No. A165963

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

ANALILIA JIMENEZ PEREA, *et al.*

Plaintiffs and Appellants,

v.

CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *et al.*,

Defendants and Respondents.

On Appeal from the San Francisco County Superior Court
Superior Court Case No. RG17867262
The Honorable Winifred Y. Smith and Evelio M. Grillo

APPLICATION OF IMPACT FUND *et al.* FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS; [PROPOSED] BRIEF

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APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF

Pursuant to California Rule of Court 8.200(c), the Impact Fund respectfully requests permission to file an amici curiae brief in support of Plaintiffs-Appellants Analilia Jimenez Perea, *et al*. The proposed brief is lodged concurrently with this application.[1]

The Impact Fund and its fellow amici are California nonprofit legal services organizations that litigate cases in the public interest. Many receive funding from the California State Bar to serve indigent Californians and all represent vulnerable communities seeking equal access to and equal treatment by state-funded programs, including those who rely on Medi-Cal physician services to obtain basic health care for themselves and their families.

The disparate impact analysis is critical to robust enforcement of Government Code section 11135 and the Legislature's vision of fair and equitable state-funded programs that serve all Californians, including the Medi-Cal program. Amici seek to appear before this Court to describe how the Superior Court's restrictive disparate impact analysis frustrates the goal of section 11135 to eradicate discrimination in government-funded

[1] Pursuant to California Rule of Court 8.200(c)(3), amici curiae certify that no party or party counsel authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity contributed money that was intended to fund the preparation or submission of the brief.

programs, runs counter to the statute's expansive legislative history, and impedes the goal of Welfare and Institutions Code section 14000 to provide much-needed health care to the most economically vulnerable Californians. Finally, the Superior Court's narrow analysis departs from the flexible, fact-specific approach taken by courts across the country when analyzing disparate impact claims under other antidiscrimination statutes.

STATEMENTS OF INTEREST OF PROPOSED AMICI

The **Impact Fund** is a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in major civil rights cases brought under federal, state, and local laws, including cases challenging employment discrimination; unequal treatment of people of color, people with disabilities, and LGBTQ people; and limitations on access to justice. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

Asian Americans Advancing Justice—Asian Law Caucus (Asian Law Caucus) is the oldest legal and civil rights organization in the country serving Asian and Pacific-Islander communities. Asian Law Caucus focuses on racial and economic justice for low-income and otherwise

marginalized groups and relies on anti-discrimination laws such as Government Code section 11135 to build a stronger and more inclusive society.

California Rural Legal Assistance, Inc. (CRLA) was founded in 1966 to be a world-class nonprofit law firm for those who cannot afford to pay a private attorney. Through 17 offices statewide, CRLA provides no-cost legal services and education to tens of thousands of rural, low-income Californians and litigates cases that benefit even more people. A key component of our advocacy is to address often insurmountable linguistic barriers faced by our clients, who use a variety of Indigenous languages of Latin America, Punjabi, Arabic, Hmong, Spanish, American Sign Language, and many other languages used across rural California. CRLA has filed multiple Government Code section 11135 complaints against agencies and health care providers who violate language access laws or engage in unlawful national origin discrimination.

Founded in 1969, **Centro Legal de la Raza** is a legal services agency protecting and advancing the rights of low-income and immigrant communities through legal representation, education, and advocacy. By combining quality legal services with know-your-rights education and youth development, Centro Legal ensures access to justice for thousands of individuals throughout Northern and Central California.

Disability Rights Advocates (DRA) is a non-profit public interest law firm that specializes in class action civil rights litigation on behalf of persons with disabilities throughout the United States. As one of the leading public interest disability rights legal organizations in the country, DRA regularly brings successful disparate impact cases on behalf of people with disabilities including using California Government Code section 11135 to do so. As part of its mission, DRA also regularly defends the right of all people with all kinds of disabilities access medical treatment and care.

Disability Rights California (DRC) is the non-profit Protection & Advocacy agency mandated under state and federal law to advance the legal rights of Californians with disabilities. DRC was established in 1978 and is the largest disability rights legal advocacy organization in the nation. In 2022 alone, DRC assisted more than 20,000 Californians with disabilities. As part of its mission, DRC works to ensure that people with disabilities have access to essential healthcare services and supports, with a particular expertise in access to Medicaid services provided in the home and community.

