject to the facially neutral policy or practice**. In *Darensburg*, the two groups were minority transit users and white transit users. Indeed, the Ninth Circuit stressed that this comparison needed to be made for each specific expansion project at issue. Moreover, by citing *Robinson* with approval, the Ninth Circuit specifically rejected the use of the general population as a proper comparison group.

Plaintiffs assert that "*Darensburg* was a case about failure to prove the threshold element of harm, and it did not reach the subsequent question of comparison population." (AOB, at 42.) Plaintiffs are mistaken. *Darensburg* focused on the proper comparison population – minority riders for each transit expansion project versus white riders for each such project. Indeed, *Darensburg* rejected the very type of comparison—*i.e.*, a general population comparison—that plaintiffs urge here.

Collins v. Thurmond (2019) 41 Cal.App.5th 879 also demonstrates that a plaintiff bringing a disparate impact claim must show that one group subject to the facially neutral practice has suffered greater harm than another group subject to the practice. In that case, the plaintiffs challenged disciplinary rules enacted by the Kern High School District ("KHSD"). One of the claims brought by the plaintiffs was a disparate impact claim under the equal protection clause of the California Constitution. (*Id.* at 896-97.) The plaintiffs alleged "that **African-American and Latino students are being <u>suspended and expelled at</u>**

rates substantially higher than White students and those rates increase even further when considering schools with higher enrollment of African-American students. Appellants go further, however, alleging that KHSD **subjects all students to harsher punishments than necessary** but that it incorporates into its disciplinary proceedings negative stereotypes about minorities, such as involvement in gang activity or low educational prospects, **that resulted in increased punishment for African-American and Latino students.**" (*Id.* at 893-94, emphasis added.) The plaintiffs also alleged that "67% of expelled African-American students were expelled for offenses that did not include physical injury or possession of drugs or weapons, while only 42% of expelled Whites were expelled for less serious offenses." (*Id.* at 894, internal quotation marks omitted.) The court held that that the plaintiffs "have pleaded facts suggesting that minority students subjected to these policies are provided with a lower quality education than White students." (*Id.* at 898.)

In *Thurmond*, the defendants argued that plaintiffs had failed to allege that they were treated differently than a similarly situated group, which is required to state a disparate impact claim under the equal protection clause of the California Constitution. This is another way of saying that a plaintiff must identify an appropriate comparison group—one that is also subject to the challenged policy—that is treated differently (more harshly) than the group the plaintiff is in.

The court stated that the plaintiffs "allege through reasonable inference that African-American and Latino students are **regularly subjected to suspensions and expulsions for offenses that are less severe than their White counterparts** and, thus, are **treated differently than similarly situated White students** who are not subject to suspension or expulsion for the same or similar conduct." (*Id.* at 894.) According to the Court, "[u]pon demurrer . . . [i]t is thus sufficient **to allege with supporting facts that one group is sufficiently similar to another to allow a comparison as to whether they are being treated unequally under the law**. Appellants have alleged, with statistical support, that minority students accused of similar behaviors as their White counterparts are subject to expulsion and suspension for that conduct at different, and statistically significant levels. In this context, **the nature of the evidence permits a comparison between similarly situated students-e.g., those accused of similarly serious offenses-based on identifiable groupings—e.g., race**." (*Id.* at 894, citations omitted.) The court held that the plaintiffs "stated an equal protection claim against the state-level defendants under California's equal protection guarantees predicated upon a disparate impact theory of liability." (*Id.* at 900.)

Plaintiffs' position that it is appropriate to compare individuals who receive home visits with those who do not receive them flies directly in the face of *Darensburg* and *Thurmond*. Women and minorities who receive the home visits are not similarly situated to members of the general public who do not

receive them. If plaintiffs' position were accepted, the plaintiffs in *Thurmond* would not need to show that minorities were disciplined at rates greater than their White counterparts. Rather, they would just need to allege that a higher percentage of minorities attended the school when compared to the population of the community as a whole since expulsion or suspension from school is "harsh" treatment and expelled students are stigmatized and suffer trauma. Nowhere in the *Thurmond* decision did the court remotely suggest that such allegations would be sufficient to state a disparate impact claim.

