IN THE COURT OF APPEAL IN THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

No. C080941

RODRIGO ROMO, on behalf of himself and his two minor children,
Plaintiff-Appellant,

v.

EDMUND G. BROWN, in his official capacity as Governor of the State of California; Division of Oil, Gas & Geothermal Resources, KENNETH A. HARRIS, in his official capacity as California Oil and Gas Supervisor,
Defendants-Respondents.

On Appeal from the Superior Court of Sacramento County
(Case No. 34-2015-00181715, Honorable David I. Brown, Judge)

PLAINTIFF-APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

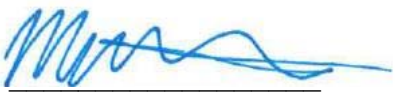
STATUTES

REGULATIONS

OTHER AUTHORITIES

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court rule 8.208(e)(3), the undersigned Counsel for Appellant does hereby certify that she knows of no entity that has an ownership interest of 10% or more in the Appellant or of any other person or entity that has a financial or other interest in the outcome of these proceedings.



Madeline Stano

INTRODUCTION

Students of color across California experience life threatening pollution from oil drilling at much higher rates than white students. The State of California enacted regulations on a group of new oil drilling technologies that caused a proliferation of new damaging wells in and around schools with majority students of color. The State's harmful regulations caused a new and unique disparate impact on students of color prohibited by California Government Code section 11135.

In this appeal, Plaintiff-Appellant Rodrigo Romo will establish that the factual allegations in the complaint, which the Court accepts as true on demurrer and during this appeal, satisfy all the elements of a cause of action under California Government Code section 11135. Thus, the Superior Court should have allowed Romo to go to trial and this Court should reverse the erroneous judgment below. Alternatively, should the Court find fault with Romo's complaint, the Superior Court erred in sustaining the demurrer without leave to amend. Romo will demonstrate there is a reasonable possibility to cure any defect by amendment.

Romo's daughters – like all students in California – deserve and are entitled to a quality public education. This Court should grant Romo an opportunity to demonstrate at trial how the oil drilling regulations injured his daughters and thousands of students of color like them throughout California.

STATEMENT OF THE CASE

The present action has its origin in a complaint for injunctive and declaratory relief Romo filed on behalf of himself and his two minor children against Defendants-Appellees Governor Edmund G. Brown, the Division of Oil, Gas, Geothermal Resources ("DOGGR"), and Kenneth A. Harris[1] (collectively "the State") on July 14, 2015. (CT[2] 1-29.) The complaint alleged one cause of action – that the State violated California Government Code section 11135 by approving regulations that had a disparate negative impact on Latino schoolchildren and students of color. (CT 27: 3-21.)

On September 16, 2015, the State responded to the complaint by filing a general demurrer under Code of Civil Procedure section 430.10(e), arguing the complaint lacked facts sufficient to state a cause of action. (CT 30-43.) After argument, the Superior Court sustained the demurrer without leave to amend on the ground that the State has discretion to adopt regulations that are necessary or appropriate. (CT 67.) The Superior Court found that "the failure of the defendants to completely eliminate the existing disparate impact by enacting yet more regulations even more beneficial to the children of color fails to state a cause of action against

[1] The complaint named Steven Bohlen, in his official capacity as Oil & Gas Supervisor. Subsequently, November 30, 2015, Governor Brown appointed Kenneth A. Harris Oil & Gas Supervisor.
[2] Clerk's Transcript notated as CT; Reporter's Transcript notated as RT.

defendants." (CT 68.) The court's minute order reflects that the basis for its ruling was the decisions in *Zetterberg v. State Department of Public Health* (1974) 43 Cal.App.3d 57 and *Tailfeather v. Board of Supervisors of Los Angeles County* (1996) 48 Cal.App.4th 1223. (CT 67.)

STATEMENT OF APPEALABILITY

This appeal is from Sacramento Superior Court's judgment entered on November 16, 2015 in accordance with its order sustaining a demurrer without leave to amend served on November 2, 2015. This is a final judgment which disposed of all issues between the parties and is appealable under California Civil Procedure Code section 904.1(a)(1).

