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)

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Rodrigo Romo properly pleaded a valid cause of action under California Government Code section 11135 and thus deserves an opportunity to argue the merits of his case. Romo challenged a state action for causing harm to a protected group, of which he and his minor daughters are members. Romo pleaded facts sufficient to demonstrate Respondents Governor Edmund G. Brown, Division of Oil Gas, Geothermal Resources ("DOGGR") and Kenneth A. Harris (collectively "the State") harmed Romo. This Court must accept these pleaded facts as true on demurrer. The Superior Court erred when it granted a demurrer. The State's request for this Court to rule on the merits or probability of success of Romo's claim on appeal is premature and impermissible on demurrer. Even if Romo's pleadings were insufficient, the Superior Court erred when it denied leave to amend because Romo can reasonably cure any ambiguity in his complaint.

STANDARD OF REVIEW

This Court must determine whether Romo alleged facts sufficient to state a cause of action under any legal theory *de novo*. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) The Court must assume the truth of a complaint's properly

pleaded or implied factual allegations. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074.)

Here, the Court must decide whether Romo pleaded sufficient facts for each of the three required elements of California Government Code section 11135: (1) a facially neutral practice, program or activity (2) funded or administered by the state; (3) that has a disparate impact on protected groups. (*See* Gov. Code § 11135; Cal. Code Regs., tit. 22 §§ 98010, 98101, 98210.)

In setting forth its standard of review, the State ignores the standard for reviewing a section 11135 cause of action and instead outlines an agency's general discretion to issue regulations in compliance with a governing statute. (RB 10 [*citing Yamaha Corporation v. State Board of Equalization* (1998) 19 Cal.4th 1; *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1223; *Western States Petroleum Association v. Air Resources Board* (1995) 9 Cal.4th 559].) *Yamaha*, *Samantha C.* and *Western States Petroleum Association* have no bearing in this demurrer proceeding. The *Yamaha* standard is inapplicable because Romo is not challenging the State's compliance with Senate Bill 4. The State can be well within its discretion in applying SB 4 and simultaneously violate section 11135. Compliance with the governing statute does not foreclose a successful section 11135 challenge. (*See Fry v. Saenz* (2002) 98 Cal.App.4th 256, 260-261 [plaintiffs successfully

challenged a rule under non-governing statutes, including section 11135].) Since the State must comply with both section 11135 and Senate Bill 4, and this case is limited to a review of the State's compliance with section 11135, Respondent's reliance on *Yamaha* deference to agency action is misplaced.

Additionally, this Court reviews a decision sustaining a demurrer without leave to amend by deciding whether a reasonable possibility exists that amendment may cure any defect. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; *see also Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Unless a Court can find "as a matter of law" that an amendment cannot cure the defect, it must grant leave to amend. (*Shultz v. Harney* (1994) 27 Cal.App.4th 1611, 1622.)

ARGUMENT

I. SUMMARY OF ARGUMENT

The question before the Court is procedural: whether Romo pleaded sufficient facts for each of the three required elements of California Government Code section 11135 in his complaint, and if not, whether amendment could cure any potential defects in the complaint. Romo satisfied the procedural requirements to withstand a demurrer without leave to amend and thus this Court should vacate the Superior Court's decision.

First, Romo challenged the facially neutral promulgation and implementation of Senate Bill 4 regulations. (CT[1] 2, 27.) Second, as the State concedes, Romo challenged a "state action" under section 11135. (RB[2] 13.) Third, Romo pleaded the regulations caused harm to himself, his daughters and other members of the same protected group. (CT 15, 24-27.) Alternatively, if the Court finds the complaint deficient, Romo designates with specificity the data he will use in an amended complaint to show how the regulations themselves caused more harmful well stimulation treatments ("WST") near majority schools of color in violation of section 11135. (AOB[3] 29-30.)

