Case No. D076120

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

LUZ VILLAFANA and UHMBAYA LAURY,

Plaintiffs and Appellants,

v.

COUNTY OF SAN DIEGO,

Respondent.

Appeal from a Final Order of the San Diego Superior Court,
Case No. 37-2018-00031741-UC-MC-CTL
Hon. Ronald L. Styn, Judge Presiding

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES

In accordance with rule 8.208 of the California Rules of Court, the undersigned certifies that there are no interested persons or entities with either (1) an ownership interest of 10 percent or more in Appellants or (2) a financial or other interest in the outcome of this proceeding that the justices should consider in determining whether to disqualify themselves.

Dated: December 12, 2019

By:

/s/ Jonathan Markovitz

Jonathan Markovitz
Attorney for Plaintiff-Appellants

INTRODUCTION

In San Diego County, and only in San Diego County, virtually all applicants for cash welfare assistance must endure unannounced searches of their homes by law enforcement investigators as a condition of seeking support for which they are presumptively eligible. These blanket home inspections, which the County calls "Project 100%" ("P100"), impose significant harm on low-income families and their children. P100 requires people who apply for California Work Opportunities and Responsibility to Kids ("CalWORKs") benefits to acquiesce 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. These searches are conducted without any reason to believe applicants are ineligible for benefits. 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. The County does not tell applicants when the visits will occur, yet applicants risk denial of benefits if they are not home when investigators arrive unannounced, which can happen 10 to 14 days after applying. The result can be to force parents to stay home for this period of time, instead of picking their children up at school, looking for work, or going to see a doctor.

On those facts, which must be taken as true, the First Amended Complaint states a claim that P100 violates Government Code § 11135 ("section 11135"), which prohibits unjustified disparate impact in state-funded programs. To state a disparate impact claim, a complaint need only plead facts sufficient to show that a state-funded program inflicts legally

cognizable harm that falls disproportionately on a protected class. The First Amended Complaint meets that test.

P100 is a state-funded program that inflicts legally cognizable harm by degrading and stigmatizing CalWORKs applicants and using law enforcement officers to invade applicants' homes as if they were suspected criminals rather than families in need. It is the kind of harm that may evade detection under disparate treatment analysis because it may not have been motivated by discriminatory intent. But it is precisely the kind of harm that can be effectively addressed by disparate impact liability, which is well-suited to rooting out discriminatory policies that may have been influenced by unconscious bias. The harm P100 inflicts falls disproportionately on women and people of color because they make up a much higher percentage of CalWORKs applicants than of the County's general population, which is the appropriate comparison because CalWORKs exists for the benefit of the entire community. No more is needed to state a claim under disparate impact law. On remand, the trial court may consider whether P100 is sufficiently justified to survive disparate impact review, but on the facts pleaded, the First Amended Complaint states a claim that must be adjudicated.

In holding otherwise, the trial court made three fundamental errors. First, it placed a new limitation on the kinds of government policies that can be challenged on a disparate impact theory, finding that a challenged policy cannot establish an adverse impact on its own. Under this rationale, adverse impact can be found only where benefits are denied. This position would prevent disparate impact challenges to the types of stigmatic and dignitary injuries that have always been central to anti-discrimination law. It would also improperly insulate all "application procedures" from judicial

review regardless of how much suffering they might cause or whether groups that are meant to be protected by anti-discrimination law might be disproportionately burdened.

Second, the trial court misunderstood disparate impact law by determining that the impacted population must, in effect, be compared to itself. This ruling improperly immunized P100 from disparate impact review because it narrowly focused only on the low-income population harmed by the policy. As disparate impact case law confirms, when a challenged policy involves an income-contingent benefit such as welfare or housing assistance, the court must compare the population harmed by the policy—in this case, families presumptively eligible for CalWORKs—with the general population of the relevant region. To hold otherwise would contravene the governing statute and public policy by effectively gutting disparate impact review of any program designed for low-income people.

Third, the trial court erred in conflating the adverse impact analysis required under section 11135 with the Fourth Amendment analysis conducted by the Ninth Circuit Court of Appeals in an earlier case involving P100, *Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006). *Sanchez* involved different parties and claims—it did not include a disparate impact claim and has no preclusive effect on this case. In suggesting otherwise, the trial court held plaintiffs to a standard wholly irrelevant to a disparate impact discrimination claim and imposed an insurmountable burden with no basis in the governing statute or relevant case law. For these reasons, Appellants respectfully request that this Court reverse the judgment and remand this case for discovery and trial.

STATEMENT OF THE CASE

Plaintiffs filed suit against the County of San Diego ("County") on June 26, 2018, alleging P100 constitutes an illegal form of disparate impact discrimination prohibited by section 11135 and its implementing regulations. Clerk's Transcript ("CT") 18: 7-9. Plaintiffs also alleged that P100 constitutes an illegal expenditure of public funds in violation of Code of Civil Procedure section 526a. CT 16-17. Plaintiffs sought declaratory and injunctive relief, costs and fees, and other just and proper relief. CT 12.

The County demurred on August 27, 2018. CT 22. The trial court sustained the County's demurrer with leave to amend on November 16, 2018. CT 91. On December 7, 2018, Plaintiffs filed a First Amended Complaint. CT 96, 103, 104.

On January 8, 2019, the County demurred to the First Amended Complaint. CT 111. After briefing and oral argument, the trial court held the First Amended Complaint "fails to allege facts sufficient to establish that P100 causes an adverse impact so as to support a Government Code § 11135 disparate impact claim." CT 182. The trial court sustained the demurrer without leave to amend on March 22, 2019. CT 182.

STATEMENT OF APPEALABILITY

The trial court entered final judgment in this case on April 8, 2019, and the County served notice of the judgment on April 15, 2019. CT 186, 194. In accordance with Rule 8.104, Plaintiffs filed a timely notice of appeal from the judgment on June 12, 2019. CT 205.

STATEMENT OF FACTS

A. Administration of the CalWORKs Program Generally

California Work Opportunity and Responsibility to Kids ("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. CT 102 ¶ 27. It is California's 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 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); CT 98-99 ¶¶ 9–10. CalWORKs provides a safety net for those who may become financially eligible, for example due to job loss. CT 99, 102 ¶¶ 11–12, 27–28.