Other courts agree with the holdings in *Darensburg* and *Thurmond* that a plaintiff bringing a disparate impact claim must show that the facially neutral policy/practice has a harsher impact on one group subject to the policy/practice when compared with another group also subject to the practice. For instance, in *City and County of San Francisco v. Fair Employment & Hous. Comm'n*. (1987) 191 Cal.App.3d 976, 987, the court held that the plaintiffs had established a prima facie disparate impact claim because "[t]he easiest statistic to understand is that 47.8 percent of the White firefighters passed the H-20 lieutenant examination[8] as compared to 18.18 percent of the Black firefighters. In other words, there was a variance in the passage rate of two and one-half times. Similar passage rates have been found statistically significant in establishing a prima facie case of discrimination." (*Id.* at 987.) In other words, the court held that the proper

[8] The H-20 lieutenant examination was a test used to determine which firefighters should be promoted.

comparison was between two groups subject to the facially neutral practice (the examination) – Black and White firefighters.

Plaintiffs assert that "[b]ecause that case involved only promotion from within the fire department, not hiring in the first instance, it was proper to consider only those who took the examination. . . . Here, by contrast, the issue is whether P100 has a disparate impact on people of color and women who are seeking benefits in the first instance – transitioning from 'general population' to 'applicant' – and it is therefore proper to compare CalWORKs applicants to the general population." (AOB, at 43.) But, in *Robinson*, **a case involving hiring in the first instance**, the Ninth Circuit held that it was not appropriate to compare the percentage of Blacks employed by Orange County with the percentage of Blacks in the general population of Orange County. The Ninth Circuit relied on *Robinson* in *Darensburg*, and as noted above, it explained that *Robinson* expressly disavowed use of general population statistics. (*Darensburg*, 636 F.3d at 521, citing *Robinson*, 847 F.21d at 1318.)

Other disparate impact cases—including seminal cases in the development of the doctrine—hold that a proper disparate impact claim involves a comparison between two groups subject to the same facially neutral practice. (*Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 425-26 [facially neutral requirement that applicants for jobs have a high school diploma and pass a general intelligence test could constitute actionable discrimination where "both requirements operate to disqualify Negroes at a

substantially higher rate than white applicants"];[9] *Smith v. Xerox Corp*. (2d Cir.1998*)* 196 F. 3d 358, 368 [in a disparate impact claim involving facially neutral lay-off criteria "[t]he questions to be answered are thus what is the composition of the population subject to the reduction-in-force, what was the retention rate of the protected group compared to the retention rate of other employees, and how much of a differential in selection rates will be considered to constitute a disparate impact"]; *American-Arab Anti-Discrimination Committee v. Reno* (9th Cir. 1995) 70 F.3d 1045, 1063 ["Crucial to the analysis is the establishment of the appropriate control group – a group that is *similarly situated in all respects* . . . except for the attribute on which the [disparate impact] claim rests."].)[10]

All that plaintiffs' statistics show is that the percentage of women/Hispanics/African-Americans who need financial assistance and apply for CalWORKs benefits exceeds the percentage of women/Hispanics/African-Americans in the general population of the County. The County, however, is not responsible for this disparity – it results from factors (education, language proficiency, etc.) far beyond the County's control. In effect, plaintiffs seek to hold the County liable for this pre-existing disparity even though the County did nothing to create or advance it. Under well-established disparate impact law, "racial imbalance . . . does not, without more, establish a prima

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[9] Of course, *Griggs* also involving "hiring in the first instance."