The State's argument that this Court should make merit determinations on the causation of Romo's appropriately pleaded harms exceeds the scope of review on demurrer and runs counter to the Court's obligation to accept pleaded facts as true. Additionally, the harm private oil and gas operators may cause does not disprove or diminish the harm resulting from Senate Bill 4 regulations and is not at issue in this case. Agency discretion in promulgating regulations is irrelevant to the questions before this Court on appeal. Romo has pleaded sufficiently to afford him the opportunity to present his full case before the Superior Court. This Court cannot rule on the merits of Romo's complaint but is limited to

[1] Clerk's Transcript notated as CT.
[2] Respondents' Brief notated as RB.
[3] Plaintiff-Appellant's Opening Brief notated as AOB.

determining whether it is, or will be after amendment, legally sufficient. The State presents no argument that Romo improperly pleaded each element of the section 11135 claim or may not cure any ambiguity with amendment.

Since Romo satisfies his burden to overcome a demurrer without leave to amend, this Court should vacate the decision of the Superior Court and allow Romo to plead his case at trial.

II. ROMO PLEADED FACTS SUFFICIENT TO STATE A CAUSE OF ACTION UNDER SECTION 11135

As argued in his opening appellate brief, Romo pleaded facts for each required element of a section 11135 cause of action and the Superior Court erred in granting a demurrer without leave to amend. (AOB 20-26.) The State has not demonstrated that Romo's pleadings are legally insufficient. Instead, the State's brief asks this Court to settle factual matters not properly before it.

A. Romo Challenged State Actions Subject to Section 11135 and Not Private Activities.

To survive demurrer of a section 11135 claim, Romo's complaint must provide sufficient facts to show he is challenging a facially neutral state action. (*See* Gov. Code §11135; Cal. Code Regs., tit. 22 §§ 98010, 98101, 98210.) As Romo demonstrated in his opening brief (AOB 22-24), the complaint pleads sufficient facts demonstrating the State's actions drafting and regulating WST qualify as facially neutral state actions under

section 11135. The State concedes Romo challenged state actions: "The WST permitting program established pursuant to SB 4 is, of course, a state program." (RB 13.)[4] Romo has satisfied the first two requirements of section 11135.

While conceding that the WST permitting program is a state action, the State misstates the scope of this Court's review in three ways. First, the State argues that any harm is the result of "private entities" (RB 13.) Second, in direct conflict with the pleaded allegations, the State argues that the WST regulations do not cause harm. (RB 13-16.) Third, the State argues Romo's interpretation of section 11135 is "impossible to satisfy" thereby prohibiting the Court from hearing Romo's case. (RB 15.) None of these arguments are relevant to question before this Court: whether Romo pleaded a valid cause of action under section 11135.

i. Factual determinations on harm are improper on demurrer.

The State's first two arguments on whether there is harm and who caused it fail because review of demurrer is a legal and not factual question. (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 837 ["The sufficiency of a complaint is, of course, a question of law which we review de novo."].) It is premature and improper to make factual determinations on

[4] At the hearing on demurrer the state additionally conceded it took a "state" action adopting and implementing WST regulations. (RT 23: 26-28.)

whether the WST regulations are harmful or whether the WST caused harm to Romo. (*See Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1146.) Romo pleaded facts sufficient to demonstrate the state actions challenged caused harms to himself, his two daughters and other members of a protected group. (AOB 24-27, 30.) On demurrer, a court must accept these facts as true and must not engage in the "fact-finding appropriate for a trial on the merits." (*Id*.) The Court may not determine the *legal* sufficiency of pleadings on demurrer by relying on its own findings of *fact*. (*Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 Cal.App.2d 123, 135.)

Alleged harms perpetrated by individual oil and gas operators do not foreclose Romo's pleading that the state actions at issue authorizing oil and gas activity also caused harm. This Court consistently recognizes that multiple parties may cause harm to the same plaintiff and one party's responsibility for that harm does not foreclose liability for another party. (*See Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 89 ["California's system of 'comparative fault' seeks to distribute tort damages proportionately among all who caused the harm."].) This Court should disregard the State's red herring argument and permit the issue to be tried on the merits.

Secondly, the State's hypothesis that conditions for students of color would be more harmful without these WST regulations is pure conjecture.

