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Case No. 37-2018-00031741-CU-MC-CTL

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LUZ VILLAFANA, et al.,
Plaintiffs and Appellants,
v.
COUNTY OF SAN DIEGO,
Defendants and Respondent.

Review of a decision by the Court of Appeal
Fourth Appellate District, Division One, Case No. D076120;
San Diego County Superior Court
Case No. 37-2018-00031741-CU-MC-CTL
Hon. Ronald L. Styn, Judge

PETITION FOR REVIEW OF PUBLISHED DECISION

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ISSUE PRESENTED

Plaintiffs brought a disparate impact claim alleging that the administration of a state-funded safety net program inflicts disproportionate harm on people of color and women. In a published decision, the Court of Appeal held Plaintiffs could not state a claim because the people harmed by the challenged policy could only be compared to themselves, although the program is designed to protect the general public.

Does the published decision confuse civil rights law and repudiate California public policy by curtailing the right of people harmed by a state-funded program to state a disparate impact claim where the composition of participants is disproportional to the general population?

INTRODUCTION AND NECESSITY OF REVIEW

This case presents a pure legal question of statewide significance to California's public policy of robust civil rights enforcement. The Court's review is "necessary to secure uniformity of decision or to settle an important question of law" impacting the civil rights of millions of Californians. Cal. Rules of Court, rule 8.500(b).

California leads the nation by mandating that no person shall be "unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity" conducted or funded by the state. Govt. Code § 11135(a). The statute and its implementing regulations, which are both enforceable in court under Govt. Code § 11139, prohibit any form of discrimination in state-funded programs, whether by intent or disparate impact. 2 Cal. Code Regs. § 11154(i) (prohibiting "criteria or methods of administration" that "have the

purpose or effect of subjecting a person to discrimination" or "defeating or substantially impairing the accomplishment of the objectives of the recipient's program with respect to" protected classes). The Court of Appeal's decision calls into question whether the statute and regulations provide a meaningful remedy for inequitable harms inflicted by state-funded programs.

Disparate impact law is essential to uprooting harmful policies derived from "unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 521 (2015). California upholds that principle by ensuring that state funds do not subsidize policies that disproportionately harm marginalized communities. The Court of Appeal's decision eviscerates that protection by severely curtailing disparate impact claims involving state-funded programs.

A disparate impact claim requires the plaintiff to identify the people harmed by a challenged policy and juxtapose them to the relevant comparison group. *See, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 436 n.6 (1971) (holding that where Blacks were less likely to hold high school diploma than whites, diploma requirement for higher paying employment created disparate impact). The settled consensus of civil rights law is unequivocal—when plaintiffs challenge a policy that harms people participating in a safety net program, for example subsidized housing, the proper comparison group is the general population.

Here, Plaintiffs followed that principle. The complaint alleges that San Diego County operates a state-funded program called Project 100%, or P100, that requires presumptively eligible persons seeking benefits under California Work Opportunity and Responsibility to Kids ("CalWORKs") to

submit to suspicionless home visits by law enforcement officers. On the facts pleaded, P100 harms applicants by humiliating and stigmatizing them as presumed criminals. According to the complaint, the people harmed by P100 are disproportionately people of color and women when compared to the County's general population.

The Court of Appeal, however, rejected that comparison, holding Plaintiffs could not state a claim because "the comparison must be among those who receive the visits" and "all CalWORKs recipients are affected equally." *Villafana v. Cty. of San Diego*, 271 Cal. Rptr. 3d 639, 645 (2020). In effect, the Court of Appeal held that the people harmed by the challenged policy must be compared to themselves.

The decision radically departs from the mainstream of civil rights law, conflates disparate treatment with disparate impact, and violates the Legislature's mandate not to interpret the governing statute "in a manner that would frustrate its purpose." *See* Govt. Code § 11139. If the people harmed by administration of state-funded programs—whether CalWORKs, CalFRESH, MediCal, or public education—can only be compared to themselves, then no participant can state a disparate impact claim against such harm, no matter how outrageous the policy at issue, as long as every participant is harmed.