[10] The "attributes" at issue in this case are sex, race, and national origin.

facie case of disparate impact." (*Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S. Ct. 2507, 2523 ("Inclusive Communities"); *United States v. Lowndes County Board of Education* (11th Cir. 1989) 878 F.2d 1301, 1305 ["Racial imbalance in the public schools amounts to a constitutional violation only if it results from some form of state action and not from factors, such as residential housing patterns, which are beyond the control of state officials."]; *Frank,* 149 Cal. App. 4th at 818 [The fact that 70% of Los Angeles County police officers were minorities and were paid less and received fewer benefits than Los Angeles County Sheriff's deputies, who are 70% white, did not show a disparate impact. According to the court, "[t]he issue is whether plaintiffs' evidence that all County police officers (70 percent of whom were minority) were paid less and received fewer benefits than the LASD deputies (70 percent of whom were Caucasian) established a basis for a disparate impact claim. We conclude that it does not."].) To hold otherwise would allow "defendants [to] be held liable for racial disparities they did not create." (*Id.*, citing *Ward Cove Packing Co. v. Atonio* (1989) 109 S. Ct. 2115, 2123, superseded by statute on other grounds, 42 U.S.C. § 2000e-2(k).) *See also Inclusive Communities*, 135 S. Ct. at 2514 ["If a statistical disparity is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability."].)

Plaintiffs argue that where a public benefit program is being challenged, "the comparison population must include the entire community, any of whom may potentially participate,

though some have not yet needed to do so." (AOB, at 37, citations omitted.) But that position was implicitly rejected in *Darensburg*. In that case, anyone could use public transportation services (rail and bus), but the Ninth Circuit made it clear that the two comparison groups must both be subject to the facially neutral practice (the transit expansion plan). The Ninth Circuit rejected the use of the general population that is not subject to the facially neutral practice as a proper comparison group, even though anyone could use mass transit.

Plaintiffs acknowledge that they could have compared women and racial minorities who receive Project 100% visits with men and non-racial minorities who also receive the home visits, but they have chosen not to do so. For instance, plaintiffs could have attempted to show that women and minorities "fail" the Project 100% home visits at a rate that is statistically significantly higher than men/non-minorities. Failing the home visit would result in the rejection of the application for benefits. But plaintiffs offer no such comparison, and instead contend that they are not required to show a loss of benefits in order to establish a disparate impact claim under Section 11135. Section 11135 requires, however, a plaintiff to show discrimination. One way to show discrimination would be to show that women and minorities "fail" the Project 100% home visits at a rate that is statistically significantly higher than men/non-minorities and are therefore denied benefits at a higher rate. Without comparing women/minorities who also receive the Project 100% visits with

men/non-minorities who receive the home visits, there can be no showing of discrimination.

Plaintiffs assert "[d]isparate impact case law confirms that denial of a benefit is not necessary to establish a cognizable harm. In the employment context, for example, there is 'no reason to restrict the application of the disparate impact theory to the denial of employment opportunities.'" (AOB, at 24, quoting *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480).) Plaintiffs are correct that "[a] disparate impact claim may be based on a challenge to a practice or policy that has a significant adverse impact on the 'terms, conditions, or privileges' of employment, even if it does not result in denial of employment." (AOB, at 24, citing *EEOC v. Beauty Enterprises, Inc.* (D. Conn. Oct. 25, 2005, No. 3:01CV378 (AHN)) 2005 U.S. Dist. LEXIS 25869, *8.

But, **a plaintiff must still provide a comparison between two groups that are subject to the policy or practice**. **A plaintiff must show that the policy imposes harsher burdens on a protected group subject to the policy than another group that is also subject to the policy.** Thus, in *Garcia* the Ninth Circuit stressed that "policies or practices that impose significantly **harsher burdens on a protected group than on the employee population in general** may operate as barriers to equality in the workplace . . . ." (998 F.2d at 1485.) Similarly, in *Beauty Enterprises,* the judge found that jury should be instructed that it "must determine if Beauty's English-only policy has a substantial and adverse

impact on Beauty's Hispanic employees **that is different than its impact on the general employee population at Beauty**." (2005 U.S. Dist. LEXIS 25869, *8, citing *Garcia,* 998 F.2d at 1486.) Thus, plaintiffs could have alleged that the Project 100% home visits impose harsher burdens on women and minorities who receive them when compared to men and non-minorities who also receive them, but chose not to.