The purpose of the CalWORKs application process "is to assist the individual in establishing his/her eligibility for aid and services." CT 99 ¶ 14. The relevant rules envision a cooperative process to determine eligibility, under which individuals make applications under penalty of perjury that are promptly submitted to the state's Income Eligibility Verification System ("IEVS"), a coordinated data exchange that tracks information on wages, disability benefits, pension payments, other income, and duplicate benefit matches. CT 99-102 ¶¶ 14–18, 24–25.

Applicants must provide relevant documents, report all material facts and changes, and identify third parties who may be liable for care or services. CT 100 ¶ 19. They must further participate in a face-to-face interview. CT 101-102 ¶¶ 23, 25. Eligibility workers must compile detailed

evidence of eligibility, including proof of age and residence. CT 101 ¶ 22. State regulations require a home visit only when "living arrangements or other factors affecting eligibility, or apparent eligibility in cases of immediate need or diversion, cannot be satisfactorily determined without such a visit." CT 102 ¶ 26. Once enrolled in CalWORKs, individuals are subject to quarterly eligibility verification through IEVS, with potential prosecution if CalWORKs participants received benefits to which they were not entitled. CT 100 ¶¶ 20–21. CalWORKs recipients are also subject to inquiry by a special investigation unit if there is reason to suspect fraud. CT 102-103, 105-106 ¶¶ 33, 56–57.

B. Administration of San Diego County's Project 100%

The County initiated P100 in 1997 at the instigation of the District Attorney's office and County Department of Social Services and expanded it in 1999 to require home inspections for all new CalWORKs applications that were not "obvious denials" for lack of financial eligibility. CT 102 ¶¶ 29–30. P100 thus applies to applicants who are at least presumptively eligible for CalWORKs based on initial screening.

P100 is part of CalWORKs. CT 102 ¶ 28. And to the extent it could be considered a program or activity separate from CalWORKs, P100 is also a state-funded program or activity, or a program or activity that receives state financial assistance, which the County did not dispute. CT 102 ¶ 28.

Despite detailed and rigorous requirements for verifying eligibility at the time of application and afterward, along with the authority and ability to conduct targeted fraud investigations, the County has persisted in operating P100 as a home inspection program with far more onerous and intrusive

requirements than mandated by state regulations or imposed by any other California county.

Through P100, the County requires all CalWORKs applicants who are not obviously ineligible to submit to home inspections by investigators who are licensed peace officers. CT 102 ¶ 31. Applicants are subjected to these investigations even when their applications raise no basis for suspicion of ineligibility or fraud. CT 102 ¶ 32.

P100 is the only program of its kind in the state. CT105 ¶ 54–55. Other counties investigate claims of fraud based on individualized suspicion of applicant fraud rather than conducting indiscriminate home inspection of all applicants. *Id*. San Diego County conducts investigations of alleged fraud based on individualized suspicion alongside the blanket home inspections required by P100. *Id.* ¶ 33. Los Angeles County once operated a program modeled on P100 but abandoned it in 2009. *Id.* ¶ 55.

Under P100, investigators make unannounced home visits, effectively forcing applicants to remain confined to their homes. CT 103 ¶ 38. There is no standard policy allowing CalWORKs applicants to schedule the investigation of their homes, and applicants are not told they have any such opportunity when they apply for benefits. CT 103 ¶ 38. But if the attempt to contact an applicant is unsuccessful or the applicant does not submit to a P100 investigation, the application is denied. CT 105 ¶ 47; *see also* Reporter's Transcript, Volume 2 ("RT2") 11:7-8 (County's counsel conceding that CalWORKs application "gets denied … if [applicants] don't consent" to a P100 search).

C. The Toll of P100: Home Confinement Causing Stress and Anxiety; Privacy Invasion; Stigmatic and Dignitary Injury; and Family Trauma

Many CalWORKs applicants therefore reasonably conclude they must remain at home all or substantially all of the time between submitting their applications and waiting for the investigations to occur, which can take place without notice within 10 to 14 days or more, or risk being denied benefits. CT 103 ¶ 38. As a result, applicants may feel the need to take drastic steps, including postponing job searches, skipping medical appointments, and stopping transporting children to or from school for fear of losing desperately needed assistance. CT 103 ¶ 38. They 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 103 ¶ 39.

If the applicant is at home when the investigator arrives, the investigator seeks entry into the home and questions the applicant and others who may be in the home. The interrogation may address a variety of subjects, including matters unrelated to eligibility or that have already been documented and verified during the application process, including but not limited to intimate relationships, child care, sufficiency of toys and food for children, living, and sleeping arrangements. CT 104 ¶ 40.

The investigations address intimate matters such as child care and living and sleeping arrangements. CT 104 ¶ 40. They may involve an inspection of the applicant's home, which may entail viewing, among other things, the contents of private rooms, closets, cupboards, desks, dressers,

hampers, laundry bags, and other areas or items not in plain view. CT 104 ¶ 41.

The requirement for families to endure an unannounced home inspection by a law enforcement investigator is very invasive, stigmatizing, and traumatizing, especially for low-income women and people of color. CT 104 ¶ 42.

By requiring families to endure unannounced home inspections by law enforcement investigators as a condition of applying for CalWORKs benefits, the P100 program stigmatizes and traumatizes applicants because it treats them as if they were suspected criminals rather than people in need seeking help in good faith to support their children. CT 104 ¶ 43.

By invading the sanctity of the home and family, the inspections by law enforcement investigators inflict stigma and trauma not presented by ordinary requirements such as completing an application or other form, speaking with an eligibility worker or non-law enforcement personnel, or providing documents. It is inherently embarrassing and stigmatizing to have a law enforcement investigator ask questions about the intimate details of one's life or inspect private areas of one's home. CT 105 ¶ 44.

The investigations and interrogations often inflict significant stigma and trauma on families, causing parents to fear their children will be removed and children to fear their parents will be arrested. CT 105 ¶ 45.

The investigations and interrogations also stigmatize applicants because they attract the attention of neighbors. CT 105 ¶ 46. Many CalWORKs applicants live in close quarters with others, e.g., in apartment buildings with many units where a visitor to one unit attracts the attention of those who live in the other units. *Id*. An applicant's neighbors may think that a visit from an investigator signals that the applicant is in trouble with

law enforcement. *Id*. An applicant's neighbors may also realize that the visit means that the applicant is applying for public assistance, which may cause the neighbors to judge the applicant and think less of her. *Id*. Either way, the investigations inflict stigma by potentially attracting the attention of others, potentially causing an applicant's community to draw a variety of negative inferences about the CalWORKs applicant. *Id*.