That result confuses the law, repudiates the governing statute and regulations, violates public policy, and contravenes this Court's clear precedent commanding that civil rights laws "must be construed liberally in order to carry out [their] purpose." *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 167 (2007). The Court should therefore grant review to protect statewide civil rights enforcement from the serious harm threatened by the Court of Appeal's published decision.

PETITION FOR REHEARING

The Court of Appeal issued its decision on November 25, 2020. No petition for rehearing was filed.

FACTUAL AND PROCEDURAL BACKGROUND

CalWORKs is the state's cash assistance program for families in need. CT 97 ¶ 2. As the County did not dispute, it is a state-funded program or activity or a program that receives state financial assistance. *See id*. at 102 ¶ 27. It is the state analog to the federal Temporary Assistance to Needy Families program, which stems from "the Nation's basic commitment . . . to foster the dignity and well-being of all persons within its borders," and it is based upon the recognition "that forces not within the control of the poor contribute to their poverty." *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970). CalWORKs thus provides a safety net for those who may become financially eligible due to circumstances beyond their control, such as job loss.

P100 is a San Diego County policy requiring persons in need of CalWORKs benefits whose applications do *not* raise any suspicion of fraud or ineligibility to submit to intrusive and embarrassing scrutiny by requiring them to submit every inch of their homes—bedrooms, desks, closets, clothes hampers, medicine cabinets—to inspection by strangers. *See* CT 104 ¶ 41. On the facts pleaded, the program traumatizes and stigmatizes applicants by treating them as though they are criminals rather than people in need, seeking help in good faith to support themselves and their children. *Id*. at 104 ¶ 42-46.

The harms caused by P100 fall disproportionally on people of color and women. As pleaded in the complaint, Hispanics represent 50.33

percent of County CalWORKs recipients but only 33.5 percent of the County's general population. *Id*. at 105 ¶¶ 48–49. African-Americans represent 14.11 percent of County CalWORKs recipients but only 5.5 percent of the County's general population. *Id*. Women represent over 72 percent of CalWORKs recipients but only 39 percent of the County's population. *Id*. at 105 ¶¶ 50–51.

Plaintiffs alleged that P100 causes a disproportionate adverse impact on the basis of race, color, national origin, ethnic group identification, or sex, and therefore violates § 11135 and its implementing regulations. *Id*. at 107 ¶ 67. The trial court sustained the County's demurrer to the operative complaint without leave to amend, and Plaintiffs timely appealed. The Court of Appeal affirmed the judgment in a published decision on November 25, 2020, assuming that P100 causes cognizable harm and holding "there is no viable disparate impact claim" because the "women, Hispanic, and African American applicants" harmed by P100 can only be "compared to the entire population of applicants." *Villafana*, 271 Cal. Rptr. 3d at 645. Plaintiffs timely filed this petition.

ARGUMENT

This case warrants review to prevent a published decision from confusing the law, repudiating key parts of the governing statute and regulations, and precluding civil rights challenges to inequitable harms inflicted by the administration of state-funded programs.

A disparate impact claim requires no intent to discriminate. *Rosenfeld v. Abraham Joshua Heschel Day Sch., Inc.*, 226 Cal. App. 4th 886, 893 (2014) (holding that to state "[a] claim of disparate impact . . . a plaintiff is not required to prove discriminatory motive"). California courts

look to federal law in reviewing disparate impact claims. *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011).

To state a disparate impact claim, the plaintiff need only plead facts establishing a facially neutral policy or practice that causes a disproportionate harm to persons in a protected class.[1] *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 711 (9th Cir. 2009). The Court of Appeal assumed P100 is a facially neutral policy that causes harm to protected classes. The issue is whether the Court of Appeal identified the "appropriate statistical measure" for comparison.[2] *Darensburg*, 636 F.3d at 520.

The settled consensus of civil rights precedent holds that when a disparate impact claim arises from a safety net program, such as subsidized housing, the comparison population must include the entire community. *See, e.g.*, *Jackson v. Okaloosa County*, 21 F.3d 1531, 1534, 1543 (11th Cir. 1994) (holding exclusion of public housing "has a harsher impact on African–Americans than whites because 86% of the persons on the wait-list for public housing are African–American" and "County population is 8% African–American"); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988) (holding "refusal to permit construction" of subsidized housing "had a

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[1] The question of whether the policy or practice is justified is an affirmative defense not at issue on demurrer and thus not presented by this petition. *Inclusive Communities Project, Inc.*, 576 U.S. at 541; *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 250–51 (9th Cir. 1997); *Larry P. By Lucille P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *Lubin v. The Wackenhut Corp.*, 5 Cal. App. 5th 926, 943 (2016); *Rosenfeld*, 226 Cal. App. 4th at 893–94.

