Robert A. Naeve, Bar No. 106095
rnaeve@jonesday.com
JONES DAY
3161 Michelson Drive, Suite 800
Irvine, California 92612
Telephone: +1.949.851.3939
Facsimile: +1.949.553.7539

Nathaniel P. Garrett, Bar No. 248211
ngarrett@jonesday.com
Rachel A. Beyda, Bar No. 335165
rbeyda@jonesday.com
555 California Street, 26th Floor
San Francisco, California 94104
Telephone: +1.415.626.3939
Facsimile: +1.415.875.5700

Attorneys for Defendants
JUDICIAL COUNCIL OF CALIFORNIA and CHIEF JUSTICE TANI G. CANTIL-SAKAUYE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

GLENN MAHLER, JAMES H. POOLE, JULIE CONGER, EDWARD M. LACY JR., WILLIAM S. LEBOV, JOHN C. MINNEY, and JOHN SAPUNOR,

Plaintiffs,

v.

JUDICIAL COUNCIL OF CALIFORNIA, CHIEF JUSTICE TANI G. CANTIL-SAKAUYE, and DOES ONE through TEN,

Defendants.

Case No. CGC-19-575842

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO THIRD AMENDED COMPLAINT

[Notice of Demurrer, Statement of Demurrer, Request for Judicial Notice, and Declaration of Nathaniel P. Garrett Filed Concurrently Herewith]

Date: April 12, 2022
Time: 9:30 a.m.
Dept: 302
Judge: Hon. Richard B. Ulmer Jr.

Complaint Filed: May 9, 2019
First Amd. Compl. Filed: May 28, 2019
Second Amd. Compl. Filed: Oct. 19, 2021
Third Amd. Compl. Filed: Feb. 15, 2022

EXEMPT FROM FILING FEES (Gov't Code § 6103)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF CONTENTS
(continued)

Page

INTRODUCTION

"Facts are stubborn things, but statistics are pliable. As Mark Twain's saying suggests, though statistics are often a helpful tool, they must be consulted cautiously. This lawsuit provides a case study as to why that is." *Mandala v. NTT Data, Inc.* (2d Cir. 2020) 975 F.3d 202, 205.

In 2019, Plaintiffs filed suit, alleging that the Chief Justice of California and the Judicial Council violated the Fair Employment Housing Act's ("FEHA") prohibition on age discrimination by modifying the Temporary Assigned Judges Program ("TAJP") to restrict retired judges from sitting on assignment for more 1,320 days, subject to exceptions. Over the last three years, a series of rulings (by this Court and the Court of Appeal) have drastically narrowed the scope of Plaintiffs' suit. What remains now is one cause of action (for disparate impact age discrimination under FEHA), for one form of relief (declaratory), based on Defendants' enforcement (as opposed to promulgation) of the 1,320-day service limit.

In sustaining Defendants' demurrer to Plaintiffs' second amended complaint, Judge Schulman gave Plaintiffs one final opportunity to state a valid claim, if they could. Plaintiffs were tasked with alleging valid statistical evidence sufficient to show that Defendants' enforcement of the 1,320-day service limit caused retired judges over 70 to disproportionately suffer adverse employment effects, as compared to retired judges under 70. Plaintiffs have now filed a Third Amended Complaint ("TAC"), but it falls well short of the mark.

The TAC adds one new statistical allegation – a chart comparing the average annual days each Plaintiff worked as TAJP judges prior to implementation of the 1,320-day service limitation in January 2019, with the number of days Plaintiffs worked as TAJP judges in 2019 and 2020. These "statistics" do *nothing* to support a disparate impact case which, by definition, must compare assignments received by *all* TAJP judges with those received by the Plaintiffs, and then show a *significant statistical disparity* between assignments received by TAJP judges over the age of 70, and those who are 70 and younger. It may be that since the new rules went into effect, the seven plaintiffs have served fewer days in the TAJP, but that fact says nothing about a disparate impact between comparable groups.

Even if Plaintiffs could identify a disparity between judges over 70 and judges under 70, a

robust causality requirement requires Plaintiffs to prove that this disparity was caused by enforcement of the 1,320-day service limit *itself*. Plaintiffs seek to allege causation summarily, but that is not sufficient; causation must be alleged with statistics or facts. Plaintiffs' statistics do not identify any disparity, let alone one significant enough to permit an inference of causation. And the TAC is bereft of any facts that might demonstrate Plaintiffs are receiving fewer assignments, and to less desirable courts, *because of* the 1,320-day service limit.

