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6 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
7 IN AND FOR THE COUNTY OF ALAMEDA

8 ANALILIA JIMINEZ PEREA, et al,

9 Plaintiffs,

10 v.  
11

12 DIANA DOOLEY, et al,

13 Defendants.  
14

No. RG17-867262

[TENTATIVE] ORDER OVERRULING  
DEMURRER TO THIRD AMENDED  
COMPLAINT

Date: 6/21/19

Time: 10:00 A.M.

Dept.: 21

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16 The demurrer of Defendants Department of Health Care Services et al (collectively  
17 “DHCS”) to the Third Amended Complaint came on for hearing on 6/21/19, in Department 21 of  
18 this Court, the Honorable Winifred Smith presiding. Counsel appeared on behalf of Plaintiffs  
19 and on behalf of Defendants. After consideration of the points and authorities and the evidence,  
20 as well as the oral argument of counsel, IT IS ORDERED: The demurrer of DHCS to the Third  
21 Amended Complaint is OVERRULED.  
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23  
24 PROCEDURE

25 On 7/12/17, Plaintiffs filed this case alleging generally that the State of California  
26 discriminated against Latinos in the state’s provision of Medi-Cal.

1 On 4/12/18, the court sustained the demurrer to the Complaint with leave to amend as to  
2 all causes of action.

3 On 9/21/18, the court sustained the demurrer to the First Amended Complaint without  
4 leave to amended as to Causes of Action 1, 2, 5, and 6 [discrimination based on disparity  
5 between Medi-Cal and private insurance] and with leave to amend as to causes of action 3, 4, 7,  
6 and 8 [discrimination based on decrease in services over time], and 9 [substantive due process].  
7

8 On 10/29/18, Plaintiffs filed the Second Amended Complaint. The court approves of the  
9 practice of reiterating Causes of Action 1, 2, 5, and 6 in the Second Amended Complaint while  
10 noting that they have been dismissed. This will help provide a clean record in the event of an  
11 appeal. (2AC at 2:25-27.) On 4/12/18, the court sustained the demurrer to the Second Amended  
12 Complaint with leave to amend.

13 On 4/9/19, the DHCS filed the demurrer to the Third Amended Complaint.  
14

### 15 THE THIRD AMENDED COMPLAINT 16

17 The 3AC clarifies that the claims concern DHCS administrative action or inaction. The  
18 claims are not challenges to statutes or regulations on a facial or as applied basis. The claims are  
19 not asserted against the State for the legislature's funding decisions. (Oppo at 14:3-10.)

20 The 3AC summarizes the three categories of DHCS action or inaction: (1) proposing,  
21 recommending, setting, or otherwise approving inadequate financial reimbursement rates; (2)  
22 failing to monitor and enforce the minimum standards for the quality of the services provided;  
23 and (3) creating and permitting administrative burdens that impair the quality of the services  
24 provided. (3AC, para 175-181.)  
25  
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1 The third, fourth, seventh, and eighth causes of action assert claims for discrimination  
2 under Govt Code 11135 and for violation of constitutional equal protection. These claims are  
3 based on all three categories of DHCS action or inaction.

4 The ninth cause of action asserts a violation of constitutional substantive due process.  
5 (Cal Const., Art I, sec. 7(a).) This claim is similarly based on all three categories of DHCS  
6 action or inaction. (3AC, para 245, 246.)

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8 The tenth and eleventh causes of action are derivative of the other causes of action.

9  
10 THE CLAIMS ARE NOT UNCERTAIN

11 The demurrer to the Third Amended Complaint based on uncertainty is OVERRULED.  
12 The Order of 2/1/19 stated “the court had difficulty identifying the allegedly unlawful decisions  
13 of the DHCS and therefore the appropriate legal analysis that would be applied to the claims” and  
14 “The identification of which state entity made what decision in what context is important.”