D. Demographic Impact of P100

The harms caused by P100 fall disproportionally on women and people of color. For example, Hispanics represent 50.33 percent of County CalWORKs recipients but only 33.5 percent of the County's general population. CT 105 ¶¶ 48–49. African-Americans represent 14.11 percent of County CalWORKs recipients but only 5.5 percent of the County's general population. CT 105 ¶¶ 48–49. Adult women represent over 72 percent of CalWORKs recipients but only 39 percent of the County's population. CT 105 ¶¶ 50–51.

E. Lack of Benefit

P100's costs exceed any savings arising from prevention of any fraud it might detect. CT 106 ¶ 59. The Public Assistance Fraud ("PAF") investigators who spend a substantial amount of their time on P100 investigations could instead investigate suspected violations of law, including, but not limited to, "fraud, perjury, embezzlement, [and] trafficking." CT 105 ¶ 53.

F. Parties

Plaintiff Luz Villafana is, and at all times mentioned herein, has been a citizen resident of San Diego County. CT 98 ¶ 6. Ms. Villafana owns a home in Escondido, paid property taxes to the County of San Diego

and the State of California for that property,and is currently assessed and liable to pay additional taxes therein. *Id.* Within one year of the commencement of this action, she also paid income or sales taxes that fund the County of San Diego. *Id.*

Plaintiff Uhmbaya Laury is and at all times mentioned herein has been a citizen resident of San Diego County. CT 98 ¶ 7. She has previously applied or re-applied for public benefits under the CalWORKs program. *Id.* As a condition of seeking benefits, for which she was ultimately approved, she was forced to submit to P100. *Id.* As a result, she personally suffered adverse impacts from the County's P100 policy. *Id.* Within one year before the commencement of this action, she paid sales tax, gasoline tax, or other taxes, charges, or fees routinely imposed in the County of San Diego that fund the County of San Diego. *Id.*

The County is a public entity responsible for ensuring that the County, its agencies, officers, employees, and agents fulfill the requirements of all applicable provisions of federal and state constitutional law, statutes, and regulations with respect to the administration of public benefits, including CalWORKs. CT 98 ¶ 8.

STANDARD OF APPELLATE REVIEW

"A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law … [t]hus, the standard of review on appeal is de novo." *Berg & Berg Enterprises, LLC v. Boyle*, 178 Cal. App. 4th 1020, 1034 (2009) (citation and quotation marks omitted). "[I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory." *First Aid Servs. of San Diego, Inc. v. California Employment Dev. Dep't*, 133 Cal. App. 4th 1470, 1477 (2005).

ARGUMENT

The First Amended Complaint pleads a cause of action under section 11135, which states that no person "shall, on the basis of sex, race, color … ancestry, national origin, [or] ethnic group identification … be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that . . . is funded directly by the state, or receives any financial assistance from the state." Govt. Code § 11135(a). The statute's implementing regulations prohibit the use of "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 classifications. 2 Cal. Code Regs. § 11154(i). The statute and regulations are enforceable by civil action for equitable relief. Govt. Code § 11139.

The statute and regulations prohibit disparate impact discrimination in state-funded programs.[1] *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011).[2] A disparate impact claim does not require intent to discriminate. *Rosenfeld v. Abraham Joshua Heschel Day Sch., Inc.*, 226 Cal. App. 4th 886, 893 (2014). 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

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[1] The County has not disputed that P100 is a state-funded program, and this is not at issue in this appeal. CT 102 ¶ 27.

[2] Federal law "provides important guidance in analyzing state disparate impact claims." *Darensburg*, 636 F.3d at 519.

establishing a less discriminatory alternative." *Darensburg*, 636 F.3d at 519.

To state a disparate impact claim, the plaintiff need only plead facts establishing a facially neutral policy or practice that causes a disproportionate harm. *The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 711 (9th Cir. 2009). The question whether the policy or practice is justified is an affirmative defense not at issue on demurrer. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522–23 (2015); *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. The First Amended Complaint states a claim for disparate impact discrimination because it identifies a facially neutral policy or practice that causes an adverse and disproportionate impact on protected classes.

A. On the Facts Pleaded, P100 Is a Facially Neutral Policy That Causes Harm Cognizable Under Disparate Impact Law.

As the trial court determined, "[t]he First Amended Complaint alleges facts sufficient to establish a facially neutral practice. The complaint alleges that 'nearly all persons applying for CalWORKs benefits must submit to an unannounced home inspection' … Thus, as pled, P100 applies equally to (almost) all CalWORKs benefit recipients. As such, P100 is facially neutral." CT 184 (quoting First Amended Complaint ¶ 3). The remaining question is whether the "facially neutral policy" embodied in P100 "has caused a protected group to suffer adverse effects." *Jumaane v. City of Los Angeles*, 241 Cal. App. 4th 1390, 1405 (2015).

The trial court's decision rested on the premise that there could be no disparate impact discrimination where "a facially neutral practice (i.e., P100) … establish[es] the adverse impact." CT 185. As the court noted in its order sustaining the demurrer to the original complaint, which informed the order under review, "the complaint fails to allege facts establishing that P100 works to eliminate one group of CalWORKs benefit recipients or that P100 has caused CalWORKs benefit recipients to lose their benefits because of their membership in a protected group." CT 184-185. The County's argument similarly proceeded from the premise that to establish an adverse impact "separate" from the challenged practice, the impacted population must "lose their benefits." CT 128, 131. That premise is incorrect.

1. A Challenged Policy May Establish a Cognizable Harm Without Leading to Denial of Benefits.

Neither section 11135 nor its implementing regulations contain any requirement that denial of benefits is necessary to establish cognizable harm. And case law confirms that denial of benefits is not necessary to state a disparate impact claim.

The plain language of the statute and regulations confirm that denial of benefits is not necessary to establish cognizable harm in a disparate impact claim. The statute prohibits both denial of "full and equal access to the benefits" of a state-funded program and "discrimination under" any such program. Govt. Code § 11135(a). Implementing that mandate, the regulations prohibit the use of "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." 2 Cal. Code Regs. § 11154(i). As

noted, the regulations are enforceable by civil action for equitable relief. Govt. Code § 11139. Accordingly, denial of benefits is sufficient but not necessary to establish cognizable harm.