[2] Similar issues have arisen elsewhere and will no doubt recur. *See, e.g.*, *Cty. Inmate Tel. Serv. Cases*, 48 Cal. App. 5th 354, 368 (2020), *review denied* (Aug. 19, 2020).

greater adverse impact on minorities," because two-thirds of "the persons who would benefit from the state-assisted housing" were minorities in general population and thus "failure to build the projects had twice the adverse impact on minorities as it had on whites"); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir.), *aff'd in relevant part*, 488 U.S. 15 (1988) (finding disparate impact where "7% of all [of the town's] families needed subsidized housing, while 24% of the black families needed such housing . . . [and] minorities constitute[d] a far greater percentage of those . . . occupying subsidized rental projects compared to their percentage in the Town's population."); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) (holding refusal to permit low-income housing had discriminatory effect "[b]ecause a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing"); *cf. Sisemore v. Master Financial, Inc*., 151 Cal. App. 4th 1386, 1421 (2007) (disparate impact housing claim compared daycare operators to "the County's general population.").

In such cases, the law requires comparison to the general population to vindicate the public policy of protecting marginalized communities from inequitable disparities. For example, a leading case addressed the disparate impact caused by demolition of a neighborhood "occupied predominantly by low-income residents" who were primarily African-American and Hispanic. *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mt. Holly*, 658 F.3d 375, 377 (3d Cir. 2011). The court rejected the contention "that because 100% of minorities in the [neighborhood] will be treated the same as 100% of non-minorities in the [neighborhood], the Residents failed to prove there is a greater adverse impact on minorities." *Id*. at 383.

Instead, the court properly compared the neighborhood to the local general population, rejecting the fallacy that the people harmed should be compared to themselves, which would make it impossible for them to pursue a disparate impact claim. *Id*.

According to the court, that fallacy was the trial court's "most troubling error" because it "conflat[ed] . . . the concept of disparate treatment with disparate impact." *Id*. In a disparate impact case, unlike a disparate treatment case, the issue is not whether white residents of the neighborhood "are ***treated*** the same as the minority residents." *Id* (emphasis added). It was "whether minorities are disproportionately ***affected***" compared to the general population. *Id* (emphasis added). Accordingly, in a disparate impact case, a plaintiff states a claim by alleging that "the policy disproportionately affects or impacts one ***group*** more than another—facially disparate treatment need not be shown." *Id.* at 384 (emphasis added); *see also id.* (noting that the "decision to block a public housing project" had "racially disproportionate effect" where "waiting list for public housing comprised 85% African–Americans and 95% minorities," even though "[w]hite residents on the list were treated the same as the minority residents on the list").

By rejecting a disparate impact claim merely because "all CalWORKs recipients are affected equally," *Villafana*, 271 Cal. Rptr. 3d at 645, the Court of Appeal's decision committed the fallacy rejected in *Mt. Holly* and conflated disparate impact with disparate treatment. The decision thus radically departed from the consensus of civil rights precedent, confuses the law, and undermines California's strong public policy of advancing equity. Left unreviewed, the decision threatens pernicious consequences.

For example, if participants in a state-funded program such as CalFRESH or Medi-Cal were primarily people of color, the agency administering the program could adopt any manner of humiliating (and potentially deterring) conditions of participation without fear of disparate impact challenge, merely because the harm falls on all participants in the program.[3] That result is absurd, cruel, unfair, and at odds with civil rights precedent.

The Court of Appeal's decision creates confusion by contending that fair housing disparate impact cases are an "inapt analogy" because fair housing "law was intended to impact those who fall within protected classes, and it was also intended to impact the broader population," and "a housing decision that prevented integration impacted the entire community, not just those explicitly seeking integrated housing options." *Villafana*, 271 Cal. Rptr. 3d at 645. Here, § 11135 and its implementing regulations are designed to impact the entire community by ensuring that state funds do not subsidize inequity, which is a public policy matter that transcends the harm to particular individuals.