Plaintiffs contend that requiring a comparison between two groups that are subject to the facially neutral practice is error because a plaintiff could not state a disparate impact claim if "the entire CalWORKs population was composed only of people of color." (AOB, at 40.) But, "people of color" is not a race or national origin. African-Americans could state a disparate impact claim based on allegations that the home visits impact them in a harsher way than Latino-Americans or Asian-Americans. People of other races/national origins could do the same. In the extremely unlikely event that all CalWORKs applicants were African-American women, for example, there cannot be a disparate impact claim as a matter of law. All African-American women, in such a hypothetical are treated exactly the same. That does not mean that they could not allege that the home visits were substantively illegal, but that argument is foreclosed here because of the Ninth Circuit's ruling in *Sanchez.*

4. Plaintiffs' housing cases are not instructive.

a. "General population" comparisons are useful in assessing population-wide segregative effects. They are not useful in assessing disparate access to benefits.

Plaintiffs cite a number of out-of-circuit federal decisions decided under the Fair Housing Act (42 U.S.C. § 2000(d)) to support their argument that a comparison between those who receive home visits and the County's general population is appropriate. These cases do not help plaintiffs because the Fair Housing Act was passed to address a unique problem impacting all Americans – housing segregation. The Act aimed not just to protect those groups that were directly disadvantaged by housing discrimination. Rather, the Act was enacted to replace segregated neighborhoods with "truly integrated and balanced living patterns," and was designed to impact "the whole community." (*Trafficante v. Metropolitan Life Ins. Co.* (1972) 409 U.S. 205, 211.) The overarching goal of the Act was to "achieve racial integration for the benefit of all people in the United States." (Implementation of the Fair Housing Act's Disparate Treatment Standard, 78 Fed. Reg. 11,350, 11468 (Feb. 15, 2013)). Indeed, "the elimination of segregation is central to why the Fair Housing Act was enacted." (*Id.*)

Accordingly, the Fair Housing Act protects not only minorities, but seeks to foreclose "harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns." (*Graoch Assocs. #33, L.P. v.*

Louisville/Jefferson Cnty. Metro Human Relations Comm'n (6th Cir. 2007) 508 F.3d 366, 374-78.)

To assess whether a policy or practice results in segregation, it is often necessary to consider the impacts from a community-wide perspective. Segregation, by definition, consists of a concentration of minority groups into particular areas, accompanied by a corollary exclusion or reduction of minority groups from other areas. In other words, it is not possible to determine whether community-wide segregation exists by examining one neighborhood alone. Rather, segregation can be identified and cured only by comparing the demographics of one area to another.

Courts interpreting the Fair Housing Act have thus been attentive to community-wide impacts of housing-related policies, and some have permitted general population comparisons. (*See* Schwemm & Bradford, NYU J. Legis. & Pub. Pol'y 685, 689 (2016) ["Some FHA appellate decisions have accepted [general population comparisons], but all involved challenges to municipal actions that allegedly reduced the area's supply of affordable housing."].) In particular, *Huntington*, a case cited by plaintiffs, expressly acknowledges the dual purpose of the Fair Housing Act, and found that the district court should have been more attentive to community-wide segregation that resulted from the facially neutral policy:

> The discriminatory effect of a rule arises in two contexts: adverse impact on a particular minority group and harm to the community generally by perpetuation of segregation. In analyzing Huntington's restrictive zoning, however, the lower

> court concentrated on the harm to blacks as a group, and failed to consider the segregative effect of maintaining a zoning ordinance that restricts private multi-family housing to an area with a high minority concentration. Yet, recognizing this second form of effect advances the principal purpose of Title VIII to promote, open, integrated residential housing patterns.

(*Huntington Branch, N.A.A.C.P. v. Town of Huntington* (2d Cir. 1988) 844 F.2d 926, 937, internal citations omitted.)[11] Given the focus on community-wide segregative effects, the court's consideration of general population statistics is not surprising, and appears consistent with the purposes of the Fair Housing Act.