To require denial of benefits to establish adverse impact would render portions of the statute and regulations superfluous. This would violate the "statutory construction principle, that courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous." *Klein v. United States*, 50 Cal. 4th 68, 80 (2010); *see also Hoitt v. Dep't of Rehab.*, 207 Cal. App. 4th 513, 523 (2012) ("If possible, we must accord meaning to every word and phrase in a regulation, and we must read regulations as a whole so that all of the parts are given effect.").

Disparate 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." *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485 (9th Cir. 1993). Accordingly, "a disparate impact claim may be based upon 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. *Id.* at 1485–86. In a disparate impact case about terms and conditions, "testimony as to stigmatization" is relevant "because it will help the jury understand how the Charging Parties' employment was disproportionately affected by the [challenged] rule and that the Charging Parties' feelings of stigmatization are not unique." *E.E.O.C. v. Beauty Enterprises, Inc.*, No. 3:01CV378AHN, 2005 WL 6003547, at *6 (D. Conn. Mar. 24, 2005).

This principle applies with equal force in in this context. These cases demonstrate that terms and conditions of a program such as P100 can have a "substantial and adverse impact" through a stigmatizing or otherwise harmful effect, even if the practice does not cause denial or loss of a benefit. *Garcia*, 998 F.2d at 1486. In particular, the terms and conditions of participation in a state-funded program can cause a substantial adverse impact by stigmatization or otherwise, even if the terms and conditions do not result in denial of benefits.

2. P100 Harms CalWORKs Applicants.

On the facts pleaded, P100 causes a variety of actionable harms. Absent any reason to suspect potential ineligibility, P100 enforcement stigmatizes and traumatizes CalWORKs applicants by using law enforcement officers to invade the sanctity of the home, treating applicants as suspected criminals, and needlessly forcing them to disclose intimate details of their lives. CT 104 ¶¶ 40–44. This strikes at the core of family dynamics, causing parents to fear their children will be removed and children to fear their parents will be arrested. *Id.* ¶ 45. P100 investigations exacerbate the stigma already attached to welfare by attracting the attention of neighbors, who may become concerned that the applicant is in trouble with law enforcement. *Id.* at ¶ 46.

Furthermore, P100 inherently inflicts stigmatic and dignitary injury through invasion of the home, in which "all details are intimate details." *Kyllo v. United States*, 533 U.S. 27, 37 (2001). By shattering CalWORKs applicants' privacy, P100 violates the sanctity of the home, which the Supreme Court has long recognized is paramount. *Silverman v. United States*, 365 U.S. 505, 512 n.4 (1961). The "privacy interest" invaded by

P100 "is significant," because the home is "a traditionally protected area of personal privacy." *Sanchez*, 464 F.3d at 927; *cf. Lebron v. Sec. of Florida Dept. of Children and Families*, 772 F.3d 1352, 1364 (11th Cir. 2014) ("Of course, citizens do not abandon all hope of privacy by applying for government assistance. By virtue of poverty, TANF applicants are not stripped of their legitimate expectations of privacy").

P100 enforcement also harms applicants by forcing them to remain home and risk missing interviews, school, and other obligations, substantially impairing their ability to seek work or education and care for their children. CT 103 ¶ 38. P100 thus undermines "the goal of the CalWORKs scheme," which "is to help parents to become self-supporting," given that "CalWORKs requires, wherever possible, that the parent seek or prepare for employment." *Barron v. Superior Court*, 173 Cal. App. 4th 293, 300 (2009). Collectively, the various forms of suffering imposed by P100 serve only to "contravene[] the policy of encouraging independence and self-respect among indigent workers." *County of Los Angeles v. Workers' Comp. Appeals Bd.*, 30 Cal. 3d 391, 402 (1981).

Recognizing the adverse impact caused by P100 would not invite the kinds of frivolous disparate impact litigation suggested by County. CT 74: 16-19, 77: 13-24. 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. CT 78:2-9. P100 causes a material harm different in kind and principle 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.

Likewise, the stigmatic and dignitary harm caused by P100 is qualitatively different from any disruption caused by the County's example of sitting for the bar exam. CT 130:8-22. 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. The bar exam does not treat candidates as if they are suspected criminals by forcing them to submit to law enforcement interrogation in their homes without any reason to suspect wrongdoing.[3] Neither do other forms of social benefit or subsidy programs—for example, the mortgage interest deduction. Law students and homeowners would undoubtedly experience stigmatizing harm if they were required to submit to law enforcement inspections of their homes in the absence of any reason to suspect wrongdoing as a condition of sitting for the bar exam or claiming the mortgage interest deduction. The same is true for low-income people applying for CalWORKs benefits.

The harm of P100 is made apparent when considered against the historical stigmatization of low-income people, who have been subject to the kind of "social opprobrium which attached to indigents who did not work . . . [or to a] disfavored status [that] was justified by the fact of their

[3] Even if a law student were able to somehow make out a prima facie case for disparate impact discrimination for bar exam conditions, the state bar association would be able to rebut the claim by explaining the need for the practice. *Darensburg*, 636 F.3d at 519. Providing defendants "leeway to state and explain the valid interest their policies serve" is "[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited." *Inclusive Communities*, 135 S. Ct. at 2512.

indigency." *County of Los Angeles*, 30 Cal. 3d at 400. In furthering such opprobrium, P100 imposes burdens far beyond an ordinary application process.

The trial court's erroneous ruling to the contrary would insulate any application requirement that does not result in denial of benefits from disparate impact challenges, no matter how invasive or harmful the requirement might be. CT 202. Imposing this limitation on disparate impact law would mean, for example, that the county would not create an actionable adverse impact under section 11135 even if it required all CalWORKs applicants to wear distinctive red jumpsuits in public, or if it required CalFRESH recipients to sing and dance for the EBT cards used to purchase ingredients for their suppers. These requirements would serve no purpose other than to humiliate and shame, and would almost certainly create severe emotional trauma. To state that this kind of suffering is not an "adverse impact" is to empty the term of all meaning. This cannot be the law, and the Court should reverse the judgment for this reason alone.

3. Anti-Discrimination Legislation Was Designed to Prevent Precisely The Types of Dignitary and Stigmatic Injury Inflicted by P100.