Moreover, state-funded programs such as CalWORKs are designed to benefit the entire community. Safety net programs protect everyone, functioning as a form of public insurance for the community as a whole. The composition of participants is not static, because significant segments of the general population move in and out of financial eligibility. The entire community benefits from the safety net because anyone may

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[3] It does not matter that such conditions might violate other laws. The governing statute's disparate impact prohibitions "are in addition to any other prohibitions and sanctions imposed by law." Govt. Code § 11139.

potentially become eligible to participate and the provision of assistance to participants enables them to buy goods and services that help sustain the economy and support the businesses and jobs of non-participants.

That fact is especially clear in the present moment, as we face an unprecedented sudden economic collapse during a catastrophic pandemic when large swaths of the public face unexpectedly dire circumstances. Now, even more so than ever, the safety net both provides "the means to obtain essential food, clothing, housing, and medical care" and "guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. As such, public assistance, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'" *Goldberg*, 397 U.S. at 264–65; *see also Fox v. Morton*, 505 F.2d 254, 256 (9th Cir. 1974) (recognizing "advantages to the national welfare" in "uninterrupted assistance" to those in need); *Moore v. Miller*, 579 F. Supp. 1188, 1195 (N.D. Ill. 1983) ("The social import of a healthy welfare system that meets the basic demands of subsistence for the poor cannot be overestimated. The public, as well as the recipient, is injured when welfare benefits are unjustifiably reduced.").

As a result, "the direct benefit intended" by safety net programs accrues to everyone regardless of whether they actually tumble into the net. *Villafana*, 271 Cal. Rptr. 3d at 646. For that reason, the Court of Appeal's decision rejecting a general population comparison is in a direct irreconcilable conflict with the consensus of relevant precedent and undermines California's public policy of protecting marginalized communities.

The Court of Appeal's decision also sows confusion by improperly analogizing to employment cases about "positions requiring special skills." *Robinson v. Adams*, 847 F.2d 1315, 1318 (9th Cir. 1987) (cited in *Villafana*, 271 Cal. Rptr. 3d at 646). No "special skills" are required for CalWORKs or other safety net programs. Instead, participation depends on financial circumstances.

Besides, even in the employment context, disparate impact analysis properly involves comparisons to the general population, for instance in cases involving "entry level jobs requiring little or no specialized skills." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983); *accord Johnson v. Transportation Agency*, 480 U.S. 616, 631–32 (1987) (noting comparison to "general population is appropriate in analyzing jobs that require no special expertise"); *Teamsters v. United States*, 431 U.S. 324, 335 (1977) (comparing percentage of Blacks in employer's work force to percentage of Blacks in general population); *Dothard v. Rawlinson*, 433 U.S. 321, 329–30 (1977) (allowing use of general population data to show disparate impact of height and weight requirement on women); *Griggs*, 401 U.S. at 430 (relying on general population data in finding disparate impact of diploma requirement on Blacks); *EEOC v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus.*, 186 F.3d 110, 119 (2d Cir. 1999) (noting "studies based on general population data and potential applicant pool data . . . often form the initial basis of a disparate impact claim").

Because anyone in the general population might find it necessary to participate in a safety net program such as CalWORKs, the general population provides an appropriate "proxy pool" for disparate impact analysis of harms inflicted in that program. *Moore*, 708 F.2d at 482–83.

By disregarding that principle, the Court of Appeal's decision creates conflict in the law and undermines robust civil rights enforcement.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to grant review of the Court of Appeal's published decision.

Dated: January 4, 2021

Respectfully submitted,

/s/ Jonathan Markovitz
Jonathan Markovitz
Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Review contains 3056 words as calculated by Microsoft Word and that this document was prepared in a 13-point Times New Roman font.

Dated: January 4, 2021

Respectfully submitted,

/s/ Jonathan Markovitz
Jonathan Markovitz
Attorney for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is P.O. Box 87131, San Diego, CA 92138.