Indeed, Plaintiffs cannot even fall back on common sense. When Defendants adopted the 1,320-day service limit, they also enacted a new allocation policy that assigns retired judges based on a court's demonstrable need. Plaintiffs complain that instead of receiving assignments to courts with judicial surpluses (like Orange County), they now are receiving assignments to those courts with the greatest need for judicial assistance (like Riverside and San Bernardino Counties). But the most reasonable inference is that Plaintiffs are now receiving different, and fewer, assignments because of the new allocation policy – a policy Plaintiffs do not challenge as discriminatory. Because Plaintiffs' statistical evidence falls short both as a matter of law and common sense, Defendants' demurrer should be sustained with prejudice.

BACKGROUND

A. The Temporary Assigned Judges Program ("TAJP"), and Promulgation of the 1,320-Day Service Limit and its Exceptions.

Since 1951, the Chair of the Judicial Council—*i.e.*, the Chief Justice—has been authorized to assign retired judges, with their consent, "to sit in a court of like jurisdiction as, or higher jurisdiction than, that court from which he was retired." *Mahler v. Jud. Council of California* (2021) 67 Cal.App.5th 82, 94. The Chief Justice's appointment authority is set forth in article VI, section 6, subdivision (e) of the California Constitution, which provides that "[t]he Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court."

The Judicial Council adopted the TAJP in 1996 "to provide administrative support to the Chief Justice in the exercise of her constitutional authority to assign and reassign judges,

including retired judges." *Mahler*, 67 Cal.App.5th at 96. Assisted by Judicial Council staff, and pursuant to her constitutional mandate, the Chief Justice "'issues temporary judicial assignment orders to active or retired judges and justices in response to a variety of circumstances, including vacancies, illnesses, disqualifications, and calendar congestion in the courts.'" *Id.* at 97 (quoting 96 Ops. Cal. Atty. Gen. 36, 37 (2013).) It is well-recognized that the Chief Justice is "invested with 'discretion of the broadest character' in the assignment of judges," that her discretion "encompasses both the non-renewal and the termination of such assignments," and that the "manner, method, or criteria for selection of duly qualified assigned judges is within" the Chief Justice's discretionary powers. *Ibid.* (quotation marks and citation omitted).

In 2017, California's State Auditor initiated a review of the TAJP in response to concerns that retired judges were being assigned to courts with judicial "surpluses." *Mahler*, 67 Cal.App.5th at 97. At the same time, concerns about the TAJP were brought to the attention of the Chief Justice, who directed Judicial Council staff to conduct an internal review. *Ibid.* As the result of this internal review, the Chief Justice made a number of changes to the TAJP.

To promote a more "[e]quitable [w]orkload [d]istribution," the Chief Justice ordered that assigned judges may work a maximum of 120 days on assignment during a fiscal year. *See* Request for Judicial Notice Ex. A at p. 6. She also limited participation in the TAJP to 1,320 days (the equivalent of a single, six-year term of a full-time elected superior court judge). *See ibid.*; *Mahler*, 67 Cal.App.5th at 98. This modification was "intended to ensure that, cumulatively, retired judges serve no longer than active, full-time judges elected or retained by the state's voters, while underscoring the temporary nature of the judicial assistance provided through the AJP." RJN Ex. A at p. 7.

However, the 1,320-day service limit provides for exceptions. In particular, the 1,320-day service limit:

> can be adjusted if a superior court seeking TAJP assistance shows, among other things, the absence of other available retired judges or if there is a strong need for a specific retired judge. Accordingly, retired judges who reach the 1,320-day service limit can continue to enroll in TAJP and may be assigned to a superior court submitting an exception report that demonstrates "why it is both prudent and necessary to reappoint the judge specifically requested by the

court."

Mahler, 67 Cal.App.5th at 98 (citation omitted).

The Chief Justice also promulgated changes to the TAJP designed to deploy assigned judges based on the "[g]reatest [n]eed." RJN Ex. A at p. 6. Courts now receive an initial allocation representing a floor of prospective service days. *Ibid.*; *Mahler*, 67 Cal.App.5th at 98. Requests above the floor are evaluated case-by-case, based on demonstrable need. RJN Ex. A at p. 7. What that means is courts with an insufficient member of judges based on the Judicial Needs Assessment are more likely to receive TAJP assignments.[1] *Ibid.*; *see also* RJN Ex. B at p. 17 (explaining that the TAJP program considers a court's judicial resources in evaluating assignment requests).