STATEMENT OF FACTS

Tens of thousands of Latino schoolchildren across California attend public schools surrounded by oil drilling and well stimulation operations that jeopardize their health and well-being. (CT 2.) Students of color are exposed to chemicals and other pollution from oil drilling and well stimulation technologies at much higher rates than white students. (CT 25.) The State's adoption and enactment of well stimulation regulations to promote further oil and gas drilling under Senate Bill 4 caused a racially disparate negative impact on students of color in violation of California Government Code section 11135. (CT 2.) Subsequent to the adoption of the regulations, the state has permitted the placement of a disproportionate number of extraction wells in close proximity to schools with higher

percentages of students of color in comparison to schools with predominantly white students. (CT 26-27.)

Oil Drilling and Well Stimulation in California

Appellee DOGGR is an agency of the State of California charged with regulating "the drilling, operation, maintenance, and abandonment of oil and gas wells in the state, preventing damage to: (1) life, health, property, and natural resources; (2) underground and surface waters suitable for irrigation or domestic use; and (3) oil, gas, and geothermal reservoirs." (CT 5-6.)

Well stimulation techniques in California were developed to produce energy by extracting and refining previously unavailable oil reserves. (CT 13.) Operators in California stimulate wells by injecting highly pressurized fluids, including large amounts of water, and proppants (chemically treated silica sand) or acid, which creates fissures between molecules in a geological formation that frees the oil for extraction. (CT 13, 14.) The fluids injected contain acids and over 630 known chemicals, including carcinogens, neurotoxins and those known to negatively impact human health. (CT 13, 14.)

The Monterey Shale formation, where well stimulations for oil occur in California, is by far the nation's largest shale formation with an estimated area of 1,752 square miles. (CT 16.) The Monterey Shale formation stretches from Modesto to San Diego. (CT 16.) Despite the large

size of the Monterey Shale formation, the State is issuing permits for well stimulations overwhelmingly in areas with the highest percentages of students of color. (CT 26-27.)

Senate Bill 4 And Implementing Regulations

On September 20, 2013, Governor Brown signed into law Senate Bill 4 which directed DOGGR to promote, streamline, and encourage the expansion of well stimulation techniques in California.[3] (CT 15: 1-6.) Senate Bill 4 required DOGGR to create a permitting process for well stimulation. (CT 9: 11-12.) DOGGR's Supervisor is tasked with reviewing and approving these permits. (CT 9: 13-16.)

On December 23, 2013, DOGGR issued interim regulations pursuant to Senate Bill 4. (CT 10: 3-5.) These regulations outlined a temporary permitting process for well stimulation. (CT 10: 5-7.) The regulations did not contain setbacks for active drilling, waste disposal, or waste storage from sensitive land uses like schools, hospitals, residential housing or commercial farms.[4] (CT 10: 8-10.) DOGGR permitted numerous wells under these interim regulations. (CT 11: 17-20; 12: 19-22; 13: 3-8.)

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[3] "Other well stimulation treatments, in addition to hydraulic fracturing, are also critical to boosting oil and gas production." (Sen. Bill No. 4 (2013-2014 Reg. Sess.) ch. 313 § 1(a).)

[4] Romo offered a lack of setbacks as just one example of how interim and final implementing regulations caused a disparate impact on students of color. (RT 17: 16-20.)

On December 30, 2014, the Office of Administrative Law approved and filed the final Senate Bill 4 Implementing Regulations on well stimulation treatments with the Office of the Secretary of State. (CT 10: 24-26.)

On July 1, 2015, the State Oil & Gas Supervisor certified the Final Senate Bill 4 Environmental Impact Report which evaluated "the impacts of existing and potential future oil and gas well stimulation treatments" in California. (CT 11: 1-3.) Simultaneously, on July 1, 2015, the Senate Bill 4 Implementing Regulations went into effect. (CT 11: 4.) They include conditions on testing, monitoring, public notice, and permitting. (CT 11: 6-7.) The final regulations, like the interim regulations, did not include setbacks of any size for active drilling, waste disposal, or waste storage from sensitive land uses. (CT 21: 16-21.) Thus, the Implementing Regulations permitted oil and gas stimulation activities to occur within feet of schools, day cares, hospitals, and residences.