In fact, the kinds of suffering imposed by P100 are paradigmatic examples of the injuries caused by discrimination. Recognition of stigmatic injury and dignitary harm is foundational to anti-discrimination law. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (the "fundamental object [of Title II of the Civil Rights Act of 1964] was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments … That stigmatizing injury … is surely felt as strongly by persons suffering discrimination on the basis of their sex as by

those treated differently because of their race.") (citation and quotation marks omitted); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (addressing Congressional concern with "the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex" as reason for enacting Title VII of the Civil Rights Act of 1964); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (the Age Discrimination in Employment Act of 1967 was based on Congressional concern with the effect of "stigmatizing stereotypes" on the elderly); *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 19 (1971) ("the stigma of inferiority" imposed on women, Blacks, aliens "and the poor" is a basis to consider sex as a suspect classification in employment discrimination analysis); *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (segregated public education violates Equal Protection Clause of Fourteenth Amendment in part due to the "feeling of inferiority as to their status" it creates for Black children).[4] The centrality of dignitary harm to anti-discrimination law should erase any doubt that such harm constitutes an adverse impact.

Indeed, courts have regularly recognized dignitary harms and the imposition of stigma as legally cognizable injuries. *See, e.g.*, *Allen v.*

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[4] Although the cases addressed in this section involved disparate treatment, the principle that anti-discrimination law must recognize stigmatic and dignitary injury applies to both disparate treatment and disparate impact causes of action. Harm is harm, whether intentional or not. The trial court erred in its blanket determination that "disparate treatment cases … are not applicable to this disparate impact case," CT 179, because disparate impact and disparate treatment theories are intended to address the same fundamental problems of discrimination. *See Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 987 (1988) ("[T]he necessary premise of the disparate impact approach is that some … practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.").

Wright, 468 U.S. 737, 755 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) ("the stigmatizing injury often caused by racial discrimination …[is a] sort of noneconomic injury …[that] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing."); *Griffin v. Dep't. of Lab. Fed. Credit Union*, 912 F.3d 649, 653 (4th Cir. 2019) ("Dignitary harms or stigmatic injuries, while not tangible, may be sufficiently concrete to constitute injury in fact") (quotation marks and brackets omitted) (citing *Allen v. Wright*, 468 U.S. at 754-55); *S.K. v. N. Allegheny Sch. Dist.*, 146 F. Supp. 3d 700, 715 (W.D. Pa. 2015) ("Claims of stigmatic injury are sufficiently concrete to confer article III standing to the extent the claimants are personally subject to discriminatory treatment.") (citation and quotation marks omitted); *Smith v. City of Cleveland Heights*, 760 F.2d 720, 722 (6th Cir. 1985) (finding a Black plaintiff had standing to pursue constitutional and statutory discrimination action based on claim that defendants' "steering policies stigmatize him as an inferior member of the community in which he lives … [and that] he is forced to interact on a daily basis within the Cleveland Heights community under the weight of this imposed badge of inferiority.").

In *City of Cleveland Heights*, the Sixth Circuit found standing "[g]iven the immediacy of the injury to [the plaintiff's] dignity and self-respect as a black citizen of Cleveland Heights." *Id*. at 724. Dignitary and stigmatic harm can support standing only because courts have recognized that assaults upon dignity and imposition of stigma are damaging injuries

demanding redress.[5] If courts can recognize this principle in the context of standing, there is no basis for turning a blind eye to it in the disparate impact discrimination context when determining whether P100—a policy imposing such injuries—creates an adverse impact on the affected population.

4. Disparate Impact Liability Is Needed to Root Out Discriminatory Government Policies That May Result From Unconscious Bias, Including Punitive and Degrading Welfare Programs Like P100.

Disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Communities*, 135 S. Ct. 2507 at 2511–12. "In this way disparate-impact liability may prevent" harmful effects of discrimination "that might otherwise result from covert and illicit stereotyping." *Id*. Disparate impact liability "also targets … unthinking, even if not malignant" discriminatory policies. *Ave. 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 503 (9th Cir. 2016). "In this way, disparate impact recognizes that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the

[5] Stigma is not only a primary concern of anti-discrimination law, but also a source of discrimination. *See* Martha Nussbaum, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 336 (2004) (addressing "forms of social behavior in which a dominant group subordinates and stigmatizes other groups … Because they and their bodies are found disgusting, members of the subordinated group typically experience various forms of discrimination."). This is especially true for single, poor Black mothers and other women of color receiving CalWORKs or TANF benefits who have been stereotyped as "welfare queens" and "presumed to be lazy, baby-making system abusers in violation of the country's most cherished political values." Ange-Marie Hancock, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 62 (2004).

perversity of a willful scheme." *Id*. (citation, brackets and quotation marks omitted). Disparate impact liability may be the only effective method of challenging the discriminatory adverse impact of P100, which may well have been influenced by unconscious biases and illicit stereotyping of people of color and women-headed families. Even if the harm inflicted by P100 was merely thoughtless and not willfully perverse at its inception, the program has created precisely the kind of disaster for individual rights and the public interest that disparate impact liability was designed to prevent.

P100 is one of a series of intrusive, degrading, and punitive welfare programs enacted in the wake of the passage of the 1996 federal legislation titled the "Personal Responsibility and Work Opportunity Act." Collectively, these "policies and practices … burdened welfare receipt with criminality, policed the everyday lives of poor families, and wove the criminal justice system into the welfare system, often entangling poor families in the process."[6] The policies were all created in a media and political climate in which racist and sexist stereotypes of welfare recipients were widely disseminated.

Chief among these stereotypes is the Black "welfare queen," best understood as a figure defined by a "sense of entitlement and irrepressible procreative instincts . . . typically represented as a woman whose irresponsible choice to have children out of wedlock has caused her to turn to the state for financial support."[7] Numerous scholars have examined the

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[6] Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 665 (2009)

[7] Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 261 (2016)

ways in which invocation of this stereotype served "to demonize poor women of color in need of state assistance."[8] *Id*. The stereotype has been recognized in the employment context as an example of "dog-whistle racism" and part of a category of "facially non-discriminatory terms [that] can invoke racist concepts that are already planted in the public consciousness." *Lloyd v. Holder*, No. 11 CIV. 3154 AT, 2013 WL 6667531, at *9 (S.D.N.Y. Dec. 17, 2013).