On January 4, 2021, I served true copies of the following document(s) described as **PETITION FOR REVIEW OF PUBLISHED DECISION** on the interested parties in this action as follows:

Thomas E. Montgomery Thomas.Montgomery@sdcounty.ca.gov County Counsel County of San Diego Thomas D. Bunton, Chief Deputy Thomas.Bunton@sdcounty.ca.gov 1600 Pacific Highway, Room 355 San Diego, California 92101-2469 Telephone: (619) 531-6456 Facsimile: (619) 531-6005 Attorneys for Defendant and Respondent COUNTY OF SAN DIEGO	Served Electronically via TrueFiling
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Office of the Clerk San Diego Superior Court Hon. Ronald L. Styn Dept C-74 330 West Broadway San Diego, CA 92101	Personally Served

I declare under penalty of perjury under the laws of the State of California

that the foregoing is true and correct.

Executed on January 4, 2021, at San Diego, California.

/s/ *Jonathan Markovitz*
Jonathan Markovitz; SBN 301767

ATTACHMENT: COURT OF APPEAL OPINION

Filed 11/25/20

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LUZ VILLAFANA et al., Plaintiffs and Appellants, v. COUNTY OF SAN DIEGO, Defendant and Respondent.	D076120 (Super. Ct. No. 37-2018-00031741-CU-MC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

ACLU Foundation of San Diego & Imperial Counties, David Loy, Jonathan Markovitz, Melissa Deleon; Fish & Richardson, Aleksandr Gelberg, Madelyn S. McCormick and Geuneul Yang, for Plaintiffs and Appellants.

Thomas E. Montgomery, County Counsel, and Thomas D. Bunton, Assistant County Counsel, for Defendant and Respondent.

Plaintiffs filed a first amended complaint (FAC) alleging discrimination under Government Code[1] section 11135 based on its requirement that all San Diego County (the County) applicants eligible for the state's CalWORKs

1 Further undesignated section references are to the Government Code.

(welfare) program participate in a home visit. The County demurred, arguing there was no discriminatory effect of the program, there was no disparate impact caused by the home visits, and the parties lacked standing to sue. The superior court granted the demurrer without leave to amend and entered judgment. Plaintiffs argue on appeal that the FAC states a viable cause of action. We disagree. Because the FAC does not allege a disparate impact on a protected group of individuals and cannot be amended to do so, we will affirm.

BACKGROUND AND PROCEDURAL FACTS

In June 2018, Luz Villafana and Uhmbaya Laury[2] filed a complaint for injunctive and declaratory relief against the County alleging the County's implementation of the state-funded California Work Opportunity and Responsibility to Kids (CalWORKs) program disproportionately impacted people of color and women.

The County demurred, and the court sustained the motion with leave to amend. Plaintiffs filed the FAC December 7, 2018.

The FAC explained CalWORKs provides a safety net for anyone who becomes income-eligible due to a job loss or otherwise, based on a net monthly family income of no more than $1,292. It alleged that under the County's regulations, applicants are required to participate in a face-to-face interview before aid will be granted even though state regulations require a home visit only if factors affecting eligibility, including living arrangements, cannot be satisfactorily determined. The County calls these home visits Project 100% (P100).

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2 Villafana brought suit as a tax payer. Laury brought suit as an individual who had applied for and received public benefits under the CalWORKs program, and who suffered "adverse impacts" from the home visit policy.

The home visits are conducted by licensed peace officers who currently are assigned to the Public Assistance Fraud division of the Department of Child Support Services.[3] The peace officer makes an unannounced visit to the address the applicant lists on the application, and, if no one is home, the investigator leaves a business card. Following a second attempt, the investigator leaves a note for the applicant to call the investigator. Applicants believe they must remain at home while waiting for the visit. If the attempts to contact the applicant are unsuccessful or the applicant declines to participate in the home visit, the application is denied. The home visit can include an inspection of an applicant's home, including closets, cupboards, desks, hampers, and laundry bags.