15  
16 The 3AC has clarified and focused the claims. The 3AC provides adequate notice to  
17 DHCS. The 3AC provides an adequate basis to define relevance for purposes of discovery. The  
18 court notes that interrogatories can be “used to clarify the contentions of the parties ... are an  
19 adjunct to the pleadings” and should be used liberally “for the purpose of clarifying and  
20 narrowing the issues made by the pleadings.” (*Jacobs v. Coldwell Banker Residential Brokerage*  
21 *Co.* (2017) 14 Cal.App.5th 438, 445.) Such interrogatories are often more productive after there  
22 has been the opportunity for discovery. (*McCaugherty v. Sifferman* (N.D.Cal. 1990) 132 F.R.D.  
23 234, 249; *McCarthy v. Paine Webber Group* (D. Conn 1996) 168 F.R.D. 448.)  
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FIRST CAUSE OF ACTION – DISPARATE IMPACT DISCRIMINATION UNDER GOVT  
CODE 11135 – COMPARISON WITH PRIVATE INSURANCE.

The first cause of action alleges that the DHCS is unlawfully discriminating against  
Latinos in violation of Govt Code 11135 by failing to comply with Govt Code 14000(a) and by  
failing to providing Medi-Cal that is equivalent to Medicare and private insurance. The court  
PREVIOUSLY DISMISSED this claim in the 9/21/18 Order. Plaintiffs restate the claim to  
preserve it for possible appeal.

SECOND CAUSE OF ACTION – INTENTIONAL DISCRIMINATION UNDER GOVT CODE  
11135 – COMPARISON WITH PRIVATE INSURANCE.

The second cause of action alleges that the DHCS is intentionally discriminating against  
Latinos in violation of Govt Code 11135 by failing to comply with Govt Code 14000(a) and by  
failing to providing Medi-Cal that is equivalent to Medicare and private insurance. The court  
PREVIOUSLY DISMISSED this claim in the 9/21/18 Order. Plaintiffs restate the claim to  
preserve it for possible appeal.

THIRD CAUSE OF ACTION – DISPARATE IMPACT DISCRIMINATION UNDER GOVT  
CODE 11135

The third cause of action asserts that the DHCS violated Govt Code 11135 because its  
actions and inaction had a disparate impact on plaintiffs and the members of the putative class.  
The demurrer to the third cause of action is OVERRULED.

1 Govt Code 11135 states “No person in the State of California shall, on the basis of ...  
2 race, color, ancestry, national origin, ethnic group identification, ... be unlawfully denied full and  
3 equal access to the benefits of, or be unlawfully subjected to discrimination under, any program  
4 or activity that is conducted, operated, or administered by the state or by any state agency, is  
5 funded directly by the state, or receives any financial assistance from the state.” (See also 2 CCR  
6 11154(i)(2).) The court’s analysis in the Order of 9/21/18 at pp 6-10 held that Govt Code 11135  
7 concerns access to or discrimination within a program or activity.  
8

9 The DHCS argues that as a matter of law that under Govt Code 11135 there can be no  
10 claim for disinvestment over time because claims for discrimination must be based on current  
11 differential treatment of similarly situated persons. A defendant can be held liable only for action  
12 or inaction within the statute of limitations.<sup>1</sup> The claims in the 3AC are focused on DHCS’s  
13 current policies and practices. The 3AC at 62-63 seeks only prospective relief in the form of an  
14 injunction and/or writ of mandate. The parties and the court will not need to address the issue of  
15 compensation for past alleged discrimination.  
16

17 DHCS’s citation to *People v. Floyd* (2003) 31 Cal.4th 179, 188-189, misses the mark  
18 because in that case the issue was whether the legislature could determine that a statute was  
19 effective as of a certain date and had no retroactive application. That is not the issue in this case.  
20 The issue in this case is whether the DHCS is unlawfully discriminating in violation of Govt  
21 Code 11135 and whether it did do within the statute of limitations.  
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23 The temporal reach of a claim should not be confused with the temporal scope of the  
24 evidence that can be offered in support of the claim. The statute of limitations does not limit the  
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26 <sup>1</sup> The statute of limitations can be extended in the case of a continuing violation.  
(*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802.)