On July 9, 2015, after certification of the Senate Bill 4 Implementing Regulations, the California Council on Science and Technology published its independent scientific assessment of well stimulation treatments, including hydraulic fracturing in California as required by Senate Bill 4. (CT 11: 8-11.) The report recommended setbacks for well stimulation from residences, schools and other sensitive receptors as a method of mitigating known health risks from air toxics and water pollutants. (CT 22: 12-15.)

Disparate Impacts of Well Stimulation in California After Senate Bill 4 Implementing Regulations

California school districts with high enrollment of Latino and other students of color contain a greater number of oil and gas wells, including wells that use well stimulation technologies, than districts with low student of color enrollment. (CT 25: 6-8.) Statistical trends show that as the number of Latino students and students of color in a school district increases, so does the number of oil and gas wells found in the district and near the schools. (CT 25: 9-11.) At least 61,612 California students attend a school within one mile of an oil well drilled using well stimulation methods and at least 12,362 students attend a school within a half mile of these wells. (CT 24: 9-21.) Students of color represent 83.8 percent of students attending a school within 1 mile of confirmed oil well stimulation and 62.5 percent of students at those schools are Latino. (CT 25: 14-15.) Students of color represent 89.9 percent of students attending a school within a half mile of confirmed well stimulations and 61.6 percent of students at those schools are Latino. (CT 25: 18-20.)

A Latino student is 18.4 percent more likely to attend a school within 1.5 miles of a stimulated well than a non-Latino student. (CT 26: 20-21.) A student of color is 19.1 percent more likely to attend a school within 1.5 miles of a stimulated well than a white student. (CT 26: 22-23.) A Latino student is 20.2 percent more likely to attend a school within 1.5

miles of an active well[5] than a non-Latino student. (CT 26: 24-25.) A student of color is 24.8 percent more likely to attend a school within 1.5 miles of an active well than a white student. (CT 27: 1-2.)

Negative Health Impacts from Well Stimulation

Close proximity to well stimulations negatively impacts the full array of mental, physical and social health of students of color through both direct exposures to dangerous chemicals and pollutants in addition to the psychosocial stress from living and attending schools in an area surrounded by oil drilling. (CT 18: 4-7.) Proximity to oil and gas production increases a population's exposure to air pollutant emissions, as well as dust, chemicals, noise, and light. (CT 19: 15-18.) Proximity to air toxic releases increases the experience of negative health effects including birth defects, cancer, respiratory ailments, and neurological damage. (CT 19: 16-18.)

Exposure to air toxics is associated with mild and severe respiratory disorders, exacerbates existing respiratory disorders like asthma, damages neurological and gastrointestinal cardiovascular systems, damages the immune system, harms the skin and eyes, and causes premature death. (CT 19: 1-4.) Children, the elderly, and those already suffering from chronic health problems are especially vulnerable to negative health impacts from air toxics and experience irreversible damage at lower levels of exposure

[5] For the purposes of this appeal, an "active well" means an actively producing oil or gas well.

than the general population. (CT 19: 15-8.) Oil spills, oil drilling, proximity to heavy industry, superfund cleanup sites, and well stimulation of the Marcellus Shale in Pennsylvania have resulted in statistically significant psychological, psychosocial, and physical stress. (CT 20: 11-14.)

Students of color disproportionately attend schools within unsafe distances of well stimulation, putting them at increased risk of these serious health impacts. (CT 18-21, 25.) Romo's daughters, Jane and Joan Doe,[6] both suffer from asthma and Jane Doe suffers from epileptic attacks, all of which began after well stimulations and subsequent oil production in their schools' close proximity. (CT 5: 1-5, 15-16; 20: 7.) Jane and Joan Doe both suffer from psychological distress and fear for their health and safety because of their schools' close proximities to well stimulations. (CT 21: 8-9.)