The FAC alleged that because the home visits are unannounced, applicants often remain confined to their homes waiting for a visit, and this may require them to postpone job searches, skip medical appointments, or stop taking children to school out of fear they will miss the investigator's unannounced visit. Applicants also experience stress and anxiety waiting for an investigator to conduct the unannounced home visit, fearing their application will be denied if they are not home when the investigator visits. Additionally, the FAC alleged the home visit requirement is embarrassing, stigmatizing, and traumatizing, because it treats applicants as suspected criminals and attracts the attention of neighbors, signaling the applicant is in trouble with law enforcement or needs public assistance.

The FAC further alleged that 50.33 percent of the County's CalWORKs recipients are Hispanic, and 14.11 percent are African American in contrast to the general population, which is 33.5 percent Hispanic and 5.5 percent

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[3] The County separately investigates individuals suspected of having committed welfare fraud, but that is not a subject of the action.

African American. Additionally, while women represent 72.73 percent of enrollees in the CalWORKs Welfare-to-Work program, women represent only 39 percent of the general population.[4]

Finally, the FAC alleged the policy of conducting home visits for every applicant violates Government Code section 11135 and Code of Civil Procedure section 526a because the practice discriminates against protected groups and substantially impairs the accomplishment of the CalWORKs program objectives with respect to individuals in the protected classes.

The County demurred a second time, arguing home visits could not be the facially neutral practice and also constitute the adverse impact, there was no allegation of a disparate impact on women and minorities, and the plaintiffs lacked standing to sue. Plaintiffs responded that the adverse impact of stigma resulted from the visit and fell disproportionately on a protected population when CalWORKs applicants are compared to those who do not apply for CalWORKs benefits.

The court sustained the demurrer to the FAC without leave to amend on March 22, 2019. It granted the demurrer on the basis that the neutral practice could not be the adverse impact, and there were no allegations the home visit placed a significantly harsher burden on a protected group of CalWORKs recipients because the allegations of stress, anxiety, and stigma applied equally to all CalWORKs applicants.

Judgment was entered April 8, 2019. Plaintiffs timely appealed.

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4 The FAC alleged on information and belief that the Welfare-to-Work program numbers reflect the demographics of CalWORKs recipients more broadly because nearly all CalWORKs recipients are required to participate in Welfare-to-Work.

DISCUSSION

A. Legal Principles

"On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo: we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439.) We evaluate whether a cause of action has been stated under any legal theory. (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 637.) In making our determination, we admit all facts properly pleaded (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 (*Aubry*)); we " 'give the complaint a reasonable interpretation, reading it as a whole and its parts in their context' " (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38). We read the allegations "in the light most favorable to the plaintiff and liberally construed with a view to attaining substantial justice among the parties." (*Venice Town Council v. City of L.A.* (1996) 47 Cal.App.4th 1547, 1557.)

If the pleading is insufficient on any ground specified in a demurrer, we will uphold the order sustaining it, even if it is not the ground relied upon by the trial court. (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998.) We review the trial court's refusal to grant leave to amend under the abuse of discretion standard. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*); *Aubry*, *supra*, 2 Cal.4th at p. 967.)

B. Disparate Impact Theory

The FAC alleged P100 violates Government Code section 11135, subdivision (a),[5] which prohibits denial of full and equal access to benefits of a state-funded program and prohibits discrimination under any state-operated program, because the home visits are embarrassing, stigmatizing, and traumatizing. Assuming the harm identified in the FAC qualifies as an actionable discriminatory impact, we conclude that because plaintiffs have not and cannot allege a significantly harsher burden on protected groups than non-protected groups as result of P100, the FAC fails to state a claim.

Under disparate impact law, "(1) a plaintiff establishes a prima facie case if the defendant's facially neutral practice causes a disproportionate adverse impact on a protected class; (2) to rebut, the defendant must justify the challenged practice; and (3) if the defendant meets its rebuttal burden, the plaintiff may still prevail by establishing a less discriminatory alternative." (*Darensburg v. Metro. Transp. Comm'n* (9th Cir. 2011) 636 F.3d 511, 519 (*Darensburg*).)[6] In establishing a claim, the plaintiffs must plead facts that establish a facially neutral policy or practice that causes a disproportionate harm to persons in a protected class. (*Comm. Concerning Cmty. Improvement v. City of Modesto* (9th Cir. 2009) 583 F.3d 690, 711.)