The Chief Justice's modifications to the TAJP were announced in May 2018, and became effective on July 1, 2018, after having been reviewed by the Judicial Council's Trial Court Presiding Judges Committee, the Court Executives Advisory Committee, and the Administrative Presiding Justices Advisory Committee. *Mahler*, 67 Cal.App.5th at 98. The State Auditor was notified of these changes, and observed that the Chief Justice had restructured "how the Judicial Council allocates AJP service days and funds so that it assigns resources within the AJP based on the greatest need, as defined by its judicial needs assessment." Request for Judicial Notice Ex. D at p. 71. The State Auditor concluded that "[b]y modifying the process to establish metrics for judicial participation and changing how it allocates service days and funds in the AJP, the Judicial Council has taken steps to administer the AJP in a more efficient manner." *Ibid.*; *see also* *Mahler*, 67 Cal.App.5th at 98.

B. After Judge Schulman Sustains Defendants' Demurrer, the Court of Appeal Issues a Qualified Reversal, Remanding One Limited Claim.

Plaintiffs are seven retired superior court judges, each over 70 years old, who have participated in the TAJP for more than 1,320 days. Third Am. Compl. ("TAC") ¶ 2. They filed

[1] Every two years, the Judicial Council must report to the Legislature and the Governor on the "factually determined need for new judgeships in each superior court" using an established allocation criteria. Gov. Code, § 69614(c)(1). The most recent "Judicial Needs Assessment" report is dated November 2020, and identifies a need for 139 new judicial officers; two superior courts—Riverside County Superior Court and San Bernardino Superior Court—account for 73 of the unfunded judgeships (52.5%). *See* RJN Ex. C at p. 43.

their original complaint on May 9, 2019, and their First Amended Complaint ("FAC") on May 28, 2019, naming the Judicial Council and the Chief Justice in her official capacity as Chair of the Judicial Council. *Mahler*, 67 Cal.App.5th at 99.

Plaintiffs challenged the Chief Justice's imposition of a 1,320-day service limit, alleging that the limit "subjects them to 'different' conditions than 'younger judges.'" *Mahler*, 67 Cal.App.5th at 98-99. Plaintiffs asserted two causes of action—disparate impact age discrimination in violation of FEHA and violation of Article VI, section 6(e) of the California Constitution—and sought monetary relief, as well as declaratory and injunctive relief. *Id.* at 99.

Defendants demurred to the FAC, asserting that the suit was barred by legislative immunity and, alternatively, that plaintiffs failed to allege a prima facie case of disparate impact age discrimination under the FEHA. *Mahler*, 67 Cal.App.5th at 99. Judge Schulman sustained the demurrer without leave to amend on the ground of legislative immunity. *Ibid.*

The Court of Appeal reversed in part and remanded for further proceedings, but it strictly limited the claims that Plaintiffs could pursue on remand. The Court of Appeal began by affirming the superior court's holding that the Chief Justice's promulgation of changes to the TAJP was "legislative in character," and fell within the doctrine of legislative immunity. *Mahler*, 67 Cal.App.5th at 108. Thus, legislative immunity "shield[s] the Chief Justice and the Judicial Council from suit, regardless of the nature of the relief sought, to the extent plaintiffs' discrimination claim is based on the Chief Justice's *promulgation* of changes to the TAJP." *Id.* at 91 (emphasis added).

The court observed that in addition to promulgating changes to the TAJP, the Chief Justice also "makes individual assignments pursuant to that policy." *Mahler*, 67 Cal.App.5th at 108. This function is "different in character" and not protected by legislative immunity. *Ibid.* However, the Chief Justice's "enforcement of the challenged provisions of the TAJP through individual judicial assignments" does "come within the bounds of judicial immunity (and also discretionary immunity)." *Id.* at 92, 108. And judicial immunity "foreclose[s] a damages award" (*id.* at 110 n.15), as well as injunctive relief where declaratory relief is available (*id.* at 110): the *only* form of relief unaffected by judicial immunity is "prospective declaratory relief." *Id.* at 92.

Accordingly, the Court of Appeal remanded to permit Plaintiffs to pursue a cause of action under FEHA "for prospective declaratory relief against the Chief Justice and Judicial Council based on 'enforcement' of the new TAJP requirements." *Mahler*, 67 Cal.App.5th at 107. The court held that Plaintiffs' allegations in the FAC did not support a disparate impact claim because the allegations were "conclusory and particularly bereft when it comes to causation." *Id.* at 113. Yet it found Plaintiffs should be granted leave to amend to attempt to plead such a claim, albeit "express[ing] no opinion as to whether plaintiffs will be able to sufficiently plead such a claim, let alone raise a triable issue of age discrimination or prove such a claim." *Id.* at 128.