At the time Romo filed a complaint in this case, Jane Doe was thirteen years old and attended Richland Junior High in Shafter, California. Richland Junior High is within 1.5 miles of the North Shafter Field which contains a total of 92 non-enhanced active wells and a minimum of 45 well stimulations. (CT 4: 6-7, 8-10.) Richland Junior High had an enrollment of

[6] Minor children's names are confidential and withheld at this time to protect their privacy and physical safety. Romo is willing to file their names under seal with the Court if necessary.

703 students, 94 percent of whom were Latino and 96 percent of whom were students of color. (CT 4: 7-8.) Previously, she attended Sequoia Elementary School, also in Shafter. (CT 4: 12.) In the 2013-2014 school year, Sequoia Elementary School had an enrollment of 805 students, 86 percent of whom were Latino and 89 percent of whom were students of color. (CT 4: 12-14.) Sequoia Elementary School is within a half mile of a minimum of three well stimulations and eight non-enhanced oil wells. (CT 4: 14-15.) Sequoia Elementary School is within 1 mile of a minimum of 12 well stimulations and 34 non-enhanced oil wells. (CT 4: 15-17.) Sequoia Elementary School is within 1.5 miles of a minimum of 15 well stimulations and 42 non-enhanced active wells. (CT 4: 17-18.)

While Jane Doe attended Sequoia, school officials instructed students to stay inside for recess for a week because of bad smells assumed to be associated with the well stimulations neighboring the school. (CT 5: 6-8.) She continues to fear spending time outside and exercising near Richland Junior High because of her health and the school's proximity to well stimulations. (CT 5: 8-10.)

At the time Romo filed a complaint in this case, Joan Doe was seventeen years old and attended Independence High School in Wasco, California. (CT 5: 11-12.) For the 2013-2014 school year, Independence High School had an enrollment of 129 students, 96 percent of whom were Latino and 97 percent of whom were students of color. (CT 5: 12-14.)

Independence High School is within 2 miles of the Rose Field with 62 active wells, and a minimum of 44 well stimulations. (CT 5: 14-15.) Joan Doe suffers from severe asthma and fears for her health and safety because of her school's proximity to well stimulations. (CT 5: 15-16.)

ARGUMENT

I. SUMMARY OF ARGUMENT

Any valid cause of action pleaded with supporting facts overrules a demurrer. Romo sufficiently pleaded facts for every required element of Government Code section 11135 and thus the Superior Court should have overruled the demurrer. Further, the Superior Court erred when it denied Romo leave to amend the complaint.

First, Romo pleaded that a facially neutral action occurred when the State promulgated the Senate Bill 4 regulations which contain no express or implied provisions on race. (CT 2: 11-14; 27: 9-12.) Second, Romo pleaded that the State drafted, signed, finalized and implemented these regulations thereby constituting a "state administered" series of activities. (CT 8-11.) Third, Romo pleaded that after and because of the regulations, a protected group (students of color and Latino students) suffered greater harms than white students from well stimulations. (CT 24-27.) Romo pleaded the state regulations promote well stimulations in California. (CT 15: 1-6; RT 14: 15-18; 25: 28 - 26: 12.) The complaint alleges statistics

that establish a racial disparity sufficient to violate Government Code section 11135. (CT 24-27.) On demurrer and on appeal the Court must accept all of these factual allegations as true. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Additionally, Romo may cure any defect in his original complaint by amending the complaint to include even more data from several state and federal datasets to demonstrate the harmful, disparate impacts of the regulations on students of color. Romo, if required, can amend the complaint with additional data to how the regulations caused more well stimulations to occur closer to greater numbers of students of color. Romo will allege how this disparate impact is statistically significant in comparison to data on white students' exposure to well stimulations following Senate Bill 4 with even more specific statistical allegations. Any broader questions of causation are out of the scope of review on demurrer and are premature at this time.