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5 Governing regulations also prohibit using criteria or any methods of administration that have the effect of subjecting someone to discrimination or that defeat or substantially impair the program's objectives. (Cal. Code Regs., tit. 2, § 11154(i).)

6 Federal law "provides important guidance in analyzing state disparate impact claims." (*Darensburg*, *supra*, 636 F.3d at p. 519; see also *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 354 [California courts look to federal precedent in applying California employment discrimination laws].)

However, the 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. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1324, citing *Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831.) To make out a prima facie case of disparate impact, a plaintiff must employ an appropriate comparative measure. (*Darensburg*, *supra*, 636 F.3d at p. 519.) "An appropriate statistical measure must . . . take into account the correct population base and its racial makeup." (*Id.* at p. 520.) There is no prima facie case when the wrong base population is used in the statistical sample. (*Robinson v. Adams* (9th Cir. 1987) 847 F.2d 1315, 1318.) "[T]he appropriate inquiry is into the impact on the total group to which a policy or decision applies." (*Hallmark Developers, Inc. v. Fulton County* (11th Cir. 2006) 466 F.3d 1276, 1286.)

Central to plaintiffs' claim is that the alleged psychological harms of the P100 program falls disproportionately on classes protected by section 11135 when comparing CalWORKs applicants subject to home visits with the general population of the County. The County contends that to properly assess whether the harm caused by home visits has a disparate impact on protected classes, the comparison must be among those who receive the visits because that is the group to which the facially neutral practice applies. And because all CalWORKs recipients are affected equally, the FAC fails to state a claim. Moreover, because the FAC acknowledges that all CalWORKs applicants are harmed the same by home visits, plaintiffs cannot amend the complaint to successfully make a disparate impact claim. We agree with the County; the appropriate comparison is between groups to whom the facially neutral policy has been or can be applied. (See *Darensburg*, *supra*, 636 F.3d at p. 520; *County Inmate Telephone Service*

Cases (2020) 48 Cal.App.5th 354, 368 (*Inmate Telephone Service Cases*) [analyzing impact of telephone services on the inmate population affected by policy rather than general population].)

To support their theory of proper comparison groups, plaintiffs point to disparate impact cases predominantly in the housing context. (See *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1421 [home loan]; *Jackson v. Okaloosa County* (11th Cir. 1994) 21 F.3d 1531, 1543 [housing construction bidding policy]; *Huntington Branch, NAACP v. Huntington* (2d Cir 1988) 844 F.2d 926, 938 (*Huntington Branch*) [zoning]; *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights* (7th Cir. 1977) 558 F.2d 1283, 1288 (*Metropolitan Housing*) [zoning]; *Green v. Sunpointe Associates, Ltd.*, (W.D. Wash. May 12, 1997, No. C96-1542C) [1997 WL 1526484, at p. *6] [Section 8 housing].) These cases challenged zoning, construction, home loan practices, and rental decisions under the Fair Housing Act (42 U.S.C. § 3601 et seq.), which, like section 11135, prohibits discrimination. However, the legislative goals of the Fair Housing Act make it an inapt analogy for the case before us.

In addition to prohibiting discrimination, the Fair Housing Act aims to promote integrated housing patterns and prevent the increase of segregation in the general population. (*Trafficante v. Metropolitan Life Ins. Co.* (1972) 409 U.S. 205, 211 [Fair Housing Act intended to integrate neighborhoods and directly impact the whole community]; *Huntington Branch*, *supra*, 844 F.2d at pp. 937-938 [refusal to permit projects reinforced racial segregation]; *Metropolitan Housing*, *supra*, 558 F.2d at pp. 1288-1289 [zoning regulation perpetuated racial segregation].) In *Metropolitan Housing*, the Seventh Circuit explained that "[c]onduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as

purposefully discriminatory conduct in frustrating the national commitment 'to replace the ghettos "by truly integrated and balanced living patterns." ' " (*Metropolitan Housing*, at p. 1289.) In other words, the law was intended to impact those who fall within protected classes, and it was also intended to impact the broader population. Accordingly, a housing decision that prevented integration impacted the entire community, not just those explicitly seeking integrated housing options. Thus, in those cases, the demographic statistics within the general population could serve as an appropriate measure for comparison.