The **Disability Rights Education & Defense Fund (DREDF)**, based in Berkeley, California, is a national cross-disability law and policy center that protects and advances the civil and human rights of people with disabilities through legal advocacy, training, education, and development of legislation and public policy. Founded in 1979 by people with disabilities

and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. For over three decades, DREDF has received funding from the California Legal Services Trust Fund (IOLTA) Program as a Support Center providing consultation, information, training, and representation services to legal services offices throughout the state as to disability civil rights law issues. In the healthcare arena, we are committed to increasing accessible and equally effective healthcare delivery for all people with disabilities and eliminating persistent health disparities that affect the length and quality of their lives.

The **Equal Justice Society (EJS)** is transforming the nation's consciousness on race through law, social science, and the arts. EJS is a national civil rights organization focused on restoring constitutional safeguards against discrimination, combatting anti-Black and other forms of racism, and promoting race equity.

Law Foundation of Silicon Valley is a nonprofit corporation based in San José, California, focused on advancing the rights of under-represented individuals and families in Santa Clara County through legal services, strategic advocacy, and educational outreach. The Law Foundation of Silicon Valley serves more than 10,000 low-income individuals and families each year. Part of the Law Foundation's mission includes protecting the civil rights of individuals and groups in Santa Clara

County who are underrepresented in the civil justice system through class action and impact litigation.

Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCRSF) works to advance, protect, and promote the legal rights of communities of color and low-income persons, immigrants, and refugees. Assisted by pro bono attorneys, LCCRSF provides free legal assistance and representation to individuals on civil legal matters through direct services, impact litigation, and policy advocacy. A substantial portion of our racial and economic justice work focuses on protecting the rights and wealth of unhoused and low-income people of color. This includes regular class action litigation for damages and injunctive relief in both state and federal courts.

Legal Aid at Work (formerly known as the Legal Aid Society – Employment Law Center) is a San Francisco-based, non-profit public interest law firm that has for decades advocated on behalf of the rights of members of historically underrepresented communities, including persons of color, women, immigrants, individuals with disabilities, and the working poor. Founded in 1916 as the first legal services organization west of the Mississippi, Legal Aid at Work frequently appears in state and federal courts to promote the interests of low-wage workers. Legal Aid at Work is recognized for its expertise in the interpretation of state and federal civil

rights statutes, including the Americans with Disabilities Act, the Fair Employment and Housing Act, and the Unruh Civil Rights Act.

Public Counsel is a nonprofit public interest law firm dedicated to advancing civil rights and racial and economic justice, as well as to amplifying the power of our clients through comprehensive legal advocacy. Founded on and strengthened by a pro bono legal service model, our staff and volunteers seek justice through direct legal services, promote healthy and resilient communities through education and outreach, and support community-led efforts to transform unjust systems through litigation and policy advocacy in and beyond Los Angeles. Public Counsel regularly brings impact litigation to advance racial and economic justice using disparate impact causes of action under Government Code section 11135.

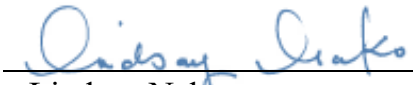
The **Public Interest Law Project (PILP)** is a California non-profit corporation providing advocacy support, technical assistance, and training to local legal services offices throughout California on issues related to housing, government benefits, civil rights, and community redevelopment. PILP is frequently called on to assist in litigation directed at obtaining and protecting significant changes in governmental policies, laws, and actions.

The **Western Center on Law and Poverty**, for more than 50 years, has represented low-income Californians in the courts and in the Capital, particularly in the areas of health, welfare, housing, and access to justice. Ensuring equity for Medi-Cal beneficiaries has been a particular focus of

the Western Center. (See, e.g., *Clark v. Kizer* (E.D. Cal. 1990) 758 F.Supp. 572 [inadequate reimbursement for dentists violated equal treatment provisions of Medicaid Act]; *Conlan v. Shewry* (2005) 131 Cal.App.4th 1354 [failure to ensure reimbursement of beneficiaries' out-of-pocket expenses violated the comparability provisions of the Medicaid Act].) The trial court's overly narrow interpretation of Government Code section 11135 jeopardizes the equitable treatment of Medi-Cal recipients.

Amici submit the following brief to address the error in the Superior Court's disparate impact analysis and urge the Court to preserve the ability of Californians to effectively challenge disparate impact discrimination in state-funded programs through section 11135.

