Robert A. Naeve (State Bar No. 106095)
Cary D. Sullivan (State Bar No. 228527)
JONES DAY
3161 Michelson Drive
Suite 800
Irvine, CA 92612.4408
Telephone: +1.949.851.3939
Facsimile: +1.949.553.7539
Email: rnaeve@jonesday.com

Nathaniel P. Garrett (State Bar No. 248211)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: +1.415.626.3939
Facsimile: +1.415.875.5700
Email: ngarrett@jonesday.com

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, JOHN APUNOR, and F. CLARK SUEYRES,

Plaintiffs,

v.

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

Defendants.

CASE NO. CGC-19-575842

DEFENDANTS' REPLY IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT

DATE: August 8, 2019
TIME: 9:30 a.m.
DEPT: 302
JUDGE: Hon. Ethan P. Schulman

Complaint Filed: May 9, 2019

Reservation No. 07030808-14

INTRODUCTION

Plaintiffs essentially concede that this Court should sustain the demurrer without leave to amend under the legislative immunity doctrine for the reasons outlined in this Court's order denying Plaintiffs' motion for preliminary injunction. Plaintiffs say they disagree with this Court's prior ruling, but offer nothing to warrant reconsideration.

Plaintiffs urge the Court not to consider any additional grounds for demurrer if it finds that legislative immunity bars the First Amended Complaint ("FAC"). However, this invitation to avoid consideration of patent legal defects in the FAC, and to create an incomplete record on appeal, must be declined.

In particular, Plaintiffs' first cause of action under the Fair Employment and Housing Act ("FEHA") fails as a matter of law to establish the prima facie element of causation. The FAC asserts the bare legal conclusion that the 1,320-day service limit disproportionately impacts older participants in the Temporary Assigned Judges Program ("TAJP"), but fails to allege any *facts* demonstrating that the limit disproportionately impacts judges on the basis of age. At best, the FAC suggests that the TAJP's service limit affects retired judges depending on their experience in the TAJP, but it is settled that experience and age are analytically distinct.

Plaintiffs' FEHA claim also fails as a matter of law because it attempts to establish age discrimination by comparing one subgroup of protected employees (*e.g.*, retired judges over 72) with another subgroup of protected employees (*e.g.*, retired judges between the age of 60 and 72). FEHA's plain text, considerations of sensible policy, and a majority of federal court decisions prohibit this type of subgrouping.

Plaintiffs' second cause of action under the California Constitution is likewise defective for reasons beyond legislative immunity, and Plaintiffs do not even contest the point. Both on the merits and under established principles of waiver, Plaintiffs' constitutional claim should be dismissed with prejudice.

Finally, this Court should reject Plaintiffs' request for leave to amend their causation allegations, because: (a) the proposed amendment cannot cure the legal bar of legislative immunity, or the rule prohibiting subgrouping, or the defects in Plaintiffs' constitutional claim;

and (b) Plaintiffs have not demonstrated that leave to amend would be anything but futile. Plaintiffs already tried to make an evidentiary showing that the TAJP amendments disproportionately impact retired judges of a certain age, yet their submission was both improper and deficient. Plaintiffs' opposition does not explain how their next submission would be any different. Accordingly, Defendants' demurrer to the FAC should be sustained, and without leave to amend.

ARGUMENT

I. DEFENDANTS ARE IMMUNE FROM SUIT.

Part I.A of Defendants' demurrer demonstrated that the legislative immunity doctrines bars Plaintiffs' claims. *E.g.*, *Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1784. Plaintiffs oppose, based upon their "previous submissions and arguments" in support of their motion for preliminary injunction, and further suggest that if the Court is inclined to sustain the demurrer on this ground, it need not consider any other issue. Opp'n at 2. The Court should reject both contentions.

First, Plaintiffs' reliance upon their previous submissions and arguments proves nothing. This Court explicitly rejected those submissions when it concluded, in denying Plaintiffs' motion for preliminary injunction, that the FAC impermissibly challenged an "act of rulemaking expressly grounded in the Judicial Council's and the Chief's Justice's constitutional authority which has all the hallmarks of a legislative action." Order at 7:5-7.