The plaintiffs attempt to paint the CalWORKs program as similarly benefitting society, arguing that because welfare offers a safety net for all members of society, the comparison group must include the entire population, including those who could potentially participate in the future though not presently eligible. While we recognize that welfare benefits can "foster the dignity and well-being of all persons" because it helps guard against "the societal malaise that may flow form a widespread sense of unjustified frustration and insecurity" (*Goldberg v. Kelly* (1970) 397 U.S. 254, 264-265), this is not the same as the direct benefit intended by the desegregation goals of the Fair Housing Act. Welfare benefits are not distributed with the express aim of affecting those who do not qualify for them in the same way that the Fair Housing Act does.

Although not a perfect analogy, the line of cases addressing titles VI and VII of the Civil Rights Act (42 U.S.C. §§ 2000d et seq. & 2000e et. seq.) offers a more apt comparison. In the employment context, courts consider whether an "an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants, or, in promotion and benefit cases, in a proportion smaller than in the actual

pool of eligible employees." (*Moore v. Hughes Helicopters, Inc., Div. of Summa Corp.* (9th Cir. 1983) 708 F.2d 475, 482; *Hazelwood School Dist. v. United States* (1977) 433 U.S. 299, 308 [comparison should be between composition of those filling at-issue jobs and composition of population in relevant labor market]; *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1171 [compare composition of representation of protected class in work force against qualified population in labor force]; *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324 [regarding equal pay between men and women]; *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1122; *Robinson v. Adams*, *supra*, 847 F.2d at p. 1318 [explaining general population is not a proxy for a pool of potential applicants when the positions require special skills].)

In the employment context, courts consider the percentage of individuals within a protected class that should advance and compare that to the number of individuals who actually advance. The difference in those numbers can demonstrate the harm arising from the disparate impact. Plaintiffs here do not claim denial of the CalWORKs benefit is a harm. In that sense, employment cases do not offer an ideal analogy because they focus on denial of the employment benefit, not stigma from the hiring or promotion process. However, because the issues in both contexts can reasonably impact only a subset of the general population—those qualified for positions in the employment context and those eligible for CalWORKs benefits here—we are satisfied that the employment cases provide adequate guidance for the issue before us. Just as the entire county population may not be eligible for a particular job, neither is the entire county population eligible for CalWORKs benefits. Thus, comparing CalWORKs applicants and the general population of the county ignores the basic principal that comparators be similarly

situated. (See *Inmate Telephone Service Cases*, *supra*, 48 Cal.App.5th at p. 368; *Darensburg*, *supra*, 636 F.3d at pp. 519-520.) The appropriate statistical comparison asks whether the home visits disproportionately harm women, Hispanic, and African American applicants when compared to the entire population of applicants.

Plaintiffs' FAC alleges that the P100 home visit requirement is embarrassing, stigmatizing, and traumatizing.[7] However, plaintiffs fail to allege that Hispanic, Latino, or female applicants suffer harsher impacts than other groups to whom the practice is applied. Because all applicants are subject to the home visits, and plaintiffs allege these visits cause a dignitary harm, there is no viable disparate impact claim, and the court's grant of the demurrer without leave to amend did not abuse its discretion. (See *Zelig*, *supra*, 27 Cal.4th at p. 1126; *Aubry*, *supra*, 2 Cal.4th at p. 967.)

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7 The parties dispute whether the home visit requirement can properly be characterized as treating applicants as suspected criminals in light of *Sanchez v. County of San Diego* (9th Cir. 2006) 464 F.3d 916, 918, a case in which the Ninth Circuit concluded the home visits required by P100 were not searches under the Fourth Amendment and were otherwise reasonable and held the home visit requirement did not violate the state or federal constitution or California's welfare regulations. We do not wade into this dispute because, absent a statistical comparison that can demonstrate disparate impact, we need not evaluate the viability of these "dignitary injuries" as evidence of harmful impact envisioned by section 11135.

DISPOSITION

The judgment is affirmed. Costs are awarded to Respondent.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

11/25/2020

KEVIN J. LANE, CLERK

By A. Galvez
Deputy Clerk