For those reasons, this Court should overrule the decision of the Superior Court and allow Romo to proceed to trial so that he may fully protect his daughters from life threatening pollution at school.

II. STANDARD OF REVIEW

As this is an appeal from a decision sustaining a demurrer without leave to amend, this Court reviews the complaint *de novo* to determine

whether Romo alleged facts sufficient to state a cause of action under any legal theory. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) A demurrer tests the sufficiency of the complaint as a matter of law, and therefore, raises a question of law that does not entitle the Superior Court's decision to deference. (Code Civ. Proc., § 589; *Charpentier v. Los Angeles Rams Football Co.* (1999) 75 Cal.App.4th 301, 307; *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 870.) The Court must "give the complaint a reasonable interpretation and treat the demurrer as admitting all material facts properly pleaded" but does not assume the truth of contentions, deductions or conclusions of law. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655; *see also Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 5.)

While the decision to sustain or overrule a demurrer is subject to *de novo* review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) The Court must decide whether a reasonable possibility exists that amendment may cure any defect. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) If the defect can be cured by amendment, the Superior Court has abused its discretion and the ruling should be reversed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

III. ROMO PROPERLY ALLEGED A CAUSE OF ACTION UNDER CALIFORNIA GOVERNMENT CODE SECTION 11135.

To surpass demurrer, a complaint needs only to allege facts sufficient to state a cause of action. (*C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861.) The Superior Court never found Romo pleaded insufficient facts under Government Code section 11135 or any other legal theory. (CT 66-68.) Romo in fact pleaded sufficient facts for each element of section 11135 and this Court should allow Romo to proceed to trial.

California's anti-discrimination statute, Government Code section 11135, and its implementing regulations prohibit the State from both intentional discrimination as well as facially neutral acts that inflict discriminatory results. Government Code section 11135, subdivision (a) provides:

> "No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state."

Regulations implementing section 11135 prohibit "disparate impacts," state funded or administered practices that "utilize criteria or methods of

administration that have the purpose or effect of subjecting a person to discrimination." (Cal. Code Regs., tit. 22, § 98101, subd. (i)(1).)

A prima facie violation of section 11135 for a disparate impact claim requires a showing that (1) a facially neutral practice, program or activity; (2) funded or administered by the state; (3) has a disparate impact on protected groups. (*See* Gov. Code § 11135; Cal. Code Regs., tit. 22 §§ 98010, 98101, 98210.)

The Superior Court was unclear as to the basis of its decision. The minute order states "the failure of defendants to completely eliminate the existing disparate impact by enacting yet more regulations even more beneficial to the children of color, fails to state a cause of action against defendants." (CT 68.) The Superior Court's conclusion is not based on any analysis of Romo's factual pleadings. The Superior Court did not identify how Romo failed to satisfy any essential element of section 11135. (CT 66-68.) Unless Romo failed to state a cause of action, the court lacked legal authority to sustain the demurer. (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998.)

Romo pleaded all facts necessary to state a cause of action under 11135 and the demurrer should have been overruled. This Court should reverse the Superior Court's decision and allow Romo to fully argue the merits of his case at trial for the reasons set forth below.

A. Romo Challenges the Adoption and Implementation of the Facially Neutral Senate Bill 4 Implementing Regulations.

The first element of a section 11135 cause of action is a facially neutral practice or program. The complaint challenges the adoption and implementation of the facially neutral final Senate Bill 4 regulations. (CT 2, 27.) These regulations direct DOGGR to adopt a permitting system for well stimulation. (CT 9: 11-16.) This permitting system contains no provisions on race or otherwise directly states a racial animus or indicates an intent to subject students of color to harmful exposures from well stimulation and oil production. (CT 9: 11-16.) The Superior Court did not find that Romo failed to challenge a facially neutral action. (CT 66-68.) Romo sufficiently pleaded the first element of a section 11135 cause of action.