Here, plaintiffs do not sue under the Fair Housing Act, nor do they sue under its California analogue (Cal. Gov't Code § 12900 *et seq*.). Rather, they sue under California Government Code section 11135. Section 11135, like its federal analogue (42

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[11] In addition to *Huntington*, plaintiffs also cite *Jackson v. Okaloosa County, Fla.* (11th Cir. 1994) 21 F.3d 1531; *Metro. Hous. Dev. Corp. v. Village of Arlington Heights* (7th Cir. 1977) 558 F.2d 1283, 1288 ; and *Green v. Sunpointe Assocs., Ltd.* (W.D. Wash. May 12, 1997, No. C96–1542C) 1997 WL 1526484. Each of these cases was decided under the Fair Housing Act, and involves a reduction in the supply of affordable housing – an effect that can be meaningfully assessed by evaluating the demographics of the broader community. *Sisemore*, too, was a housing case, and offers no assistance in the public benefits context. It was decided under the housing provisions of California's Fair Employment and Housing Act, and the court noted that FEHA was "substantially equivalent" to the Fair Housing Act. (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal. App. 4th 1386.)

U.S.C. § 2000d ("Title VI")), applies generally to state- and federally-funded benefits and programs. It is not focused on housing discrimination, and says nothing about community-wide housing segregation.

While courts interpreting the Fair Housing Act have expressly recognized the Act's dual purpose (prohibiting discrimination against protected groups, and combating community-wide housing segregation), no court has recognized an anti-segregation purpose in section 11135, nor for Title VI, its federal analogue.[12] Moreover, the legislative history shows that Title VI was squarely focused on protecting disadvantaged groups from benefits discrimination, not on combatting community-wide segregation. (*See U.S. v. Baylor University Medical Center* (5th Cir. 1984) 736 F.2d 1039, 1043 ["Title VI had a single overriding purpose: 'to make sure that the funds of the United States are not used to support racial discrimination."]; *Regents of University of Calif. v. Bakke* (1978) 438 U.S. 265, 287 [per legislative history, "the bill has a simple purpose. That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted."].)

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[12] Finding no support in California law, plaintiffs cite *Goldberg v. Kelly* (1970) 397 U.S. 254, and claim that it stands for the proposition that "welfare benefits 'foster the dignity and well-being of all persons.'" (AOB 37.) In reality, *Goldberg* states only: "From its founding, the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders." (*Goldberg*, 397 U.S. at 265.) It does not say, as plaintiffs contend, that welfare programs accrue to the benefit of those who are ineligible for assistance.

Accordingly, in interpreting section 11135, cases under the Fair Housing Act are not instructive. Title VI cases are instructive. (*See Darensburg*, 636 F.3d at 519 ["In light of the parallel language of [section 11135] and [Title VI], federal law provides important guidance in analyzing state disparate impact claims."].) So too are Title VII cases. (*Id.* [courts "look to Title VII disparate impact analysis in analyzing Title VI claims."].) But Fair Housing Act cases are animated by different policies, including a legislative desire to combat segregation throughout the broader community. Plaintiffs' efforts to shoehorn Fair Housing Act principles into this public benefits case is thus unavailing.

b. Here, a comparison to the "general population" defies reality, as the vast majority of the general population is ineligible for CalWORKs benefits.

Plaintiffs' own cases show that a proper disparity analysis employs comparisons that are meaningful and realistic. In *Mt. Holly*, the Township proposed eliminating homes in its "Gardens" neighborhood (which was 46% African-American and 29% Hispanic) and replacing them with more expensive housing. The Court analyzed the demographics of those who would be impacted, and compared the impacted group to the township as a whole – "22.54% of African-American households and 32.31% of the Hispanic households in Mount Holly [would] be affected by the demolition of the Gardens," while only "2.73% of White households" would be affected. (*Mt. Holly Gardens Citizens in*

Action, Inc. v. Township of Mount Holly (3d Cir. 2011) 658 F.3d 375, 382.)

In the housing context, such a comparison (between those in a town who are denied housing versus the general population of the town) can be illuminating. Specifically, it analyzes those who are impacted by a policy versus those who **could** have been impacted had an alternate policy been adopted. The township could have elected to demolish housing elsewhere in town, but opted to select the Gardens. The comparison between impacted individuals and the town population thus sheds at least some light on how the selected policy might compare to alternatives.