Dated: August 3, 2022



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BRIEF OF AMICI CURIAE IMPACT FUND *et al.*

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INTRODUCTION

Medi-Cal's basic health plan ("physician services") provides critical emergency, maternity and prenatal, pediatric, psychiatric, and chronic disease management services to low-income families, seniors, people with disabilities, children in foster care, and pregnant women, as well as single adults with incomes below 138 percent of the federal poverty level.[2] Recipients are disproportionately people of color, with growing Latine[3] enrollment since the 1980s. (Appellants' Opening Brief ["AOB"], pp. 18-19.) Today, Medi-Cal participants are 58 percent Latine, as compared to 39 percent of the overall state population. (*Id*. at p. 18.) Despite the growing need for physicians to provide physician services, the state's steady reduction in reimbursement rates has led many physicians to decline or give lower priority to patients with Medi-Cal coverage. (*Id*. at p. 20.) Consequently, low-income Latine participants are receiving substandard and segregated physician services. (*Id*. at p. 20-21.)

Plaintiffs Analilia Jimenez Perea *et al.* ("Perea") challenge Respondents California Department of Health Care Services *et al*. ("the

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[2] Department of Health Care Services, *Medi-Cal Eligibility & Covered California – FAQ*, <https://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/Medi-CalFAQs2014a.aspx#1> (last visited July 31, 2023).

[3] "Latine" is the gender-neutral alternative to "Latina" or "Latino." See Merriam-Webster Dict. Online, "Latine," <https://www.merriam-webster.com/dictionary/Latine> (last visited July 31, 2023).

Department") denial of meaningful access to necessary health care due to the low reimbursement rates for physician services in California's Medi-Cal program. Because Medi-Cal participants using physician services are predominantly Latine and the reimbursement rates set by the State for these services are lower than those in settings serving whiter populations, Perea alleges that the reimbursement rate scale is discriminatory and violates Government Code section 11135.

As described in Appellants' Opening and Reply briefs, Perea's *prima facie* showing of discrimination may be met by comparing the current Medi-Cal reimbursement rates for physician services with reimbursement rates for any of three other populations: (1) current Medi-Cal long-term care participants; (2) past Medi-Cal physician services participants; or (3) Californians currently insured by Medicare and commercial health care plans. These three comparator groups all contain higher percentages of white participants and receive higher reimbursement rates with a correspondingly higher quality of health care.

Amici write separately because, in rejecting these three comparator groups, the trial court adopted a dangerously narrow view of disparate impact: that the *prima facie* showing of discrimination requires identifying a better-off comparator group within the exact same population of people affected by the exact same policy at the exact same point in time. The experience of Amici representing marginalized individuals and

communities, many of whom belong to one or more groups protected by section 11135, demonstrates that the fact-specific and flexible approach to identifying relevant comparators applied by previous courts is appropriate and necessary to address systemic discrimination. The gravamen of a disparate impact claim lies in the discriminatory *impact* resulting from seemingly benign state action, which can present in myriad insidious ways and therefore may be revealed through a variety of statistical comparisons.

As discussed further below, the overly narrow inquiry adopted by the trial court in its 2022 Order frustrates the broad remedial purpose of Government Code section 11135 to eradicate discrimination in state-funded programs; ignores the directive of Welfare and Institutions Code section 14000 to provide "health care in the same manner employed by the public generally"; and departs from commonly accepted principles of disparate impact analysis implemented by courts across the country. The trial court's analysis inhibits necessary enforcement of section 11135 and should be reversed.

ARGUMENT

I. The Superior Court Erred by Adopting an Unduly Narrow Interpretation of Disparate Impact.

At issue on appeal are the two orders in which the trial court dismissed Perea's disparate impact claims on the basis that Perea failed to identify appropriate comparators. (AOB at pp. 22-26; Order Sustaining Demurrer with Leave to Amend (September 21, 2018) ["2018 Order"], Appellants' Appendix, Ex. 14, pp. AA357-380; Order Granting in Part Motion of DHCS for Judgment on the Pleadings (March 9, 2022) ["2022 Order"], Appellants' Appendix, Ex. 34, pp. AA909-928.)