B. Romo Challenges the State Administered and Adopted Senate Bill 4 Implementing Regulations.

The second required element of a section 11135 violation is state action. Romo challenged the state adoption and administration of the Senate Bill 4 Implementing Regulations. (CT 8-11). At the hearing the State conceded it took a "state action" when it adopted and implemented Senate Bill 4 regulations.[7] (RT 23: 26-28.) Romo pleaded the following

[7] The State argued on demurrer that "private" actors caused harm to Romo. (CT 41.) However, Romo properly pleaded in his complaint and argued at hearing that he was challenging state administered and sanctioned actions,

facts to demonstrate implementing and adopting the regulations are state administered:

On September 20, 2013 Governor Brown signed into law Senate Bill 4 and directly and indirectly influences staff composition and decision of DOGGR. (CT 8, 11-13.)

DOGGR, a state agency and the Oil and Gas Supervisor adopted regulations challenged by Romo and administer the program. (CT 5, 6, 8-9, 11.) DOGGR is an agency of the State tasked with supervising the drilling, operation, maintenance and plugging and abandonment of onshore and offshore oil, gas, and geothermal wells. (CT 8: 4-5.)

On November 15, 2013, DOGGR began its formal well stimulation rulemaking process with the release of its proposed permanent implementing regulations. (CT 9: 25-26.)

On December 23, 2013, DOGGR issued interim regulations pursuant to Senate Bill 4. (CT 10: 3-5.) These regulations outlined a temporary permitting process for well stimulation. (CT 10: 5-7.)

On December 30, 2014, the Office of Administrative Law approved and filed the final Senate Bill 4 Implementing Regulations on well

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not the actions of private actors. (RT 26: 20-24.) At issue in the complaint is whether the state action caused disproportionate harm to students of color. Romo is prepared to demonstrate this causation at trial.

stimulation. (CT 10: 24-26.) On July 1, 2015, the final Senate Bill 4 Implementing Regulations took effect. (CT 11: 4.)

C. The Complaint Pleads Students of Color Suffer Disparate Harms Caused by Senate Bill 4 Implementing Regulations.

The third and final required element of a section 11135 cause of action is a disparate impact on a protected group. Romo pleaded that students of color, who are a protected group under section 11135, suffer from greater exposure to the harms from well stimulation and oil production than white students in California due to the adoption and implementation of Senate Bill 4 Implementing Regulations. (CT 24-27.) The Complaint pleads specific harms suffered by Romo and students of color including, but not limited to, severe respiratory conditions; epileptic attacks; psychological distress and fear for health and safety. (CT 4-6, 18-21.)

Romo pleaded the following facts to demonstrate implementing and adopting the regulations caused racially disparate impacts on students of color:

Senate Bill 4 commits DOGGR to promoting, streamlining, and encouraging the expansion of well stimulation techniques in California:

> "The hydraulic fracturing of oil and gas wells in combination with technological advances in oil and gas well drilling are spurring oil and gas extraction and exploration in California. Other well stimulation treatments, in addition to hydraulic fracturing, are also critical to boosting oil and gas production."

(CT 15: 1-6; Sen. Bill No. 4 (2013-2014 Reg. Sess.) ch. 313 § 1(a).)

Romo pleaded that subsequent to the adoption of Senate Bill 4 Interim and Implementing Regulations, statistical trends show that as the number of Latino and students of color in a school increases, so does the number of oil and gas wells found in immediate surrounding area. (CT 25: 9-13.)

On July 9, 2015 and after the regulations went into effect, the California Council on Science and Technology published its report on well stimulation in the state as required by Senate Bill 4 and found setbacks from residences, schools and other sensitive receptors would reduce increased health risks associated with well stimulation and oil production. (CT 22: 12-15.)

In order to document the disparate impact of the regulations on Latino students and students of color, Romo conducted a disparity analysis of California schools located in regions that are known to produce hydrocarbons. The analysis documented the following conclusions:

- A Latino student is 18.4 percent more likely to attend a school within 1.5 miles of a stimulated well than a non-Latino student.
- A student of color is 19.1 percent more likely to attend a school within 1.5 miles of a stimulated well than a white student.