(RB 13.) The State's "logical conclusion" on this matter, (RB 13), is not supported by evidence or other citation, nor does it justify the Court's deviation from the longstanding precedent precluding it from making factual determinations on demurrer. As Romo pleaded, the regulations are designed to promote, streamline and encourage the expansion of WST in California. (Sen. Bill No.4 (2013-2014 Reg. Sess.) ch. § 313 1(a); CT 15 ["…well stimulation treatments, in addition to hydraulic fracturing, are also critical to boosting oil and gas production"].) State action that encourages increased oil and gas production do not benefit students of color attending school near new oil and gas activities. Therefore, the State's proposition that WST regulations *benefit* students of color runs counter to Romo's factual pleadings and prematurely asks the Court to make findings of fact.

ii. Compliance with section 11135 is not impossible.

The State's actions violate the plain language of section 11135. The State's argument that Romo's interpretation of section 11135 is "impossible to satisfy," simply mischaracterizes Romo's complaint. (RB 15.) Romo never stated, as the State suggests, that the Government must ensure "private activities" affect "minority populations" equally. (*Id.*) Rather, the Government must ensure that its actions do not have the "effect of subjecting a person to discrimination" based on his or her inclusion in a protected class, including race, national origin, and ethnic group identification. (CT 6.) Latino students and students of color are protected

groups under section 11135 and Romo pleaded that they suffer disparate harms from WST regulations. (CT 2, 6, 26-27.) Romo pleaded state actions promoting WST caused this disparate harm and thus constitutes racial discrimination in violation of section 11135. (*Id.*)

The State, without legal citation, suggests that because the plain language requirements of section 11135 are difficult to comply with, they are therefore impossible and not legally binding. (RB 16.) The difficulty of compliance with section 11135 is irrelevant to this Court's review on demurrer. The plain language of a statute "best expresses its legislative intent." (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 45; s*ee also Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365 ["This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used."].) The plain language of section 11135 states no person in California shall on the basis of race 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 any state agency." (Cal. Code Regs., tit. 22, § 98101, subd. (i)(1).) Here, the State ignored its obligation under section 11135 and is asking the Court to eliminate its legal obligation because it is too hard.

The State offers no case law demonstrating an alternative legislative intent or plain meaning of section 11135. The State offered no factual evidence that it would be "impossible" for WST regulations to comply with section 11135. The State's suggestion that students of color have historically experienced greater pollution from oil and gas development does not disprove the disparate impact of its actions prohibited by section 11135. Harm can always get worse. For these reasons, the State's arguments fail. Romo sufficiently pleaded facts for each required element of the plain language meaning of section 11135 and this Court should vacate the demurrer.

B. Agencies Have No Discretion to Violate Section 11135.

The final element of section 11135 that Romo's complaint must satisfy to prevail over a demurrer is to plead sufficient facts to allege a disparate impact on a protected group. (Cal. Code Regs., tit. 22, § 98101, subd. (i)(1).) Romo offered sufficient facts in the complaint to demonstrate how the State's actions caused disparate harm. (*See* AOB 24-27.) The State does not refute this, but instead implies that since it had discretion in determining how to comply with SB 4, that it also had discretion to implement the statute in a manner that caused disparate harm. (*See, e.g.* RB 17, 19 [arguing that since the legislature did not explicitly compel the State to adopt setbacks, it had no duty to do so even to avoid the disparate impacts of its actions].) In essence, the State argues it had discretion to

cause disparate harm because SB 4 was silent on the issue. However, the State's compliance with a governing statute does not equal compliance with section 11135. As SB 4 specifically acknowledges, the State is not discharged from its duties under other statutes in implementing SB 4.[5] The adoption of the WST regulations is a state action and must comply with section 11135 regardless of agency discretion under another statutory scheme. (*See* AOB 27-29.)

Further, Romo pleaded WST regulations are harmful to students of color for many reasons beyond the decision to exclude setback limits. (CT 22.) For example, Romo pleaded harms suffered because of inadequate notice requirements, public participation requirements, and permitting criteria, among other allegations:

> "Both the interim regulations and SB 4 Implementing regulations do not require industrial operators or state officials to give notice to students, parents, teachers, or school officials at schools near well stimulation sites. SB 4 implementing regulations do not even require state officials to consider a proposed well's physical proximity to sensitive land uses like schools in their permit review process. Additionally, community residents, students, and school officials are not provided an opportunity to participate in the process of siting, approving, or denying wells in their area." (CT 21-22.)