C. Judge Schulman Sustains Defendants' Demurrer Again, but Grants Plaintiffs One Final Opportunity.

Plaintiffs filed a Second Amended Complaint ("SAC"), which Judge Schulman dismissed again on January 26, 2022. *See* Order on Defs.' Demurrer to Second Am. Compl. ("Demurrer Order"). The Court sustained Defendants' demurrer as to Plaintiffs' cause of action under the California Constitution without leave to amend, as unopposed. *Id.* at p. 2.

With respect to Plaintiffs' FEHA claim, the Court expressed "frustration that Plaintiffs ha[d] disregarded the Court of Appeal's explicit guidance regarding what is required to plead a prima facie case of age discrimination on a disparate impact theory." Demurrer Order at p. 9. The Court explained that Plaintiffs' SAC continued to improperly focus "on the Chief Justice's promulgation of the 1,320-day service limit and on the wisdom of that change, rather than on her enforcement of that limit through individual assignments." *Id.* at p. 4. The Court of Appeal's opinion permitted Plaintiffs *only* to state a claim based on Defendants enforcement of "'the challenged provisions of the TAJP *through individual judicial assignments*.'" *Id.* at p. 5 (quoting *Mahler*, 67 Cal.App.5th at 92). The SAC, however, "contain[ed] literally *no* factual allegations regarding Defendants' enforcement of the challenged provisions of the TAJP through individual judicial assignments … that would be sufficient to show a significant disparate impact that results in such judges being systematically excluded from receiving assignments." *Ibid.*

The Court granted Plaintiffs "one final opportunity to amend to attempt to plead a cognizable claim." Demurrer Order at p. 9. The Court was crystal clear about what was required

to survive dismissal with prejudice: Plaintiffs "'must offer statistical evidence of a kind and degree sufficient to show'" that Defendants' enforcement of the 1,320-day service limit has had a "disparate impact on a protected group of individuals." *Id.* at p. 4 (quoting *Juumane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1404-1405). This statistical evidence must "'demonstrat[e] a causal connection between the challenged policy'"—here, enforcement of the 1,320-day service limit—"and a significant disparate impact on the allegedly protected group.'" *Ibid.* (quoting *Mahler*, 67 Cal.App.5th at 114).

D. Plaintiffs' New Allegations Complain About Reduced Assignments to Courts with the Greatest Need, but Do Not Compare Plaintiffs' Experience to a Control Group.

Plaintiffs filed their TAC on February 15, 2022, asserting one cause of action for disparate impact age discrimination under the FEHA, in violation of Government Code section 12940(a). TAC ¶¶ 61-63. Plaintiffs allege they are members of a subgroup of retired judges who have participated in the TAJP and are over 70 years of age. TAC ¶ 35. According to Plaintiffs, they have been denied assignments as part of Defendants' enforcement of the 1,320-day service limit, and Plaintiffs allege that the rate of denials is "statistically significant compared to judges who are not part of the subgroup" of judges over 70 who have participated in the TAJP. *Ibid.*

To support this legal allegation, Plaintiffs rely on two sets of statistics: one old, one new. Plaintiffs copy a chart from their last complaint, which purports to show that 23% of judges in the TAJP who are over 70 have served more than 1,320 days, whereas only 7% of judges in the TAJP under 70 have served more than 1,320 days. TAC ¶ 52. Problematically for Plaintiffs, Judge Schulman already observed that this metric has nothing to do with *enforcement* of the 1,320-day service limit; it measures only the proportion of judges affected by *promulgation* of the 1,320-day service limit. Demurrer Order at p. 7.

The only new set of statistical evidence compares the average number of days Plaintiffs "worked" or participated in the TAJP from entry to 2018, with the number of days Plaintiffs participated in 2019 and 2020. *See* TAC ¶¶ 46-47. Plaintiffs allege that before Defendants adopted new rules to govern the TAJP, all of them except one (Judge John Minney) worked more than the 120 days per year now permitted under the TAJP. *See ibid.* In 2019 and 2020, Plaintiffs

allege, the number of days they worked in the TAJP decreased anywhere from 39.5% (for Judge William Lebov) to 98% (for Judge Julie Conger). *Ibid.*

Plaintiffs do not allege how other judges over 70 have been impacted by changes to the TAJP. Nor do they allege how any judge under 70 has been impacted by changes to the TAJP. Accordingly, the TAC lacks the kind of statical evidence necessary to *compare* the effect of the TAJP amendments on Plaintiffs and the protected class (retired judges over 70) vis-à-vis the control group (retired judges under 70).