The Court need go no farther than the face of the FAC to confirm that the doctrine applies. The FAC concedes that the Constitution expressly grants Defendants the authority to regulate the qualifications for participants in the TAJP (FAC ¶¶ 2, 3, 4, 17); Defendants' policy changes are not "ad hoc," but instead create binding statewide rules for TAJP administration (*id.* ¶¶ 7, 17, 18); and the TAJP amendments have all the hallmarks of legislative action, including the use of discretion, implication of budgetary priorities, and prospective implications that reach beyond the particular persons immediately impacted (*id.* ¶¶ 8-16). Nothing more need be alleged to establish legislative immunity; Plaintiffs' complaint is barred accordingly. *See Esparza v. County of Los Angeles* (2014) 224 Cal.App.4th 452, 462; *People ex rel Harris v. Rizzo* (2013) 214 Cal.App.4th

921, 939-40; *Schmidt v. Contra Costa Cty.* (9th Cir. 2012) 693 F.3d 1122, 1132.

That conclusion is only underscored by Plaintiffs' new concession that their request for damages against the Chief Justice is barred by Government Code section 820.2. *See* Opp'n at 2:20-21. Section 820.2 immunity "applies only to deliberate and considered policy decisions, in which a '[conscious] balancing [of] risks and advantages … took place.'" *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 981 (citation omitted; brackets in original). Plaintiffs effectively admit that, in amending the TAJP, Defendants made a deliberate and considered policy decision—one that the Legislature delegated to Defendants in section 6(e) of the California Constitution—that is necessarily legislative in nature.

This Court should reject Plaintiffs' second point, that if the Court adheres to its prior ruling and sustains the demurrer on the basis of legislative immunity, it not "reach any other issue raised by defendants." Opp'n at 2:15-18. Defendants agree that legislative immunity alone warrants dismissal. However, Defendants ask that this Court adjudicate the remaining arguments so that the parties and Court of Appeal will have a fulsome record on review. After all, a judgment based on an order sustaining a demurrer may be affirmed on appeal on any ground supported by the record, whether or not the trial court relied on that ground. *See Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1144. This Court would assist the Court of Appeal by assessing and explaining whether the FAC is defective, independent of the legislative immunity bar. For the reasons explained below, it is.

II. PLAINTIFFS FAIL TO ALLEGE A PRIMA FACIE CASE OF DISCRIMINATION.

Part II of Defendants' demurrer identified the substantive deficiencies in Plaintiffs' FEHA claim, namely that the FAC fails to allege facts supporting the prima facie element of causation, and that the FAC impermissibly seeks to establish a cause of action based upon subgrouping. Both of these grounds for demurrer should be sustained.

A. Plaintiffs Fail to Establish the Prima Facie Element of Causation.

To establish a claim for disparate impact under FEHA, "causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions *because of their*

membership in a protected group…. [S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation." *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1323-24 (emphasis added); *see also Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1405 ("It is well settled that valid statistical evidence is required to prove disparate impact discrimination, that is, that a facially neutral policy has caused a protected group to suffer adverse effects.").

Plaintiffs argue the FAC is sufficient because it alleges that the 1,320-day service limit "has a disparate impact on plaintiffs and other persons of their age" and "does not apply to younger, more recently retired judges." Opp'n at 3:5-11 (quoting FAC ¶¶ 24, 26). But that summary allegation, bereft of any supporting facts, is inadequate.

To survive a pleading challenge, a plaintiff "need not prove the prima facie elements" of a disparate impact claim, but the plaintiff "must plead the general elements to make a claim facially plausible." *Lee v. Hertz Corp.* (N.D. Cal. 2019) 330 F.R.D. 557, 561. Thus, while the complaint need not contain "detailed statistical evidence," the plaintiff "must still provide *some* well-pleaded facts to support her claim." *Garay v. Lowes Home Centers, LLC* (D. Or. Nov. 14, 2017) 2017 WL 5473887, at *3; *see also Adams v. City of Indianapolis* (7th Cir. 2014) 742 F.3d 720, 733 (a disparate impact claim is properly dismissed at the pleading stage when it lacks "basic allegations" regarding statistical methods and comparison or "any other factual material to move the disparate-impact claim over the plausibility threshold"); *Jianqing Wu v. Special Counsel, Inc.* (D.D.C. 2014) 54 F. Supp. 3d 48, 54 ("[c]ommon sense and fairness … dictate that [the plaintiff] must, at a minimum, allege some statistical disparity, however elementary, in order for the defense to have any sense of the nature and scope of the allegation").[1]