1 temporal reach of evidence. Plaintiffs and defendants can present evidence of individual  
2 decisions, as well as patterns or practices, that are outside the statute of limitations as evidence of  
3 intent inside the statute of limitations. (Evid Code 352.) In the context of this case, evidence of  
4 DHCS's action or inaction over the years might be relevant to DHCS's intent for its action or  
5 inaction within the statute of limitations.

6  
7 The DHCS argues that as a matter of pleading plaintiffs have failed to identify two  
8 similarly situated groups that are being treated differently. The 3AC at identifies two  
9 comparators: (1) Medi-Cal long term care beneficiaries and (2) Medi-Cal participants in the past.  
10 (3AC, para 148-167.) The 3AC assert that both groups of comparators have proportionately  
11 fewer Latinos than the current Medi-Cal population. This allegation is adequate for purposes of  
12 the complaint. The identification of similarly situated persons is fact specific. The court cannot  
13 readily determine on the pleadings whether a specific person or group of persons is similarly  
14 situated.

15  
16 The court considers the concepts of "similarly situated" and "temporal proximity" in the  
17 more familiar context of a single plaintiff discrimination claim. A plaintiff could credibly assert  
18 that co-workers with the same job title were similarly situated and support a disparate impact  
19 claim with evidence that an employer policy or procedure had a disproportionate adverse effect  
20 on the plaintiff when compared to the co-workers in a time frame that ran from six months before  
21 to six months after the challenged employer decision. Regarding "similarly situated," the co-  
22 workers might be similarly situated if they had different, but similar, job descriptions or worked  
23 in different, but similar, conditions. Regarding "temporal proximity," the impact of the employer  
24 policy or procedure regarding the co-workers (1) would probably be a relevant comparator if it  
25 applied the same policy or procedure within six months of the challenged decision, (2) might be a  
26

1 relevant comparator if it applied the same policy or procedure within years of the challenged  
2 decision if the economic or other surrounding circumstances were similar, and (3) would not  
3 likely be a relevant comparator if it applied the same policy or procedure if the economic or other  
4 surrounding circumstances were materially different. A change in content of the policy or  
5 procedure over time would be another relevant consideration. These are fact specific  
6 determinations.  
7

8       Also regarding the definition of similarly situated persons, a plaintiff does not necessarily  
9 need to identify a similarly situated person to prove a claim of discrimination. The Order of  
10 9/21/18 at 12-13 stated, “A person can prove a claim of discrimination without identifying a  
11 similarly situated person who was treated differently. For example, a woman can prove that she  
12 was denied a promotion because of her gender if the employer elected to leave the position  
13 vacant. ... There is no bright line rule that there must be a similarly situated person or group.”  
14

15       The DHCS argues that as a matter of pleading plaintiffs have failed to assert facts that  
16 could support a disparate impact claim when the actions or inaction of the DHCS is evaluated  
17 under the rational basis standard of review. *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279,  
18 298-299, sets out the law. *Hernandez* states that “economic and social welfare legislation in  
19 which there is a “discrimination” or differentiation of treatment between classes or individuals”  
20 ... “requir [es] merely that distinctions drawn by a challenged statute bear some rational  
21 relationship to a conceivable legitimate state purpose.” In contrast, ““ [a] more stringent test  
22 [that] is applied ... in cases involving “suspect classifications” or touching on “fundamental  
23 interests.” Here the courts adopt “an attitude of active and critical analysis, subjecting the  
24 classifications to strict scrutiny. ... [T] he state bears the burden of establishing not only that it  
25  
26

1 has a compelling interest which justifies the law but that the distinctions drawn by the law are  
2 necessary to further its purpose.”” (*Hernandez*, 41 Cal.4<sup>th</sup> at 289-299.)