The TAC similarly makes no meaningful effort to demonstrate that the reduction in Plaintiffs' assignments was *caused* by the conduct they challenge (enforcement of the 1,320-day service limit), as opposed to policies they don't (such as the annual 120-day limit on all retired judges, or the TAJP's new policy of making assignments based on demonstrated need). For example, the TAC alleges that the Presiding Judge of the Orange County Superior Court requested exceptions so that Plaintiffs Mahler and Poole could serve on assignment there, but that these exceptions were denied. TAC ¶¶ 18-19, 24. The TAC likewise alleges that exceptions to serve at unidentified courts were denied for Plaintiffs Conger and Lebov. *Id.* ¶¶ 28, 32. Critically, however, the TAC is bereft of any facts demonstrating that these exceptions were denied *because of* the 1,320-day service limit or Plaintiffs' age. There is no allegation, for example, that judges *under 70* were assigned in Plaintiffs' stead.

To be sure, Plaintiffs summarily allege that, but for Defendants' enforcement of the 1,320-day service limit, Plaintiffs would have received additional appointments. TAC ¶¶ 29, 32-34. And Plaintiffs complain that because of the 1,320-day service limit, they now are being assigned to courts miles from their home, primarily in Riverside and San Bernardino counties. *Id.* ¶¶ 20, 25, 32. Yet Plaintiffs never attempt to measure, let alone explain, how their reduced workloads and assignment locations are the result of the 1,320-day service limit – rather than because Defendants are now reviewing assignment requests for demonstrated need (a policy that affects all retired judges equally and that Plaintiffs do not challenge here).

ARGUMENT

Plaintiffs assert one cause of action under Government Code section 12940(a), which

makes it unlawful for an employer "because of … age … to refuse to hire or employ the person … or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." Gov. Code, § 12940(a). A discrimination claim under FEHA may proceed either under a theory of disparate treatment or, as in this case, disparate impact. *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20. Whereas disparate treatment is *intentional* discrimination, a disparate treatment claim may lie, regardless of motive, if "a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." *Ibid.*

To state a claim for disparate impact discrimination, a plaintiff must allege: (1) the existence of a specific employment practice; (2) that had a disproportionate adverse effect on a protected class; and (3) that the employment practice was a substantial factor in causing the disparity. *See* Judicial Council of California Civil Jury Instruction No. 2502 (2020 ed.); *Villafana v. County of San Diego* (2020) 57 Cal.App.5th 1012, 1017; *Freyd v. University of Oregon* (9th Cir. 2021) 990 F.3d 1211, 1224. The specific employment practice Plaintiffs challenge is Defendants' enforcement of the 1,320-day service limit. TAC ¶¶ 3-6, 56. Yet the TAC fails to allege that Defendants' enforcement of the 1,320-day service limit had a disproportionate adverse impact on retired judges over the age of 70, or indeed that the 1,320-day service limit has caused *any* injury (let alone a statistically-significant disparity in treatment). Accordingly, and for the reasons explained below, Defendants' demurrer should be sustained with prejudice.

I. PLAINTIFFS FAIL TO OFFER STATISTICAL ALLEGATIONS OF A KIND AND DEGREE SUFFICIENT TO SHOW AGE DISCRIMINATION.

"Once a specific practice is identified in a disparate impact case, the next … question becomes whether that practice had a disproportionate adverse impact" on a protected group, here retired judges over seventy. *Stockwell v. City and County of San Francisco* (9th Cir. 2014) 749 F.3d 1107, 1115.[2] "Statistical evidence is essential to showing such a disproportionate effect on a protected group." Demurrer Order at p. 4. "[V]alid statistical evidence is required to prove

[2] "[I]n interpreting the FEHA**,** California courts have adopted the methods and principles developed by federal courts in employment discrimination claims arising under" federal law. *Reno v. Baird* (1998) 18 Cal.4th 640, 659 (quotation marks and citation omitted).

disparate impact discrimination," and the statistical disparities identified must be "substantial." *Juumane*, 241 Cal.App.4th at 1405. After all, a disparate impact claim requires proof that a facially-neutral practice is "in operation functionally equivalent to intentional discrimination," a showing that requires evidence of "*significant* adverse effects" on the protected group. *Mahler*, 67 Cal.App.5th at 113 (quotation marks and citation omitted; emphasis added). Plaintiffs offer two sets of statistics to allege a disproportionate adverse impact, but neither passes muster.