In the 2018 Order sustaining the Department's demurrer to the first amended complaint,[4] the trial court (Smith, J.) held that participants in Medicare and commercial health insurance plans were an inappropriate comparator group because Welfare and Institutions Code section 14000(a)'s equal and integrated access requirement "is an aspirational goal and is not a requirement." (AA366.) On this basis, the court distinguished

[4] The first amended complaint asserted two disparate impact theories on behalf of current Medi-Cal physician services participants. First, it compared the inferior access of disproportionately Latine Medi-Cal physician services participants to that of the disproportionately white populations with other forms of coverage, primarily Medicare and commercial insurance. Second, it alleged that, as Medi-Cal physician services participants shifted over the decades to become increasingly Latine, the Department allowed the real value of physician reimbursement rates and associated access to doctors to decline precipitously. (AOB at pp. 22-23.)

caselaw allowing comparisons to other programs and activities under the federal Fair Housing Act and Americans with Disabilities Act. (AA367.)

The 2018 Order also sustained the Department's demurrer as to Perea's theory that the State decreased Medi-Cal benefits over time as Latine representation in the Medi-Cal program increased, providing leave to amend "to develop the legal basis and factual content of the claim." (AA371.) In dismissing the claim, the trial court acknowledged that a decrease in funding or operation of a program over time "could arguably be discrimination." (AA369.) It also recognized the flexibility of the discrimination analysis: "A person can prove a claim of discrimination without identifying a similarly situated person who was treated differently," and "[t]here is no bright line rule that there must be a similarly situated person or group." (AA369, AA370.)

In the 2022 Order, however, the trial court (Grillo, J.) cabined the disparate impact analysis to a single inquiry: "The proper disparate impact analysis starts with a single neutral policy and asks whether that policy has a disparate impact on groups subject to that same neutral policy." (AA917.) With regard to this case, the court concluded:

> In the disparate impact claim, the appropriate inquiry is whether DHCS has policies or practices in administering Medi-Cal that have a disparate impact on the Latinos in the Medi-Cal program when compared to non-Latinos in the Medi-Cal program.

(*Ibid.*) The court then held that Perea's disparate impact claim based on a comparison between the Medi-Cal basic health plan (physician services) and the Medi-Cal long term care plan, both administered by the Department of Health Care Services, could not be maintained because "[t]hey are two different plans" that "are not part of the same neutral policy or procedure." (AA918, AA919.) The comparison between current and former reimbursement rates for Medi-Cal physician services also could not be maintained because they "are not part of the same neutral policy or procedure." (AA919.)

Affirming the trial court's analysis will deny future courts the opportunity to fairly evaluate the many other contexts in which discrimination arises and will dramatically limit the ability of Californians to enforce section 11135's antidiscrimination mandate.

II. The Superior Court's Disparate Impact Analysis Should Permit Comparators Outside Those Currently Receiving Medi-Cal Physician Services Benefits.

A. Permitting Plaintiffs to Proceed with Their Identified Comparators Is Appropriate to Effectuate the Purpose of Government Code Section 11135.

The evolution of section 11135 demonstrates a legislative intent to broaden the impact of California's anti-discrimination law. Since enacting section 11135 in 1977, the California Legislature has continually expanded application of the statute and its corresponding regulations to eliminate "criteria or methods of administration that . . . have the *purpose or effect* of

subjecting a person to discrimination" from all state-funded programs. (Cal. Code Regs., tit. 2, § 11154, subd. (i)(2).) The trial court's disparate impact analysis conflicts with this statutory mandate. Identifying criteria and methods of program administration with discriminatory effect requires more analytic options than merely identifying two groups affected differently by a single neutral policy.

Contrary to the narrow approach taken by the trial court, throughout the history of section 11135, the state Legislature has implemented multiple amendments to identify a growing range of protected classes and prohibited activities. For example, in 1992, the Legislature amended the statute to incorporate broader coverage for persons with disabilities and expanded the definition of disabled persons. (See Stats. 1992, ch. 913, § 18.) In 2001, the Legislature amended section 11139 to confirm that section 11135's private right of action for equitable relief "shall be independent of any other rights and remedies." (Stats. 2001, ch. 708 [Assemb. Bill No. 677], § 2.) As part of the 2001 amendments, the Legislature also broadened the scope of section 11135 to include programs or activities that are "conducted, operated, or administered by the state or by any state agency." (*Id.* § 1) Through these amendments, the Legislature amended section 11135 to unambiguously apply to the State and eliminated procedural obstacles to its private enforcement. (See *id.* §§ 1-2.)