Indeed, the figure of the "welfare queen" is so deeply rooted in American culture that it continues to shape understandings of race, gender, and poverty even when it is not directly addressed. It has "become so firmly a part of the American cultural landscape that . . . parties structure everyday

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[8] There is also a wealth of scholarly research debunking welfare stereotypes. *See, e.g.*, Risa E. Kaufman, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 311 (1997) (noting that "although a disproportionate percentage of African-American women receive welfare, blacks and whites receive welfare in approximately equal numbers. Furthermore, the number of children born to an average welfare recipient is no larger than the number born to her non-recipient counterpart. Perhaps most importantly, social science research indicates that receiving welfare does not motivate recipients to get pregnant."); Camille Gear Rich, *Reclaiming the Welfare Queen, supra* n.6 at 265-66 (finding "restrictions on welfare benefits that prevented poor mothers from purchasing cruises, theme park tickets, tattoos, nail salon services, and other non-essentials … particularly ironic given that the standard welfare allotment is barely sufficient to support a family's basic food and housing requirements in most jurisdictions … [and] that there is no evidence that substantial state or federal dollars were going to non-essential items.); Nicki Lisa Cole, *9 Surprising Facts About Welfare Recipients*, ThoughtCo., September 28, 2019, https://www.thoughtco.com/who-really-receives-welfare-4126592 (last accessed November 25, 2019) (noting, *inter alia*, that most welfare recipients are children, that many are employed, and that most recipients of government assistance programs are white).

conversations, political arguments, and government programs in ways that hew to the implicit citizenship norms imposed by the construct without ever explicitly mentioning" it.[9] The stereotype "has become a trigger for disgust in public debate . . . used to stigmatize and distance recipients of public assistance from other Americans for decades."[10]

But as powerful as the "welfare queen" stereotype is, it merely marks the consolidation of racist and sexist stereotypes that have been central to welfare discourse and policy for generations. There is a "long history of … politicians comparing people who receive government benefits to animals, including wolves, alligators, brood mares, monkeys, and mules."[11] Indeed, welfare has been so firmly linked with race in American culture, and with Blacks in particular, that "perceptions of blacks … play the dominant role in shaping the public's attitudes towards welfare."[12] Welfare policy is so inextricably intertwined with stereotypes of race and gender that it has become a "'race-coded' topic that evokes racial imagery and attitudes even when racial minorities are not explicitly mentioned."[13]

Disparate impact liability is thus a necessary tool for challenging the discriminatory effects of punitive and degrading welfare policies that are likely to have been influenced by racist and sexist stereotypes and beliefs

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[9] Camille Gear Rich, *Reclaiming the Welfare Queen*, 25 S. CAL. INTERDISC. L.J. at 266-67.
[10] *Id.* at 277 (citing Ange-Marie Hancock, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 56 (2004)).
[11] Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 UC IRVINE L. REV. 297, 331 (2013).
[12] Martin Gilens, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTI POVERTY POLICY 71 (1999).
[13] *Id*. at 67.

that may have never been openly expressed or even consciously held—disparate impact liability may be the only way to challenge their discriminatory effects. *See Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 990 (1988) (disparate impact analysis is necessary because "even if one assumed that any [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain.").

As an example of an economic policy "regulating the poor," P100 is "fraught with stereotypes about low-income people, particularly low-income mothers of color."[14] It is one of a series of "state policies and practices that involve the stigmatization, surveillance, and regulation of the poor [and] that assume a latent criminality among the poor."[15] Law professor Kaaryn Gustafson writes about P100 as a prime example of a "degradation ceremony."[16] Degradation ceremonies are communicative practices that transform "the public identity of an actor . . . into something looked on as lower in the local scheme of social types."[17] They are "policies and law-centered media spectacles that make examples of low-income women and that communicate to the public that low-income mothers of color are inferior and crime-prone."[18] Like fingerprinting of welfare applicants, a practice that has been abandoned in California, P100

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[14] Kaaryn Gustafson, *Degradation Ceremonies*, 3 UC IRVINE L. REV. at 300.
[15] *Id*.
[16] *Id*. at 306-07.
[17] Harold Garfinkel, quoted in *id*.
[18] *Id*. at 300.

"is a form of subjection that . . . makes poverty itself into a status crime that requires the basic sacrifice of dignity and privacy."[19]

Plaintiffs do not allege an intentional discrimination claim. Nor do they need to do so to state a claim under section 11135. But the saturation of racist and sexist stereotypes in discussions of welfare around the country when P100 was enacted make it likely that stereotypes played some role in the development of the program, if only in an "unthinking" way. *City of Yuma, Ariz.*, 818 F.3d at 503. Disparate impact liability is premised upon the understanding that it is important to prevent protected groups from disproportionately suffering the adverse effects of a harmful policy even when the policy was not intended to discriminate. *Id*.

What ultimately matters is that "a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices." *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 990 (1988). This is exactly the case with P100. The prevalence of racist and sexist stereotypes when the policy was created makes it highly likely that the program was influenced by either conscious or unconscious bias. But whether P100 was based on racist and sexist stereotypes or not, the effects of the policy would be indistinguishable. In either case, the program subjects CalWORKs applicants to a stigmatizing, intrusive, and humiliating "degradation ceremony." That harm is more than

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[19] Camille Gear Rich, *Reclaiming the Welfare Queen*, 25 S. CAL. INTERDISC. L.J. at 275; *see also* California Department of Social Services, *All County Letter No. 18-68*, June 7, 2018 ("the use of the Statewide Fingerprint Imaging System (SFIS) as a requirement for issuing California Work Opportunity and Responsibility to Kids (CalWORKs) benefits shall be discontinued effective July 1, 2018"), http://www.cdss.ca.gov/Portals/9/ACL/2018/18-68.pdf?ver=2018-06-07-143855-267, last accessed, November 10, 2019.

sufficient to state a cognizable adverse impact, and the trial court erred in holding otherwise.

B. The Harms of P100 Disproportionately Fall on Classes Protected by Section 11135.

As pleaded in the First Amended Complaint, the harms of P100 fall disproportionately on protected classes, which is evident by comparing the CalWORKs applicants subject to home searches under P100 with the general population for whose benefit CalWORKs exists.

A disparate impact claim requires "a comparison between two groups—those affected and those unaffected by the facially neutral policy." *Darensburg,* 636 F.3d at 519. For convenience, this brief uses the terms "impacted population" and "comparison population." Here, the impacted population is applicants for CalWORKs who are not initially denied as obviously ineligible, for whom CalWORKs recipients are a "reasonable proxy," *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 927–28 (9th Cir. 1982), which the County does not dispute.