3 A plaintiff cannot transform “economic and social welfare legislation” into legislation  
4 involving “suspect classifications” by presenting evidence that the facially neutral legislation has  
5 a disproportionate effect on suspect classifications. *Jefferson v. Hackney* (1972) 406 U.S. 535,  
6 545-548, addressed this in the context of constitutional equal protection claim. *Jefferson* states:

8 So long as its judgments are rational, and not invidious, the legislature's efforts to  
9 tackle the problems of the poor and the needy are not subject to a constitutional  
10 straitjacket. The very complexity of the problems suggests that there will be more  
than one constitutionally permissible method of solving them.

11 The standard of judicial review is not altered because of appellants' unproved  
12 allegations of racial discrimination. ...

13 Appellants are thus left with their naked statistical argument: that there is a larger  
14 percentage of Negroes and Mexican-Americans in AFDC than in the other  
15 programs, and that the AFDC is funded at 75% whereas the other programs are  
16 funded at 95% and 100% of recognized need. As the statistics cited in the footnote  
17 demonstrate, the number of minority members in all categories is substantial. ...  
18 The acceptance of appellants' constitutional theory would render suspect each  
19 difference in treatment among the grant classes, however lacking in racial  
20 motivation and however otherwise rational the treatment might be. Few  
legislative efforts to deal with the difficult problems posed by current welfare  
programs could survive such scrutiny, and we do not find it required by the  
Fourteenth Amendment.

21 Applying the traditional standard of review under that amendment, we cannot say  
22 that Texas' decision to provide somewhat lower welfare benefits for AFDC  
recipients is invidious or irrational.

23  
24 (406 U.S. 535, 546-549.) (See also *Whitfield v. Oliver* (M.D. Ala., 1975) 399 F.Supp. 348, 351.)

25 The 3AC adequately asserts a claim under Govt Code 11135 for discrimination based on  
26 disparate impact. This is a demurrer and the court accepts the allegations of the complaint as true

1 and construes them in favor of plaintiffs. Given the stage of the proceeding, the DHCS has not  
2 had the opportunity to present any evidence of any rational basis for the alleged disparate impact  
3 between the plaintiffs and the putative class and the alleged comparators. *Jefferson* appears to  
4 have been decided following a trial on the papers in which the trial court considered “depositions  
5 of Welfare officials.” (406 US at 547.) (See also *Jefferson*, 406 US at 575 [dissent] [“The  
6 evidence also shows that 87% of the AFDC recipients in Texas are either Negro or Mexican-  
7 American”].) *Whitfield* likewise appears to have been decided following a trial on the papers, and  
8 the trial court considered “voluminous depositions and a mass of documentary data.” (399  
9 F.Supp. at 351.) The application of the rational basis test might make the claim difficult to  
10 prove at trial, but this is a demurrer. (Order of 9/21/18 at 20:24-25.)

11  
12 The demurrer to the third cause of action is OVERRULED.

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15 FOURTH CAUSE OF ACTION – INTENTIONAL DISCRIMINATION UNDER GOVT CODE  
16 11135

17 The fourth cause of action asserts that the DHCS has violated Govt Code 11135 because  
18 its actions and inaction demonstrate an anti-Latino intent to discriminate against plaintiffs and  
19 the members of the putative class. The demurrer to the fourth cause of action is OVERRULED.

20 A plaintiff can assert a claim for intentional discrimination based on a “sensitive” multi-  
21 factor inquiry. Under *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252,  
22 266-268, a court analyzes whether the defendant's actions were motivated by a discriminatory  
23 purpose by examining (1) statistics demonstrating a “clear pattern unexplainable on grounds  
24 other than” discriminatory ones, (2) “[t]he historical background of the decision,” (3) “[t]he  
25 specific sequence of events leading up to the challenged decision,” (4) the defendant's departures  
26

1 from its normal procedures or substantive conclusions, and (5) relevant “legislative or  
2 administrative history.” (*Pacific Shores Properties, LLC v. City of Newport Beach* (9<sup>th</sup> Cir.,  
3 2013) 730 F.3d 1142, 1156-1157.) The 3AC is not required to allege facts regarding each of the  
4 *Arlington* factors, and the court can consider allegations of circumstantial evidence of intentional  
5 discrimination that does not fit neatly into one of the *Arlington* factors. (*Avenue 6E Investments,*  
6 *LLC v. City of Yuma, Ariz.* (9<sup>th</sup> Cir., 2016) 818 F.3d 493, 504.)