A. Plaintiffs' New Statistical Allegations Do Not Compare the Impact of a Particular Employment Decision on Those Within the Protected Group and Those Outside It.

Plaintiffs amended their complaint to add statistics purporting to show that since Defendants modified the TAJP program in 2018, Plaintiffs have received fewer TAJP assignments. TAC ¶¶ 46-47. These statistics do not move the needle for the simple reason that "[t]he basis for a successful disparate impact claim involves a *comparison* between two groups — those affected and those unaffected by the facially neutral policy." *County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354, 368 (quotation marks and citation omitted); *see also Mandala*, 975 F.3d at 210 (statistics in a disparate impact case "must, at the very least, focus on the disparity between appropriate comparator groups").

It has long been recognized that "[s]tatistical comparisons, if they are to have any value, must be between comparable groups and free from variables which would undermine the reasonableness of discrimination inferences to be drawn." *Mazus v. Department of Transp., Com. of Pa.* (3d Cir. 1980) 629 F.2d 870, 875. Put more simply, "to be probative of discrimination, statistics must compare the impact of a particular employment decision or practice on those within the protected group and those outside it." *Shannon v. Fireman's Fund Ins. Co.* (S.D.N.Y. 2001) 156 F.Supp.2d 279, 295. Where a plaintiff fails to allege proper comparison groups, dismissal is appropriate. *Mahler*, 67 Cal.App.5th at 128 (citing *Villafana*, 57 Cal.App.5th at 1018-1020).

Under the foregoing authorities, Plaintiffs had an obligation to *compare* the effects of enforcement of the 1,320-day service limit, and its exceptions, on judges over 70 (the alleged protected group) against its effects on judges under 70 (the control group). Plaintiffs' new

statistics do not validly measure either side of the scale.

As Plaintiffs concede, there are 257 retired judges over 70 years old in the TAJP – 77% of whom have *not* reached the 1,320-day threshold. TAC ¶ 52. Excepting Plaintiffs, however, the TAC fails to measure how enforcement of the 1,320-day service limit allegedly has affected any of the other 250 members of the protected group. It is true that where the appropriate statistics are unavailable, courts have permitted disparate impact plaintiffs to rely on substitute statistics so long as they "'[so long as they] are equally probative.'" *Mandala*, 975 F.3d at 210 (quoting *Wards Cove Packing Co., Inc. v. Atonio* (1989) 490 U.S. 642, 651.) But Plaintiffs plainly are not adequate substitutes for their 250 peers. Given that the vast majority of retired judges over 70 have *not* served more than 1,320 days in the TAJP, Plaintiffs' experiences are unlikely to be representative of the group.

On the other side of the scale, Plaintiffs' allegations say nothing about the effect of enforcement of the 1,320-day service limit and its exceptions on judges under the age of 70, even though some of the judges in this control group *have* served more than 1,320 days. *See* TAC ¶ 52. Plaintiffs' new statistics thus fail their fundamental task – to measure the impact of the 1,320-day service limit on "the *total* group to which [it] applies." *County Inmate Telephone Service Cases*, 48 Cal.App.5th at 368 (quotation marks and citation omitted; emphasis added). As a result, one cannot assess whether enforcement of the 1,320-day service limit has had a disproportionate impact on judges over 70 compared to judges under 70 at all, let alone an impact of such substance and significance so as to sustain a lawsuit under the FEHA.

B. This Court Already Rejected Plaintiffs' Old Statistical Allegations, Which Measure the Wrong Metric in any Event.

The TAC also carries over from Plaintiffs' prior complaint statistical allegations regarding the number of judges under and over 70 who have served more than 1,320 days in the TAJP. TAC ¶ 52. According to Plaintiffs, these statistics show that age has a statistically significant relationship to serving more than 1,320 days in the TAJP. *Id.* ¶ 53. But these allegations fail several times over.

Judge Schulman already ruled that this statistical allegation is not sufficient to survive

demurrer. Demurrer Order at p. 7. Plaintiffs neither moved for reconsideration of that ruling (*see* Code Civ. Proc., § 1008), nor added any allegations that call the Court's reasoning into doubt.

In any event, the allegation that 23% of TAJP judges over the age of 70 have served 1,320 days, as compared to 7% of TAJP judges under 70, measures the wrong metric. That allegation measures the average age of judges affected by the *promulgation* of the 1,320-day service limit, rather than the average age of judges affected by the implementation of that policy and its exceptions through individual judicial assignments. That distinction is critical, insofar as the Court of Appeal limited Plaintiffs to a claim "'based on defendants' enforcement of the challenged provisions of the TAJP *through individual judicial assignments*.'" Demurrer Order at p. 5 (quoting *Mahler*, 67 Cal.App.5th at 92; emphasis in Order).