Without authority, Respondents infer Romo is required to exhaustively list every possible way that the WST regulations could have avoided harm to satisfy section 11135 on demurrer. (RB 6, 8, 18.) Romo provided examples

[5] Sen. Bill No. 4 (2013-2014 Reg. Sess.) 3160 ("This article does not relieve the division or any other agency from complying with any other provision of existing laws, regulations, and orders.")

of methods that the state could have adopted to reduce harm, but were under no obligation to do so to survive demurrer. Instead, Romo needed only to plead with supporting facts that the state's actions caused disparate harm to students of color. (CT 2 ["Governor Brown, Supervisor Bohlen and DOGGR are failing public school students of color and our state as a whole by adopting regulations that result in and fail to redress the racially disparate impact of well stimulations on students of color, including Latino students.[6]"].)

Romo pleaded extensive facts showing the disparate impact of WST regulations in compliance with both state and federal standards for demonstrating disparate impact. (*See* CT 26-27 ["In order to document the disparate impact of SB 4 implementing regulations on Latino students and students of color, plaintiffs conducted a disparity analysis of California schools limited to those located in regions that are known to produce hydrocarbons..."].) Romo met his burden to plead facts demonstrating disparate impact and this Court should correspondingly reverse the Superior Court's ruling on demurrer.

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[6] The State argues Romo's complaint does not allege the State created disparities, but "only that they did not do enough to eliminate them." (RB 14.) This quote mischaracterizes the complaint. Romo stated state actions both "result in" and "fail to redress" disparate impacts. (CT 2.) Romo sufficiently pleaded that the state action itself caused disparate harm in addition to failing to redress the past harm.

III. ROMO CAN REASONABLY CURE ANY COMPLAINT AMBIGUITIES WITH AMENDMENT

On appeal from a sustained demurrer without leave to amend, the Court must decide whether there is a reasonable possibility that any defect can be cured by amendment. If it can be, the Superior Court abused its discretion and this Court must reverse. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1142.) A plaintiff must show in what manner he or she can amend and how such amendment will change its legal effect. (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1337-1338.) Pleading requires only "general allegations of ultimate fact." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1469.) A plaintiff does not need to plead evidentiary facts to support his or her allegations. (*Id.*) The Court may not rely on the "possible difficulty or inability of proving such allegations." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1391.) Finally, this Court may not rely on its own fact-finding to decide whether the reasonable possibility of curing a defect exists. (*Id.*)

In his opening brief, Romo satisfied his burden to show a reasonable possibility exists to cure any potential defect in his complaint. (*See* AOB 29-30.) Romo set forth how he can amend his complaint to further demonstrate the regulations caused more WST to adversely and disparately

impact students of color. (*Id*.) Romo supplied the necessary general allegations of ultimate fact that would help show how state actions violated section 11135 and caused his family harm. (*Id*.)

Romo offered additional sources of factual support that he could include in an amended complaint. (AOB 29-30.) Though the State cited to this list of evidence extensively, it simply states that this evidence is not sufficient. (RB 21.) What is missing from the State's argument is any explanation or justification for why the proffered evidence is insufficient. (*Id*.) Apparently, the State believes that Romo must specifically detail all facts it proposes to use in proving his case on the merits in his amendment on this appeal. (*Id*.) This standard runs counter to well-established law.[7] (*McKell* (2006) 142 Cal.App.4th 1457.)

Romo can further demonstrate how WST regulations increased the amount of WST and its harmful pollution. For example, in 2015, DOGGR disclosed 2,127 well stimulations and 1,016 new conventional wells.[8] Since

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[7] The State makes an additional argument that the proposed amendment would contradict allegations in the complaint. (RB 22.) The State asserts the complaint challenges oil and gas generally and not WST regulations. This characterization of the complaint is inaccurate. Romo directly challenged WST regulations for promoting dangerous WST. (CT 15.) The State's argument on inconsistency fails and amendment would further clarify how WST regulations caused Romo harm.