Plaintiffs' FAC contains no statistical evidence, let alone basic facts demonstrating a correlation between the 1,320-day service limit and participants of a certain age. Indeed, the FAC does not even identify Plaintiffs' ages. Contrary to Plaintiffs' argument, this pleading failure cannot be excused merely because they filed in state court under state law.

[1] Plaintiffs' contention that *Wu* concerned only a disparate treatment theory of liability is incorrect. *See Wu*, 54 F. Supp. 3d at 53-56.

Because California and federal employment discrimination laws are "virtually identical," California courts "have adopted the methods and principles developed by federal courts … under the federal Age Discrimination in Employment Act" when adjudicating FEHA claims. *Cummings v. Benco Building Servs.* (1992) 11 Cal.App.4th 1383, 1386; *see also Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 ("Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes."). Plaintiffs identify no case suggesting that the obligation to plead facts demonstrating causation is a creature of federal law alone.

Indeed, California requires *fact* pleading, or pleading of ultimate facts, rather than the more forgiving notice pleading allowed in federal courts. *See* Code Civ. Proc. § 425.10 (a "complaint … shall contain … a statement of facts constituting the cause of action in ordinary and concise language"). The FAC's legal assertion that the 1,320-day service limit disproportionately impacts "older" judges cannot substitute for facts demonstrating a causal link between the 1,320-day service limit and a disproportionate impact on judges of a particular age.

If anything, the FAC's only pertinent facts demonstrate that the 1,320-day service limit distinguishes between TAJP participants on the basis of *experience* (or, as Plaintiffs phrased the concept in proceedings on their motion for preliminary injunction, on the basis of whether a particular retired judge was "hardworking"), and not *age*. The FAC alleges that Plaintiffs have been adversely impacted by the 1,320-day service limit for one simple reason: "as of January 1, 2019 [Plaintiffs] had already worked on assignments for more than 1,320 days." FAC ¶ 16. As this Court previously explained, "experience may but does not necessarily correlate with age, because age and work experience are analytically different." Order at 9:3-4 (citing *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 611). For that reason, courts hold that, at the pleading stage, "age discrimination cannot be inferred from differential treatment based on length of service." *Hogan v. Metromail* (S.D.N.Y. 2000) 107 F. Supp. 2d 459, 467.

Plaintiffs urge this Court to diverge from federal law, and assume that an employment policy that distinguishes between employees on the basis of experience necessarily impacts older workers disproportionately. But Plaintiffs offer no persuasive reason to adopt their outlier

position.

The ADEA and FEHA have certain differences, as Plaintiffs note, but none is material to the question of whether experience necessarily correlates with age for purposes of discrimination law. *See* Opp'n at 4:19-5:5. For example, none of the extant federal cases that draw a distinction between age and experience turns on the fact that the ADEA permits employers to differentiate among employees on the basis of "reasonable factors other than age." 29 U.S.C. § 623(f)(1). They turn, rather, on the fact that a "younger employee might easily have more" experience in an employment program "than a newly-hired older employee and so a policy involving long-term employees does not automatically implicate a disparate impact on employees over forty." *Garay*, 2017 WL 5473887, at *3. California law does not require courts to blind themselves to this commonsense proposition, and to assume that all experience-based policies discriminate against protected employees.

The California legislature, certainly, did not intend as much when it revised Government Code section 12941 to abrogate *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30. In *Marks*, the Court of Appeal sanctioned a jury instruction providing that an employer is "entitled to prefer lower paid workers to higher paid workers, even if that preference results in choosing younger workers." *Id.* at 36. In abrogating that holding, the California legislature made clear that if an employment policy has a disproportionate impact on protected employees, an employer cannot escape liability simply because the policy was motivated by a desire to save costs.