In 2002, the Legislature amended section 11135 to prohibit discrimination based upon race and national origin. (Stats. 2002, ch. 1102 [Sen. Bill No. 105].) Four years later, the Legislature added sexual orientation as a protected characteristic. (Stats. 2006, ch. 182 [Sen. Bill No. 1441], § 1.) Also in 2006, it added subsection (f), which prohibits discrimination based on the mere perception that a person has characteristics associated with a protected class or that a person is associated another who has or is perceived to have any of those characteristics. (*Ibid.*) Finally, in 2011, the Legislature expanded section 11135 to prohibit discrimination based upon "genetic information." (Sen. Bill No. 559 (2011-2012 Reg. Sess.) § 6.)

The Legislature has also acted to reverse narrow judicial interpretations of section 11135. For example, in 1992, in evaluating an individual claim of sex discrimination, the Court of Appeal "conclude[d] that section 11135 does not provide a private right of action." (*Arriaga v. Loma Linda University* (1992) 10 Cal.App.4th 1556, 1564.) In 1999, the Legislature passed the California Civil Rights Amendments, which among other things incorporated into section 11139 an explicit private right of action to enforce the provisions and regulations of the article.[5] (Stats. 1999,

[5] The California Civil Rights Amendments of 1999 stated: "This bill would make these provisions and regulations thereunder enforceable by a civil action for equitable relief." (Stats. 2001, ch. 708 [Assem. Bill No. 677],

ch. 591 [Assem. Bill No. 1670], § 3.) The Civil Rights Amendments also amended section 11139 to emphasize its liberal construction: "This article shall not be interpreted in a manner that would frustrate its purpose." (*Ibid.*)

In 2005, the Legislature again rejected a judicial interpretation that would have exempted the California State University system from the reach of section 11135. In an appeal challenging allegedly discriminatory admissions criteria to the California Polytechnic University at San Luis Obispo, the Court of Appeal determined that section 11135 did not apply to the California State University. (*Garcia v. California State University* (Aug. 15, 2005, B178329) review den. and opn. ordered nonpub. Nov. 16, 2005.) In response, the Legislature passed Assembly Bill 1742, which "reject[ed] the interpretation given to the law in *Garcia v. California State University*[.]" (Stats. 2005, ch. 706 [Assem. Bill No. 1742], § 40.) Today, the statute reads: "[T]his section applies to the California State University." (Gov. Code § 11135, subd. (a).)

This legislative history confirms that the Legislature consistently intended and enacted an expansive interpretation of section 11135, which runs counter to the trial court's limitation on the types of cases that can

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§ 2.) Government Code section 11139 was amended to read: "This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief." (Gov. Code § 11139.)

proceed under the disparate impact theory. (*Cf. Stop Youth Addiction, Inc. v. Lucky Stores, Inc*. (1998) 17 Cal.4th 553, 570-571 [noting history of amendments to Unfair Competition Law shows legislative intent to expand, not restrict, its reach].)

The trial court's limited view of disparate impact comparators denies section 11135 the expansive interpretation required by its express language and legislative history, including its mandate that the statute "not be interpreted in a manner that would frustrate its purpose." (Gov. Code § 11139.)

B. Permitting Plaintiffs to Proceed with Their Identified Comparators Is Appropriate to Effectuate the Purpose of Welfare & Institutions Code Section 14000.

The Court should also take a fact-specific and flexible view of acceptable comparators in disparate impact cases to effectuate the legislative intent of the Medi-Cal Act, Welfare and Institutions Code section 14000 *et seq*. The Medi-Cal Act expressly states that its intent is:

> to provide, to the extent practicable . . . for health care for California residents who lack sufficient income to meet the costs of health care and whose other assets are so limited that their application toward the costs of that care would jeopardize the person or family's future minimum self-maintenance and security.

(Welf. & Inst. Code § 14000.) To achieve this goal, the statute further provides:

> The means employed shall allow, to the extent practicable, eligible persons to secure health care in the same manner

> employed by the public generally, and without discrimination or segregation based purely on their economic disability.