[8] Well Stimulation Treatment: First Annual Report, DOGGR (Dec. 31, 2015) available at http://www.conservation.ca.gov/index/Documents/Well%20Stimulation%20Treatment%20Report%202015%20-%20FINAL.PDF (last accessed February 5, 2017).

SB 4 passed, over half of all new oil wells are WST in the form of hydraulic fracturing.[9] Prior to SB 4 for the past decade, WST in the form of hydraulic fracturing only constituted one-fifth of oil production in California. WST in California increased significantly following implementation of interim and final SB 4 regulations.

Romo can amend his complaint to include more specific analysis of datasets cited in his complaint and opening brief to show how harmful WST regulations *caused* an increase in WST in areas that disproportionately impact students of color. This Court should provide him the opportunity to amend.

IV. ROMO AND HIS TWO MINOR DAUGHTERS HAVE STANDING

Romo and his two minor daughters suffered personal injuries caused by State actions and can demonstrate standing on this appeal in accordance with California law.

The standing requirements under California state statutes are determined from the statutory language, legislative intent and purpose of the statute. (*Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal.App.4th 456, 465.) To demonstrate standing under section 11135, a plaintiff must allege that "he or she was personally injured." (*Blumhorst v. Jewish Family*

[9] Well Stimulation in California, CCST (July 9, 2015), available at http://ccst.us/publications/2015/2015SB4-v1.pdf (last accessed February 5, 2017).

Services of Los Angeles (2005) 126 Cal.App.4th 993, 1002-1004 ["The right to sue for a violation of section 11135 exists in injured victims of unlawful discrimination."].)

Here, Romo alleged all facts necessary to show he and his two minor daughters are actual injured victims of unlawful discrimination. Romo pleaded he suffers psychological distress and fear for his children's health and safety due to their greater exposure to WST pollution caused by WST regulations. (CT 4.) Romo pleaded his two minor daughters suffer from severe asthma, respiratory and psychological distress fearing for their own health and safety due to their greater exposure to WST pollution caused by WST regulations. (CT 5.) Romo pleaded he and his daughters are experiencing more harmful pollution after the State took a series of actions *authorizing* and *promoting* WST in its harmful WST regulations. (CT 15.) Romo pleaded scientific information linking WST pollution to negative physical, mental and social health impacts. (CT 18-21.) Romo pleaded significant facts linking the injuries he and his daughters suffered with injuries suffered by a protected group under section 11135. (CT 24-26.) Romo thus pleaded sufficient facts to demonstrate judicial controversy and satisfies the standing requirements of section 11135.[10]

[10] The State prematurely challenges Romo's standing to support its argument that this Court should not grant leave to amend. (RB 23.) This challenge is untimely because Romo has not had the opportunity to file an

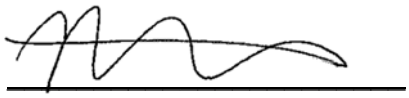
CONCLUSION

Based on the preceding arguments, Romo respectfully requests that this Court vacate the Superior Court's judgment to sustain demurrer without leave to amend and allow Romo the opportunity to fully argue his case. Alternatively, Romo requests the opportunity to amend the complaint and cure any potential deficiencies. Romo deserves an opportunity to prove the merits of his case and this Court should not decide them on demurrer.

Dated: February 10, 2017

Respectfully Submitted,

CENTER ON RACE, POVERTY & THE ENVIRONMENT



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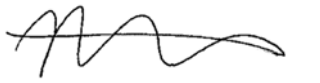
amended complaint. The State has no basis to challenge an amended complaint that does not yet exist.

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 4055 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 February 10, 2017.



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 February 10, 2017, I mailed a copy of the APPELLANT REPLY 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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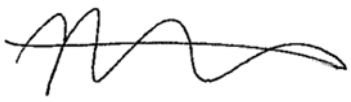
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 10, 2017 at Oakland, California.



MADELINE STANO
Declarant

Signature