Putting aside the fact that section 12941 addresses "the use of salary as the basis for differentiating between employees"—as opposed to experience—*Marks* did not concern the fatal flaw in Plaintiffs' FAC. The defect in the FAC is not that the 1,320-day service limit discriminates on the basis of *both* experience and age; the problem is that the FAC does not plausibly allege facts demonstrating that the 1,320-day service limit disproportionately impacts employees on the basis of age at all. Government Code section 12941 does not excuse that failure.

B. Plaintiffs' FEHA Claim Requires Impermissible Subgrouping.

The Court should sustain the demurrer to Plaintiffs' FEHA claim also because all retired

judges who participate in the TAJP are in the protected class of employees over age forty, so that Plaintiffs' claim requires proving "that the 1,320-day limit discriminates against the oldest members of the larger group of retired judges eligible to serve on the TAJP." Order at 10, n.5. The plain text of FEHA does not permit Plaintiffs to proceed on this "subgroup" theory.

Plaintiffs maintain their theory is permissible because they are comparing retired judges with less than 1,320 days of service against retired judges with more than 1,320 days of service, and "[a]ll employees subject to the 1,320-day limit are in the same group: participants in the Assigned Judges Program." Opp'n at 7:19-20. As this Court already has explained, the fact that retired judges affected by the 1,320-day service limit "also belong to a protected class does not show that they were affected *because* they belong to a protected class." Order at 10:23-11:2. Retired judges with more than 1,320 days of service—like "administrative managers"—are not a protected group under FEHA. *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1326. FEHA protects employees over 40-years old, and Plaintiffs must prove *that* group has been disproportionately impacted, as compared to employees under forty. Gov't Code §§ 12926(b), 12940(a).

That is the holding of both courts to consider the question under FEHA. Under this precedent, a plaintiff suing under FEHA cannot "distinguish between subgroups of employees over the age of 40." *Schechner v. KPIX-TV* (N.D. Cal. Jan. 13, 2011) 2011 WL 109144, at *4. If the law were otherwise, employers would be required to do the impossible: "achieve statistical parity among the virtually infinite number of age subgroups in its workforce." *Rudwall v. Blackrock, Inc.* (N.D. Cal. Feb. 28, 2011) 2011 WL 767965, at *10 (quotation marks and citation omitted).

The fact that *Schechner* and *Rudwall* were decided at summary judgment is of no moment. Those cases set forth a principle of law, adopted by the majority of federal courts, which applies with full force at the pleading stage. *See, e.g.*, *E.E.O.C. v. McDonnell Douglas Corp.* (E.D. Mo. 1997) 969 F.Supp. 1221, 1225, *aff'd* (8th Cir. 1999) 191 F.3d 948; *Petruska v. Reckitt Benckiser, LLC* (D.N.J., Mar. 26, 2015) 2015 WL 1421908, at *7. And here, the FAC expressly alleges that all participants in the TAJP are over forty years old, and thus necessarily relies on subgrouping.

FAC ¶ 5.

Plaintiffs urge this Court to reject *Schechner*, *Rudwall*, and the majority view in favor of *Karlo v. Pittsburgh Glass Works, LLC* (3d Cir. 2017) 849 F.3d 61, which diverged from three of its sister circuits in holding that ADEA disparate impact claims can be based on subgroups. *Id.* at 80. *Karlo* provided two justifications for its holding, neither of which is persuasive here.

First, the court held that a policy can discriminate against older workers on the basis of age even if it benefits protected employees closer to the 40-year old threshold. *See id.* at 70-72. For this proposition, the court relied on *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, which held that a plaintiff may sue for disparate *treatment* discrimination even if replaced by another worked in the protected class. But the reasoning of *O'Connor—i.e.*, that intentional age discrimination is unlawful whether the protected employee is replaced by a 39-year old or a 41-year old—"makes little sense in a disparate impact case, where no evidence of discriminatory intent is required. There is simply no reason to force an employer who has no discriminatory animus to achieve statistical parity for each and every conceivable age subgroup throughout its workforce." *McDonnell Douglas*, 969 F. Supp. at 1224.