(*Id.*, subd. (a); see also Welf. & Inst. Code § 14079 ["The director shall periodically review the reimbursement levels . . . to comply with applicable federal Medicaid program requirements, including provisions on reasonable access to physician and dental services for Medi-Cal beneficiaries."].) In short, the Medi-Cal Act is intended to provide "mainstream care" to indigent Californians. (*California Med. Assn. v. Brian* (1973) 30 Cal.App.3d 637, 642.)

The trial court's 2018 Order mischaracterized the language as "an aspirational goal" and not a requirement (AA366), departing from previous courts that have invoked this statutory intent to evaluate legal challenges involving the Act. For example, in *California Medical Association v. Brian*, the court considered whether certain regulations promulgated by the Director of Health Care Services were valid under the Medi-Cal Act. In doing so, the court looked to the purpose of the statute, stating that "in any litigation concerning statutory programs, legislative intent is of paramount concern." (*California Med. Assn.*, *supra*, 30 Cal.App.3d at p. 642.) Regarding the Medi-Cal Act, the court found "[i]t is clear that the legislative intent was to provide 'mainstream' medical care to the indigent." (*Ibid.*) As a result, the court upheld the lower court's finding that the regulations in question, which significantly limited patient access to care,

were invalid because they failed to comply with the Medi-Cal Act. (*Id.* at p. 657.)

Subsequent courts have similarly given weight to the stated goals of the Act. (See, e.g., *Wickline v. State of California* (1986) 192 Cal.App.3d 1630, 1646 [noting that the Legislature "expressly declared that Medi-Cal recipients should be able 'whenever possible and feasible . . . , to the extent practical, . . . to secure health care in the same manner employed by the public generally, and without discrimination or segregation based purely on their economic disability," citing Welf. & Inst. Code § 14000, subd. (a)]; *Jeneski v. Myers* (1984) 163 Cal.App.3d 18, 25-31 [considering both the purpose of the Medi-Cal Act and the "significance of Medicaid" when evaluating whether regulations limiting access to certain drugs were permissible].)

By dismissing the stated purpose of the Act, the trial court's 2018 Order improperly limited Perea to "discrimination within a program or activity," rather than considering "whether the program or activity at issue provides benefits comparable to other programs or activities." (AA364.) By dismissing Perea's proposed comparators, the trial court adopted a narrow analytical lens that failed to fulfill its obligation to determine whether the state is discriminatorily denying "mainstream" care to the predominantly Latine population enrolled in Medi-Cal physician services.

C. Previous Courts Have Recognized that There Is No One Test to Identify Disparate Impact Discrimination.

Courts across the country have rejected a rigid limitation on comparator populations acknowledging that the disparate impact comparator analysis will necessarily vary depending on the facts of the case.

The Ninth Circuit recently considered which populations were appropriate for comparison in a disparate impact discrimination claim brought under the Fair Housing Act.[6] In doing so, it rejected the very argument adopted by the trial court in its 2022 Order. In *Southwest Fair Housing Council, Inc. v. Maricopa Domestic Water Improvement District*, the water district charged a higher service deposit to customers in public housing as compared to customers in non-public housing. ((9th Cir. 2021) 17 F.4th 950, 962.) The customers in public housing were disproportionately Black and Native American. (*Id.* at p. 956.) The water district argued that the appropriate comparators were white customers in public housing, not all customers in non-public housing. (*Id.* at p. 965.) The district court adopted the water district's position but the Ninth Circuit declined to so limit its analysis, holding that "[t]here are multiple valid

[6] Perea addresses the trial court's comments on the relevance of other federal antidiscrimination laws, in particular the Fair Housing Act, in their Opening Brief. (AA365-366; AOB at pp. 32-33.)

methods of analysis involving different comparative populations." (*Id.* at p. 963.)

Rather than restrict its analysis to only those affected by the challenged policy, the panel held:

> When a defendant makes a deliberate choice to subject only a subset of its customers or constituents to a certain policy, it is proper to compare the demographics of that subset to the larger population of clients to which the policy does not apply to discern whether the decision to limit a policy to that subset produced any disproportionate effect.

(*Ibid.*) In other words, the panel concluded that it was more appropriate to compare the subset of customers subject to the higher security deposit with those subject to the lower security deposit to determine whether the impact of the policy itself fell more heavily on protected groups.