What's more, even assuming that Plaintiffs' old statistic measured the correct metric, the disparity identified is not statistically significant enough to permit an inference of age discrimination. In *Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831, 836, the plaintiffs presented evidence that their employer's decision adversely impacted 27% of employees over the age of 60. The court held this statistic was "insufficient to raise an inference that the disparate impact fell upon employees by virtue of their membership in a protected age group." *Ibid*. Plaintiffs here allege an even smaller impact: that 23% of TAJP judges over the age of 70 have served 1,320 days in the program. TAC ¶ 52. As in *Katz*, the allegation that less than one-quarter of retired judges over the age of 70 are affected by promulgation of the 1,320-day service limit suggests that Plaintiffs are affected by the rule not because of their age, but because of their length of service in the program.

II. PLAINTIFFS FAIL TO ALLEGE FACTS DEMONSTRATING A CAUSAL CONNECTION BETWEEN THEIR CLAIMED INJURIES AND THE 1,320-DAY SERVICE LIMIT.

Defendants' demurrer should be sustained for a second, independent reason: even if Plaintiffs' statistics identified an actionable disparity between a protected group and a control group (they do not), Plaintiffs' allegations do not satisfy FEHA's "'robust causality requirement.'" *Mahler*, 67 Cal.App.5th at 113 (quoting *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 576 U.S. 519, 542).

"[S]erious problems" would ensue if liability was imposed based solely on a showing of a statistical disparity. *Mahler*, 67 Cal.App.5th at 112. That is why disparate impact law includes a robust causality requirement that requires a plaintiff to demonstrate "that, but for the defendant's unlawful conduct, its alleged injury would not have occurred." *Comcast Corporation v. National Association of African American-Owned Media* (2020) 140 S.Ct. 1009, 1014. At the pleading stage, "the complaint must allege facts or statistical evidence demonstrating a causal connection between the challenged policy and a significant disparate impact on the allegedly protected group." *Mahler*, 67 Cal.App.5th at 114. That is, the plaintiff must demonstrate, through facts or statistical evidence, that the alleged disparity "can be traced to the [challenged] policy rather than to other potential causes or factors." *Southwest Fair Housing Council, Inc. v. Maricopa Domestic Water Improvement District* (9th Cir. 2021) 17 F.4th 950, 965.

"Causation is frequently shown with statistics." U.S. Dep't of Justice, *Title VI Legal Manual* § VII.C.1.d (2021). In such a case, the statistics must not only identify disparities, but disparities that are "sufficiently substantial that they raise … an inference of causation." *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1324 (quotation marks and citation omitted). As Defendants already have explained, however, neither of Plaintiffs' alleged statistics measure *any* disparity tethered to enforcement of the TAJP amendments: Plaintiffs' new statistics do not compare the relevant protected group against the control group, and Plaintiffs' old statistics only measure the effect of promulgation. *A fortiori*, Plaintiffs' statistics do not establish the kind of *substantial* disparity sufficient to satisfy the causation element.

Case law suggests that a plaintiff also may satisfy the causation requirement by alleging "facts … demonstrating a causal connection between the challenged policy and a significant disparate impact on the allegedly protected group." *Mahler*, 67 Cal.App.5th at 114. The key point, however, is that the plaintiff must allege *facts*. Plaintiffs allege that they are serving on assignment less now than before 2019, and that they are being assigned to superior courts, like Riverside and San Bernardino, that require travel. *See, e.g.*, TAC ¶¶ 20, 25, 29, 30, 32, 33, 34. But the summary allegation that Plaintiffs' injuries are the "direct result" of Defendants' enforcement of the 1,320-day service limit lacks any supporting facts. *See id.* ¶¶ 21, 26, 29, 30,

32, 33, 34. No plaintiff alleges, for example, that the Presiding Judge of Orange County made an exception request, that the exception was denied, *and yet* a judge under 70 years old was assigned to a TAJP vacancy in Orange County. Without that necessary final predicate, Plaintiffs are complaining only about serving less time in a less "desirable" court (at least to them) – they are not complaining about a disparity between judges over 70 and under 70 caused by enforcement of the 1,320-day service limit.