The proper comparison population depends on the facts of each case. *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mt. Holly*, 658 F.3d 375, 382 (3d Cir. 2011). In this case, the proper comparison is to the County's general population because CalWORKs provides a safety net intended for the entire community. *Goldberg,* 397 U.S. at 264–65 (welfare benefits "foster the dignity and well-being of all persons"). Where a safety net benefit contingent on financial eligibility is at issue, the comparison population must include the entire community, any of whom may potentially participate, though some have not yet needed to do so. *See, e.g.*, *Huntington Branch, N.A.A.C.P. 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.").

Disparate impact precedent confirms that when a challenged policy or practice involves a community benefit contingent on financial eligibility in which anyone might potentially participate, such as subsidized housing, the appropriate comparison group is the general population. *Jackson v. Okaloosa County*, 21 F.3d 1531, 1534, 1543 (11th Cir. 1994) (holding exclusion of public housing from specified area "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 "the Okaloosa County population is 8% African–American"); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) (holding refusal to permit construction of 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").

Similarly, in housing cases generally, the general population is often the proper comparison because housing is a market in which the entire community might participate. *See Mt. Holly*, 658 F.3d at 382 (finding disparate impact based on comparison between population of neighborhood impacted by housing demolition and general population of township); *Green v. Sunpointe Associates, Ltd*., C96-1542C, 1997 WL 1526484, at *6 (W.D. Wash. May 12, 1997) (noting in housing cases "courts have often relied on comparisons of the presence of protected class members in a

particular group impacted by a facially neutral policy with the presence of those class members in the general population"); *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."). Because CalWORKs is a program in which the entire community might participate, the County's general population is a proper comparison in this case.

Other cases do not use the general population as a comparison group, but the reasons for using a different comparison group are specific to the facts of those cases—facts that are not found here. In those cases, a narrower comparison group is appropriate because the general population may not participate in the relevant market or program. For example, cases about access to employment typically compare "the composition of the successful applicants" to "the applicant pool or relevant labor market from which the positions at issue are filled," because only people in the labor market participate in employment. *Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002). An even narrower group may be the proper comparison when "special skills are required for a job . . . [and] the proxy pool must be that of the local labor force possessing the requisite skills." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482–83 (9th Cir. 1983). In this case, however, access to employment and special skills are not at issue. Indeed, anyone may potentially seek protection in the safety net CalWORKs provides for the entire community. Accordingly, this line of cases does not apply here.

The trial court did not dispute that on the facts pleaded, the disparities between the impacted and comparison populations are significant. CT 105 ¶¶ 48–52. Instead, while the order sustaining the

demurrer states that the "court does not reach" the "disparate impact" issue, and does not address disproportionality explicitly, the court appeared to have disagreed with the comparison population. CT 191. It indicated that it was necessary to allege that the "consequences [of P100] affect a protected group of CalWORKs applications/recipients more than others." *Id*. This narrow conception of the appropriate comparison population incorrectly carves the impacted population into subgroups and compares those groups to each other. Effectively, the trial court position requires that the impacted population be compared to itself.

The error in this requirement becomes clear by considering what would happen if the entire CalWORKs applicant population was composed only of people of color. In that case, under the trial court's ruling, there would simply be no population to compare the affected population to—all applicants would be members of a protected group, so there would be no way to establish that members of a protected group were affected "more than others." *Id*. There would be no way to complete the disparate impact analysis. This cannot be right. More broadly, a requirement that the impacted population be compared to itself would improperly immunize defendants from disparate impact claims brought by low-income people and violate the public policy that section 11135 "shall not be interpreted in a manner that would frustrate its purpose." Govt. Code § 11139.

The trial court's assessment is directly refuted by a leading disparate impact case arising from a policy impacting a neighborhood "occupied predominantly by low-income residents" who were disproportionately African-American and Hispanic. *Mt. Holly*, 658 F.3d at 377. In that case, the court rejected the position "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 compared the neighborhood to the local general population. *Id*. at 382. The court in *Mt. Holly* thus rejected the position that a low-income population should be compared to itself.

The fallacy of the trial court's position is further illustrated by a hypothetical in which a city refused to allow subsidized housing for low-income residents, a group with a greater proportion of black people than in the city's general population. In that circumstance, the County's argument in this case would immunize the hypothetical city from disparate impact liability, because low-income black residents would not be denied housing or face a "significantly harsher burden" than low-income white residents. CT 191. That is not the law. For example, a city's "refusal to permit construction" of subsidized housing for low-income persons "had a greater adverse impact on minorities," because two-thirds of "the persons who would benefit from the state-assisted housing" were minorities in the general population. *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988). The challenged policy had "a racially discriminatory effect," because "[t]he failure to build the projects had twice the adverse impact on minorities as it had on whites." *Id.* (citing *Arlington Heights*, 558 F.2d at 1288). Again, the case law rejects the trial court's attempt to compare the low-income impacted population to itself.

The trial court incorrectly relied on *Darensburg v. Metropolitan Transp. Comm'n* to support its holding on this point in sustaining the County's demurrer to the original complaint, which the trial court apparently relied on in sustaining the demurrer to the amended complaint. CT 94. This case does not support the trial court's ruling, as the proper

comparison population was not at issue. The *Darensburg* court did not reach the issue of comparison population because it found that plaintiffs did not prove the antecedent element that the challenged policy caused harm to the impacted population. 636 F.3d at 522.

The *Darensburg* plaintiffs challenged a regional transit plan in which "fewer bus expansion projects than rail expansion projects were included" and "bus projects received a lesser percentage of requested funding than did rail projects. *Darensburg*, 636 F.3d at 520. To prove harm to minorities, plaintiffs relied on "overall regional ridership statistics for existing bus and rail service," but those statistics said "nothing about the particular ridership of the planned expansions." *Id.* As the court noted, to favor rail over bus expansion might favor minorities because a given "rail expansion project" might benefit "minority riders more than white riders by serving areas with high concentrations of minorities," and "a particular bus project" might "serve a largely white ridership." *Id*.

It was thus "entirely plausible" that a transit plan "with a heavy emphasis on rail could significantly benefit Bay Area minorities. However, a court simply could not determine from Plaintiffs' statistical evidence whether the projects in the [plan] will benefit or harm . . . minority transit riders." *Id.* at 521. Therefore, *Darensburg* was a case about failure to prove the threshold element of harm, and it did not reach the subsequent question of comparison population. Here, by contrast, plaintiffs have pleaded facts showing that P100 causes cognizable harm to the impacted population, and the proper comparison is the general population because CalWORKs exists for the entire community.