Critical to its holding is the panel's observation that disparate impact theory allows "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." (*Id.* at p. 960 [quoting *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 576 U.S. 519, 540].) In the case of the Fair Housing Act, it also "targets 'artificial, arbitrary, and unnecessary barriers to minority housing . . . that can occur through unthinking, even if not malignant policies.'" (*Id.* [quoting *Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493, 503] [internal quotations omitted].) To achieve these goals, courts must have the flexibility to

identify relevant comparators without being cabined to any one particular analysis. (See *id.* at p. 963 fn. 10 ["We note, however, that a policy that is generally applicable and that does not explicitly apply only to a subset based on a particular characteristic may require a different analysis or consideration of idiosyncratic factors to isolate the 'affected' population"].)

A decade earlier, the Third Circuit similarly held that "no single test controls in measuring disparate impact;" rather, plaintiffs must "offer proof of a disproportionate impact, measured in a plausible way." (*Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mt. Holly* (3d Cir. 2011) 658 F.3d 375, 382 [quoting *Hallmark Developers, Inc. v. Fulton County* (11th Cir. 2006) 466 F.3d 1276, 1286].) In *Mount Holly*, residents of the Gardens neighborhood alleged violations of the Fair Housing Act in their challenge to the Township's demolition of their neighborhood, which was predominantly comprised of low-income Latine and Black residents. (*Ibid*.) To determine whether the residents made their *prima facie* showing of discrimination, the panel considered "[t]he logic behind the FHA," which looks "to determine whether a person is being deprived of his lawful rights because of his race." (*Id.* at p. 383.)

In overturning the lower court decision rejecting the residents' claims, the panel identified "[t]he District Court's most troubling error" as its adoption of the Township's argument that "because 100% of the minorities in the Gardens will be treated the same as 100% of non-

minorities in the Gardens, the Residents failed to prove there is greater adverse impact on minorities." (*Ibid.*) To the contrary, "a disparate impact inquiry requires us to ask whether minorities are disproportionately *affected* by the redevelopment plan," which can mean "that minorities are disproportionately burdened by the redevelopment plan or that the redevelopment plan falls more harshly on minorities." (*Ibid.* [internal quotation omitted].) The panel concluded that discrimination was demonstrated in *Mount Holly* because Black and Latine households were many times more likely to be affected by the demolition of the Gardens. (*Id.* at p. 382.)

In addition to the Third and Ninth Circuits, multiple other circuits have also recognized that "no single test controls in measuring disparate impact" and demonstrate the flexibility of the disparate impact analysis. (*Hallmark Developers, Inc.*, *supra*, 466 F.3d at p.1286; see also, e.g., *Isabel v. City of Memphis* (6th Cir. 2005) 404 F.3d 404, 412 ["The City contends that caselaw in our Circuit forbids reliance on alternative statistical analyses in Title VII cases. To the contrary, we require only that the statistical analyses be relevant." (internal quotation omitted)]; *Langlois v. Abington Housing Auth.* (1st Cir. 2000) 207 F.3d 43, 50 [rejecting challenge to district court's use of the Equal Employment Opportunity Commission's "four-fifths formula" in a case alleging housing discrimination]; *Huntington Branch, N.A.A.C.P. v. Town of Huntington* (2d Cir. 1988) 844 F.2d 926, 937

[prescribing a disparate impact analysis of the type that would determine whether the challenged actions "reinforced racial segregation in housing"]; *Betsey v. Turtle Creek Assocs.* (4th Cir. 1984) 736 F.2d 983, 987 fn. 3 [resolving dispute over the appropriate statistical inquiry to show discriminatory impact of "all-adult" housing policy but noting that "we do not mean to suggest that this is the only way in which a discriminatory effect may be proved"].)

Courts across the country recognize that the *prima facie* case of disparate impact discrimination can encompass more than the narrow scenario of a single neutral policy that has disparate outcomes for people based on a protected characteristic, particularly when necessary to enforce the remedial purpose of a protective statute.

III. The Superior Court's Interpretation of the Disparate Impact Analysis Jeopardizes the Future of Private Enforcement of Section 11135.

The trial court's narrow definition of "the appropriate inquiry" for a plaintiff's *prima facie* showing of discrimination is one path of potentially relevant inquiry but it unnecessarily eliminates all other possible inquiries that could arise to address a variety of fact patterns under the disparate impact theory. By closing off other analytical paths, the trial court allows state-funded programs to avoid liability for all other forms of disparate impact discrimination, such as discrimination between subsets within a program as alleged by Perea here. An order affirming the trial court's

ruling will render section 11135's private right of action inoperable in many instances.