Second, *Karlo* relied on a Title VII case, which held that the purpose of Title VII "'is the protection of the individual employee, rather than the protection of the minority group as a whole.'" *Karlo*, 849 F.3d at 72 (quoting *Connecticut v. Teal* (1982) 457 U.S. 440, 453-54). But in this regard, the California legislature was clear: disparate impact claims under FEHA "protect[] older workers as a group." Gov't Code § 12941. The plain language of FEHA thus demonstrates that the California legislature did not intend to permit disparate impact claims when an employer's policy has no measurable impact on employees older than 40 as a *group*.

III. PLAINTIFFS DO NOT DISPUTE THAT THEIR CONSTITUTIONAL CLAIM FALLS WITH THEIR FEHA CLAIM.

Part III.A of Defendants' demurrer argued that Plaintiffs' constitutional claim falls with their FEHA claim, based upon Plaintiffs' prior concession that their second cause of action "has no independent vitality, but depends entirely on their statutory age discrimination claim." Order at 8 n.4. Defendants also argued that the constitutional claim is legally defective for independent

reasons, including that Plaintiffs have no private right of action under article VI, section 6 of the California Constitution (Part III.B), and that the FAC does not allege facts establishing a constitutional violation (Part III.C). Plaintiffs do not contest any of these points, thereby waiving any argument that the second cause of action can survive demurrer. *See, e.g.*, *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 217. Accordingly, the Court should sustain Defendants' demurrer to the second cause of action without leave to amend.

IV. LEAVE TO AMEND WOULD BE FUTILE.

Plaintiffs argue that even if the Court is inclined to sustain the demurrer, Plaintiffs are prepared to submit an amended complaint that includes statistical evidence showing that the 1,320-day limit affects "older retired judges significantly more often than younger retired judges." Opp'n at 7, n.1.

This Court should reject Plaintiffs' proffer of statistical evidence as futile, because it cannot help them plead around the bar of the legislative immunity, *or* excuse their reliance on impermissible subgrouping, *or* cure the multiple defects of their second cause of action for violation of the California Constitution. In short, the Court should sustain the demurrer to Plaintiffs' second cause of action regardless; and it need consider Plaintiffs' request for leave to amend *only* if it intends to dismiss Plaintiffs' first claim on the *sole ground* of failure to allege causation.

Even if the Court considers Plaintiffs' request, however, the Court should deny it. The burden is on Plaintiffs to show in what manner they can amend the complaint, and how that amendment will change the legal effect of the pleading. *See Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349. Plaintiffs had the data necessary to demonstrate a statistically-significant impact before the preliminary injunction hearing, yet proffered a declaration improperly limited to a subgroup of "hardworking assigned judges." Order at 10:17-20. As this Court correctly held, nothing about Plaintiffs' evidentiary submission suggested that the minor disparities highlighted by their declarant "have such significant adverse effects on protected groups that they are in operation … functionally equivalent to intentional discrimination." *Id.* at 11:11-14 (quotation marks and citation omitted).

If Plaintiffs were capable of submitting statistical evidence sufficient to survive demurrer, they would have done so already. Certainly, Plaintiffs' terse request for leave does not explain how their next evidentiary proffer would be different. Because Plaintiffs have failed to show a "reasonable possibility the defect in the pleading can be cured by amendment," further leave to amend should be denied. *Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 7.

CONCLUSION

For these reasons, Defendants' demurrer to Plaintiffs' First Amended Complaint should be sustained without leave to amend.

Dated: August 1, 2019.

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 August 1, 2019, I served a copy of the within document(s):

DEFENDANTS' REPLY IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed UPS overnight envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to UPS for overnight delivery.

☒ by causing to be personally delivered by First Legal, the document(s) listed above to the person(s) at the address(es) set forth below.

☒ 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
101 California Street
Suite 2710
San Francisco, California 94111

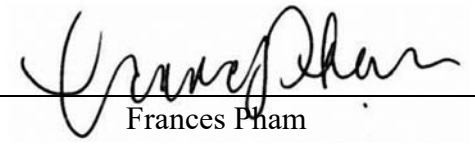
Thomas W. Jackson, Esq.
tjackson@fsmllaw.com
(707) 244-9422
Furth Salem Mason & Li LLP
640 Third Street
Second Floor
Santa Rosa, California 95404

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 August 1, 2019, at Irvine, California.



Frances Pham