The need for such facts is particularly pressing is this case, where there are obvious, lawful, alternative explanations for the injuries of which Plaintiffs complain. Plaintiffs do not challenge Defendants' enforcement of a new TAJP policy that allocates judicial assignments based on demonstrated need, in lieu of a court's "historical use of the program." Request for Judicial Notice Ex. A at 4-5. Yet it is no mere coincidence that Plaintiffs complain they now are being assigned primarily to Riverside and San Bernardino counties – the two courts with the greatest need for additional judges, according to the Judicial Needs Assessment. *See* Request for Judicial Notice Ex. C at p.8. By contrast, Orange County Superior Court has a *surplus* of judges, according to the same assessment. *Ibid.* Yet Plaintiffs do not explain—indeed, do not even attempt to explain—how their complaints about new assignments stem from the 1,320-day service limit (which they challenge), rather than the new allocation formula (which they don't).

In sum, because Plaintiffs are challenging a discrete aspect of the new TAJP rules (the 1,320-day service limit), it is their burden to allege statistics or facts demonstrating that enforcement of that rule is the cause of a disparity between judges over 70 and judges under 70. Plaintiffs assume it to be so, but in the absence of any statistics or facts buttressing that assumption, Defendants' demurrer should be sustained. *See Mahler*, 67 Cal.App.5th at 115.

III. THE DEMURRER SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND.

After nearly three years of litigation, this Court provided Plaintiffs with "one final opportunity to amend to attempt to plead a cognizable claim." Demurrer Order at p. 9. Having failed to do so, Defendants' demurrer should be sustained without leave to amend.

Failing to cure pleading defects of which a party is aware supports denial of leave to amend. *Ruinello v. Murray* (1951) 36 Cal.2d 687, 690. In *Ruinello*, after three attempts to amend

the complaint, the Court of Appeal held that "[t]he superior court could reasonably conclude that he was unable to do so, and accordingly, it did not abuse its discretion in sustaining the demurrer to the third amended complaint without leave to amend." Similar rulings denying leave to amend due to the number of amendments are common. *E.g.*, *Hardy v. Admiral Oil Co.* (1961) 56 Cal.2d 836, 842 ("[W]here, as here, [a] party had previously been given three successive opportunities to amend and thus had ample notice of the defective state of its pleadings, yet had repeatedly failed to remedy such defects, the superior court cannot be said to have abused its discretion in granting the motion without further leave to amend.").

After the Court of Appeal remanded this case with clear directives about how to state a prima facie case of age discrimination, Plaintiffs' "disregarded the Court of Appeal's explicit guidance regarding" when filing their SAC. Demurrer Order at p. 9. Judge Schulman gave one final opportunity to plead a valid claim, but the TAC falls well short of pleading the kind of facts or statistics necessary to demonstrate that enforcement of the 1,320-day service limit disproportionately affects judges over 70. Indeed, Plaintiffs do not allege that enforcement of that limit *disproportionately* affects judges over 70 at all. If Plaintiffs had a valid disparate impact claim, they would have alleged it by now.

CONCLUSION

For these reasons, Defendants' demurrer should be sustained with prejudice.

Dated: March 17, 2022.

JONES DAY

By: _____
Robert A. Naeve

Attorneys for Defendants
JUDICIAL COUNCIL OF CALIFORNIA and CHIEF JUSTICE TANI G. CANTIL-SAKAUYE

PROOF OF SERVICE

I, Frances Pham, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3161 Michelson Drive, Suite 800, Irvine, California 92612. On March 17, 2022, I served a copy of the within document(s):

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO THIRD AMENDED COMPLAINT

☒ by e-filing via File & Serve Xpress and transmitting to the recipients designated on the Transaction Receipt located on the File & Serve Xpress website the document(s) listed above to the person(s) at the address(es) set forth below.

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Quentin L. Kopp, Esq.
qkopp@fsmllaw.com
(415) 681-5555
Daniel S. Mason, Esq.
dmason@fsmllaw.com
(415) 407-7796
Furth Salem Mason & Li LLP
75 Broadway Street
Suite 202 - #1907
San Francisco, California 94111

Thomas W. Jackson, Esq.
tjackson@fsmllaw.com
(415) 722-2198
Furth Salem Mason & Li LLP
640 Third Street
Second Floor
Santa Rosa, California 95404

Attorneys for Plaintiffs
GLENN MAHLER, JAMES H. POOLE, JULIE CONGER, EDWARD M. LACY JR., WILLIAM S. LEBOV, JOHN C. MINNEY, JOHN SAPUNOR, and F. CLARK SUEYRES

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

Executed on March 17, 2022, at Irvine, California.

Frances Pham