In the two decades since the Legislature created the private right of action under section 11135, minority individuals and communities have relied upon section 11135 and the disparate impact theory of liability to challenge a variety of allegedly discriminatory policies and practices in state-funded programs, including those related to jail and prison conditions, school discipline policies and practices, provision of public services, and zoning enforcement. (See, e.g., *Jewett v. California Forensic Med. Group, Inc.* (E.D. Cal. Mar. 13, 2017) No. 213CV0882MCEACP, 2017 WL 980446, at *5, report and recommendation adopted *sub nom. Jewett v. California Forensic MedicalGroup, Inc.*, (E.D. Cal. Apr. 5, 2017) No. 213CV0882MCEACP, 2017 WL 1356054 [prisoners relied on section 11135 to address the systemic failure of penal institutions to provide prisoners with mobility disabilities access to adequate medical care, housing and facilities, and programs and services]; *C.B. v. Moreno Valley Unified Sch. Dist.* (C.D. Cal. 2021) 544 F.Supp.3d 973, 993 [student of color relied on section 11135 to challenge county practices in public schools that have disproportionately impacted protected classes]; *The Committee Concerning Community Improvement v. City of Modesto* (E.D. Cal. May 16, 2007) No. CV F-04-6121LJODLB, 2007 WL 1456142, at *19, amended (E.D. Cal. May 23, 2007) No. CV-F-04-6121LJODLB, 2007

WL 1554932, affd. (9th Cir. 2009) 583 F.3d 690, and revd. (9th Cir. 2009) 583 F.3d 690 [residents of unincorporated "island" communities relied on section 11135 to challenge disparate provision of public services]; *Insight Psychol. and Addiction, Inc. v. City of Costa Mesa* (C.D. Cal. July 10, 2020) No. SACV2000504JVSJDEX, 2020 WL 5045153, at *7 [operators of adult group homes relied on section 11135 to challenge city enforcement of zoning ordinances]; *Crenshaw Subway Coalition v. Los Angeles County Metro. Transportation Auth.* (C.D. Cal. Sept. 23, 2015) No. CV 11-9603 FMO (JCX), 2015 WL 6150847, at *37 [residents of predominantly Black neighborhoods relied on section 11135 to challenge plans for transit system improvements].)

Limiting the demonstration of a disparate impact under section 11135 to a single test will create daunting hurdles to identifying many systemic inequities in state-funded programs and frustrate the purpose of section 11135. Under the single test endorsed by the trial court, state-funded programs could freely eliminate resources for groups predominantly comprised of people of color – such as residents in communities with higher rates of crime and blight (as in *Mount Holly*), low-income tenants (as in *Southwest Fair Housing Commission*), or patients receiving a particular type of medical care (as in the present case) – without fear of repercussion. Such actions will effectively be permitted under section 11135, even when their impact falls much more heavily on protected

individuals and communities, so long as everyone within the affected group is treated the same way.

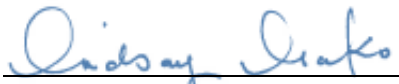
Insidious systemic discrimination cannot be reliably identified solely through the narrow analysis adopted by the trial court. The limitations that the trial court has placed on the disparate impact analysis deny this and future cases the protections of section 11135, without any basis in the statutory language, legislative history, or analogous case law.

CONCLUSION

For the foregoing reasons, Amici respectfully request this Court reverse the superior court's 2018 and 2022 Orders on Plaintiffs claims of disparate impact discrimination and remand for further proceedings.

Dated: August 3, 2023

Respectfully submitted,



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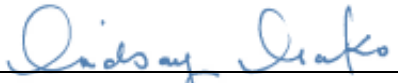
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that this brief contains 4,310 words, as calculated by the word processing program used to prepare the brief, exclusive of the material that may be omitted under Rule 8.204(c)(3).



Lindsay Nako

CERTIFICATE OF SERVICE

I, Lindsay Nako, am not a party to this action. My business address is 2080 Addison Street, Suite 5, Berkeley, California, 94704.

On August 3, 2023, I served the APPLICATION OF IMPACT FUND *et al.* FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS; [PROPOSED] BRIEF on all counsel of record via the Court's electronic filing system, TrueFiling, https://tf3.truefiling.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 3, 2023, in Berkeley, California.

Lindsay Nako