Unlike *Mt. Holly*, had the County adopted a different requirement (other than home visits) to ensure eligibility for CalWORKs benefits, this would not have impacted the general population in any way. Specifically, because the overwhelming majority of the general population is ineligible for CalWORKs benefits, any change in eligibility requirements would have no impact on the general population.

Notably, however, the *Mt. Holly* plaintiffs did not rest on their "general population" comparison. Rather, they also identified the percentage of residents in the county that would be able to afford the more expensive replacement housing (21% of African-American and Hispanic households, versus 79% of White households). This is not a "general population" comparison. Rather, it is tailored comparison identifying those individuals who are similarly situated in a material respect (*i.e.*, those located nearby **who could afford** the replacement housing).

The comparison thus serves as a measure of **meaningful** impacts. While 79% of African-American and Hispanic households would be priced out of the new Gardens community, a much smaller proportion of White households would be similarly impacted.

All told, *Mt. Holly* is a case about **meaningful impacts on a minority group** as compared to other groups. It is a case about those who are actually excluded from housing by virtue of cost, and those are not. Plaintiffs' disparity analysis, in contrast, does not draw a meaningful comparison. It compares the demographics of those who receive CalWORKs benefits against the general population, even though the latter group is composed overwhelmingly of individuals who are **not** eligible for CalWORKs benefits, and have never received them.[13] As such, plaintiffs fail to offer the meaningful comparison required by a proper disparity analysis.

Plaintiffs also claim that *Huntington* supports the following contention:

> Where a safety net benefit contingent on financial eligibility is at issue, the comparison population must include the entire community, any of whom may have potentially participated, though some have not yet needed to do so.

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[13] Plaintiffs argue that "the proper comparison is to the County's general population because CalWORKs provides a safety net intended for the entire community." (AOB 37.) In reality, CalWORKs provides a safety net only to parents, and only if they meet stringent eligibility requirements, including income and resource maximums.

(AOB 37.) That is not what *Huntington* says. In its discussion of the disparate impact on particular minority groups, the court did not rest on a comparison of the demographics of the impacted groups with the demographics of the general population as a whole. Rather, its analysis was more granular, and included an assessment of that portion of the general population *that might realistically be impacted* by limitations on subsidized housing. (*Huntington*, 844 F.2d at 938 ["7% of all Huntington families **needed subsidized housing**, while 24% of the black families **needed such housing**"] (emphasis added).) The *Huntington* court did not adopt the heavy-handed "general population" comparison that plaintiffs urge. Rather, it required plaintiffs to come forward with a meaningful comparison that took into account financial resources.

This Court should do the same. A comparison between CalWORKs applicants and the general population of San Diego County is not meaningful, and ignores the basic principle that comparators must be similarly situated. Because the general population consists overwhelmingly of individuals who are not eligible for CalWORKs benefits, plaintiffs' comparison does not support a cause of action for disparate impact.

Because the FAC does not allege the home visits impose a harsher burden on woman/African-Americans/Hispanics than people of other gender/races who also received the home visits, the disparate impact claim fails as a matter of law.

V. CONCLUSION

The trial court correctly sustained the County's demurrer to the FAC. Therefore, the judgment should be affirmed in its entirety.

DATED: March 30, 2020

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.201(c)(1), I certify that the text of this brief consists of 12,911 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

DATED: March 30, 2020

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

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PROOF OF SERVICE

I, Diana Gaitan, declare:

I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101. My electronic service address is diana.gaitan@sdcounty.ca.gov.

On March 30, 2020, I served the following documents: **RESPONDENT'S BRIEF;** in the following manner:

☒ **(By Mail)** By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named below and depositing each in the U. S. Mail at San Diego, California.

Hon. Ronald L. Styn, Presiding c/o Clerk of San Diego County Superior Court Civil Appeals 1100 Union Street, Second Flr. San Diego, CA 92101

☒ **(Via Truefiling Service)** By submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com, which electronically notifies all counsel as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 30, 2020, at San Diego, California.

Diana Gaitan