Other cases cited by the County, CT 121-139, are likewise inapplicable. In *Frank v. County of Los Angeles*, 149 Cal. App. 4th 805

(2007), the court did not address the proper comparison population. Instead, the court rejected a disparate impact claim arising from differences in salaries and benefits between two departments because no "County policies and procedures deterred minorities from applying to, and being hired by" the better-paid department. *Id*. at 822. Accordingly, the plaintiffs failed to show any practice that caused the disparity, unlike in this case, and the court did not reach the issue of identifying the comparison population.

In *City & County of San Francisco v. Fair Employment & Hous. Com.*, 191 Cal. App. 3d 976 (1987), the issue was whether a fire department's "promotional examination" had a disparate impact on black fire department employees. *Id.* at 980. Because 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. *Id.* at 987; *see also Stout*, 276 F.3d at 1123 ("In the context of promotions, the appropriate comparison is between the composition of candidates seeking promotion and the composition of those actually promoted"). 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.

In *Smith v. Xerox Corp*., 196 F.3d 358 (2d Cir. 1999), the issue was whether a company-wide layoff had a disparate impact based on age or gender. Because the case involved only layoffs from a single company, the proper comparison population was "workers subject to termination" in that company. *Id.* at 368. Here, by contrast, because CalWORKs provides a safety net for the entire community, the proper comparison is the County's general population.

C. The Complaint States a Taxpayer Claim for Illegal Governmental Activity, Because a Claim for Violation of Section 11135 Does Not Require Violation of Another Law.

Plaintiffs properly bring a taxpayer claim to enjoin illegal governmental activity. A taxpayer may obtain an injunction to prevent "any illegal expenditure of . . . the estate, funds, or other property of a county . . . ." Code Civ. Proc. § 526a. "No showing of special damage to a particular taxpayer is required as a requisite for bringing a taxpayer suit [under section 526a]. Rather, taxpayer suits provide a general citizen remedy for controlling illegal governmental activity." *County of Santa Clara v. Superior Court*, 171 Cal. App. 4th 119, 129 (2009).

Plaintiffs state a taxpayer claim to enjoin P100 because the facts pleaded show P100 violates section 11135 and its implementing regulations. The First Amended Complaint alleges that P100 unlawfully causes "a disproportionate adverse effect on the basis of race, color, national origin, ethnic group identification, or sex." CT 106 ¶ 58. The trial court therefore erred in finding "the First Amended Complaint fails to allege facts sufficient to state a CCP § 526a cause of action based on an 'illegal' expenditure." CT 202.

At oral argument, the trial court suggested a freestanding legal violation such as destruction of property is necessary to state a disparate impact claim in the absence of a denial of benefits. As the court said, "I cannot get past the lack of harm in the policy itself . . . you're not alleging that they now kicked the doors down or do something worse." Reporter's Transcript ("RT") II, 33:14-21. That premise is mistaken.

P100 is not immune from review under section 11135 merely because it does not violate some other law. As the Legislature has

confirmed, "[t]he prohibitions and sanctions imposed by this article," including section 11135, "are in addition to any other prohibitions and sanctions imposed by law." Govt. Code § 11139. Section 11135 therefore covers programs or activities regardless of whether they violate other laws. "Any other conclusion would deprive" section 11135 "of significance, contrary to the principle of statutory construction that interpretations which render any part of a statute superfluous are to be avoided." *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1207 (2006). Accordingly, Plaintiffs state a taxpayer claim that P100 violates section 11135 regardless of whether it complies with other laws.

In sustaining the demurrer, the trial court incorrectly relied on the Ninth Circuit's determination in *Sanchez* that P100 does not involve "search" under the Fourth Amendment or that any such "search" is "reasonable." CT 202; *see also* RT II 3:14-21 (trial court explaining "I cannot get past the lack of harm in the policy itself . . . the policy is they go and – you could characterize it as some sort of home invasion . . . and the *Sanchez* case says it was okay to do that."). But *Sanchez* does not immunize P100 from disparate impact review.

Sanchez was a different case, with different parties that addressed different issues and has no preclusive effect on this case. The *Sanchez* court held that P100 did not violate "the United States Constitution, the California Constitution, or California welfare regulations," but it neither addressed nor decided whether P100 violates state disparate impact law as

embodied in section 11135.[20] 464 F.3d at 918. *Sanchez* addressed only claims under the Fourth Amendment, Article I, sections 1 and 13 of the California Constitution, and a regulation prohibiting "[m]ass or indiscriminate home visits" in the course of "for-cause investigations." *Id.* at 931. To say that P100 does not violate those provisions does not mean it complies with section 11135, which requires a different analysis. For example, the *Sanchez* court did not consider whether P100 caused disproportionate adverse impacts, whether the County could have justified those impacts under disparate impact law, or whether the County's interests could have been served by a less discriminatory alternative. In conducting an ad hoc balancing of the "intrusion on the individual's Fourth Amendment interests" against the "promotion of legitimate governmental interests," *id*. at 926, the *Sanchez* court did not apply the rigorous three-step test for disparate impact analysis under section 11135. Therefore, the *Sanchez* court's observations do not support any finding as a matter of law that P100 now complies with section 11135, certainly not on currently pleaded facts thirteen years after *Sanchez*.

[20] Likewise, the decision in *Smith v. Los Angeles County Bd. of Supervisors*, 101 Cal. App. 4th 1104 (2002), which discussed the Los Angeles County analog to P100, did not address or decide any issues under section 11135.

CONCLUSION

For the foregoing reasons, plaintiffs and appellants respectfully submit that this Court should reverse the judgment for the County and remand the case for further proceedings.

Dated: December 12, 2019

By:

/s/ Jonathan Markovitz

Jonathan Markovitz
Attorney for Plaintiff-Appellants

CERTIFICATE OF COMPLIANCE

I, Jonathan Markovitz, counsel to Luz Villafana, et al., certify that the foregoing brief is prepared in proportionally spaced Times New Roman 13 point type and, based on the word count of the word processing system used to prepare the petition, the petition is 10,424 words long, excluding parts excluded by applicable rules.

/s/ Jonathan Markovitz
Jonathan Markovitz

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 12390 El Camino Real, San Diego, CA 92130.

On December 12, 2019, I served true copies of the following document(s) described as **APPELLANTS' OPENING BRIEF**on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 12, 2019, at San Diego, California.

/s/ Elizabeth Wilton
Elizabeth Wilton