- A Latino student is 20.2 percent more likely to attend a school within 1.5 miles of an active well than a non-Latino student.
- A student of color is 24.7 percent more likely to attend a school within 1.5 miles of an active well than a white student.

(CT 26-27.)

Romo pleaded the regulations promoted well stimulation development in California and thus disparately impacts students of color. If the Court believes there is any ambiguity as to whether Romo pleaded that the disparate harm resulted directly from the regulations, it can be cured by granting leave to amend the original complaint or through argument at trial.

The Superior Court compounded its legal error by making a factual finding – inappropriate on demurrer – that the regulations confer a public health benefit to students of color. (CT 68.) The Superior Court held that the State had no duty to enact regulations "even more beneficial to the children of color." (CT 68.) Romo had not pleaded that the regulations benefited schoolchildren of color at all; rather Romo pleaded the regulations *caused* racially discriminatory harm to students of color. (CT 2: 19-22; RT 25: 28, 26: 1-12.) Romo pleaded that the State designed the regulations to promote well stimulation in California and increase oil yields and thus caused disparate impacts on students of color. (RT 27: 9-14.) Under *Evans v. City of Berkeley*, *supra*, 38 Cal.4th at 6 the Superior Court must accept all facts Romo pleaded as true on demurrer. The Superior

Court's findings are entitled to no deference on appeal. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.*, *supra*, 118 Cal.App.4th at 869.) The Superior Court thus erred by relying on assumptions counter to those in Romo's complaint. (CT 68.)

None of the Superior Court's reasoning or analysis finds Romo pleaded insufficient facts under section 11135 and thus fails to justify sustaining demurrer. (CT 66-68.) Romo appropriately challenged a state action for *causing* a disparate impact on students of color under California Government Code section 11135. (CT 2.) Romo pleaded sufficient facts for each required element of section 11135 and thus this Court should reverse the Superior Court's ruling.

IV. *TAILFEATHER* AND *ZETTERBERG* HAVE NO BEARING ON THE COURT'S DETERMINATION AS TO WHETHER ROMO PLEADED SUFFICENT FACTS.

The Superior Court erred when it deferred to the State's discretion to implement Senate Bill 4 regulations. (CT 67-68.) The court wrote: "In the absence of an express legislative command, the decision whether administrative regulations are necessary or appropriate is a matter entrusted to the discretion of the administrative agency." (CT 67.) This has no bearing on whether Romo stated a cause of action. While an agency may be entitled to deference when implementing a statutory scheme, it has no authority to violate other provisions of law in its rule-making activities.

(*See e.g. Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401.) Therefore, while DOGGR had the discretion to decide how to implement Senate Bill 4, within the confines the Legislature authorized, the Legislature never specifically or impliedly abrogated Government Code section 11135. Simply put, DOGGR cannot adopt regulations *under any authorizing statute* that will cause a disproportionate and negative impact based on race if there are feasible alternatives that avoid those impacts. (*See* Gov. Code § 11135 (emphasis added) [prohibiting racially disparate impacts in "*any* program or activity that is conducted, operating, or administered by the state or by any state agency"]; *see e.g. Fry v. Saenz* (2002) 98 Cal.App.4th 256, 260-261 [the court permitted a section 11135 challenge to a rule issued under the Welfare Code]).

The Superior Court's reliance on *Tailfeather v. Board of Supervisors of Los Angeles County*, *supra*, 48 Cal.App.4th 1223 and *Zetterberg v. California State Department of Public Health*, *supra*, 43 Cal.App.3d 657 to sustain the State's demurrer was misplaced. (CT 67-68.) *Tailfeather* and *Zetterberg* merely articulate well-settled levels of deference for agency actions in promulgating regulations, a question of law that is not invoked in this demurrer. Neither case holds that an agency's discretion to implement a statutory scheme overrides section 11135's prohibition on racial discrimination. Moreover, *Tailfeather* and *Zetterberg* do not alter the

standard of review for demurrer or the essential elements of a section 11135 violation. *Tailfeather* and *Zetterberg* simply have no bearing on the Court's determination as to whether Romo pleaded sufficient facts to maintain an action under section 11135.

V. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT DENIED LEAVE TO AMEND.

If the Court finds that Romo's complaint lacks sufficient facts to satisfy the required elements of section 11135, then he respectfully requests leave to amend. At the hearing, Romo properly requested leave to amend to allege additional facts. (RT 14:15-20.) If this Court finds that there is a "reasonable possibility" that Romo can amend the complaint to cure any defects, then the Superior Court abused its discretion when it denied the request. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at 1081.)

Romo can amend his complaint to further demonstrate the regulations caused more well stimulations and oil production which disparately impacts students of color. For example, Romo can include supplemental data from the United States Census, the California Department of Education Demographic Reports, United States Geological Survey, U.S. Energy Information Association, Central Valley Regional Water Quality Control Board, the industry run national hydraulic fracturing registry FracFocus.org, DOGGR Annual Production Reports by County, DOGGR Well Stimulation Treatment Disclosure Database, DOGGR Well

Stimulation Treatment Permit Database, and DOGGR California Stimulations Mapping Utility to demonstrate with greater specificity how the regulations disparately harm students of color. Romo can further illustrate the magnitude of the disparity, the specific provisions in and absent from the regulations which cause disparate impacts, and how regulatory certainty[8] from Senate Bill 4 contributes to a greater number of wells burdening students of color in California than that existed prior to the adoption of the regulations. Finally, Romo can alleviate any confusion between the historical disparate impact of oil on people of color and the unique impact of the regulations on students of color.

Romo can cure any potential defect found in its original complaint. Correspondingly, the Superior Court abused its discretion refusing Romo's request to amend. If this Court finds any ambiguity in Romo's complaint, we respectfully request the opportunity to amend.

[8] The principle of "regulatory certainty" posits private actors are more likely to invest in activities after they are regulated because they can make more informed long-term financial decisions. (*See* RT 26: 1-12. *See also* Sivas & Caldwell (2008) *A New Vision For California Ocean Governance: Comprehensive Ecosystem-Based Marine Zoning*, 27 Stan. Envtl. L.J. 209.)

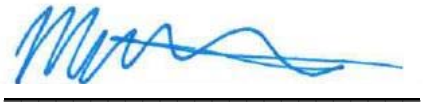
CONCLUSION

Based on the foregoing, Romo respectfully requests that this Court vacate the Superior Court's judgment to sustain demurrer without leave to amend and allow Romo's case to proceed on the merits. Alternatively, Romo requests the opportunity to amend the complaint. Romo deserves an opportunity to fully try his case on behalf of his daughters and students of color suffering from well stimulation and oil production pollution.

Dated: September 12, 2016.

Respectfully Submitted,

CENTER ON RACE, POVERTY & THE ENVIRONMENT



MADELINE STANO
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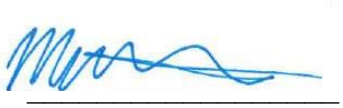
for plaintiff-appellant
RODRIGO ROMO

WORD COUNT CERTIFICATION

I, Madeline Stano, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 5,484 words, excluding the tables, this certificate, and any attachment permitted under the rules. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California, on September 12, 2016.



Madeline Stano
Attorney for Appellant
Rodrigo Romo

DECLARATION OF SERVICE BY MAIL

Case Name: ***RODRIGO ROMO v. EDMUND G. BROWN et al.***

Case No: **C080941**

I declare:
I am employed at the Center on Race, Poverty & the Environment. My business address is 1999 Harrison St., Suite 650, Oakland CA 94612.

I am 18 years of age or older and not a party to this matter.

On September 12, 2016, I mailed a copy of the APPELLANT OPENING BRIEF to each party listed below. I deposited the sealed envelopes with the U.S. Postal Service with the postage fully prepaid with the envelopes addressed as follows:

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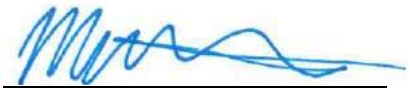
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 12, 2016 at Oakland, California.

MADELINE STANO
Declarant


Signature