8         The 3AC alleges (1) statistics demonstrating a “clear pattern unexplainable on grounds  
9 other than” discriminatory ones, (2) “[t]he historical background of the decision,” and (3) “[t]he  
10 specific sequence of events leading up to the challenged decision.” These are the same  
11 allegations that support the claim for disparate impact discrimination. Both *Whitfield v. Oliver*  
12 (M.D. Ala., 1975) 399 F.Supp. 348, and *Committee Concerning Community Improvement v. City*  
13 *of Modesto* (9<sup>th</sup> Cir. 2009) 583 F.3d 690, involved claims for intentional discrimination and both  
14 considered evidence of historical patterns and disparate impact as circumstantial evidence that  
15 might tend to prove intentional discrimination. In *Whitfield* the court examined statistical  
16 historical patterns of funding (399 F.Supp. at 352) and in *Modesto* the court examined statistical  
17 historical patterns of Latino residency (583 F.2d at 704). Historical evidence can support an  
18 inference of current discriminatory intent because under *Arlington Heights*, 429 U.S. at 266, the  
19 trier of fact can infer intentional discrimination from statistics demonstrating a “clear pattern  
20 unexplainable on grounds other than” discriminatory ones, “[t]he historical background of the  
21 decision,” and [t]he specific sequence of events leading up to the challenged decision.” In  
22 *Whitfield* and *Modesto* the allegations or evidence of disinvestment supported claims for  
23 intentional discrimination.  
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1 The 3AC alleges that DHCS departed from the required procedures by failing to conduct  
2 rate reviews and revisions as required by W&I 14079. (3AC, para 149(b) and 152.)

3 The 3AC alleges additional relevant history in the form of comments allegedly made by  
4 DHCS personnel. (3AC para 169, 170, 173.)

5 The demurrer to the fourth cause of action is OVERRULED.  
6  
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8 FIFTH CAUSE OF ACTION – DISPARATE IMPACT - EQUAL PROTECTION –  
9 COMPARISON WITH PRIVATE INSURANCE.

10 The fifth cause of action asserts a claim under Cal Const Art I, sec 7(a) and Art IV, sec  
11 16(a) for a denial of equal protection based on failing to providing Medi-Cal that is equivalent to  
12 Medicare and private insurance. The court PREVIOUSLY DISMISSED this claim in the 9/21/18  
13 Order. Plaintiffs restate the claim to preserve it for possible appeal.  
14

15 SIXTH CAUSE OF ACTION – INTENTIONAL DISCRIMINATION - EQUAL PROTECTION  
16 – COMPARISON WITH PRIVATE INSURANCE.  
17

18 The sixth cause of action asserts that the State has denied equal protection to Latinos by  
19 failing to provide Medi-Cal that is equivalent to Medicare and private insurance. The court  
20 PREVIOUSLY DISMISSED this claim in the 9/21/18 Order. Plaintiffs restate the claim to  
21 preserve it for possible appeal.  
22

23 SEVENTH CAUSE OF ACTION – DISPARATE IMPACT - EQUAL PROTECTION  
24

25 The seventh cause of action alleges that the DHCS has denied equal protection to Latinos  
26 under the equal protection clauses of the California and United States Constitutions because its

1 actions and inaction had a disparate impact on plaintiffs and the members of the putative class.  
2 The analysis regarding the disparate impact claim under Govt Code 11135 applies to the  
3 disparate impact claim. The demurrer to the seventh cause of action is OVERRULED.  
4

5 EIGHTH CAUSE OF ACTION – INTENTIONAL DISCRIMINATION - EQUAL  
6 PROTECTION  
7

8 The eighth cause of action asserts that the State has intentionally denied the equal  
9 protection to Latinos required under the equal protection clauses of the California and United  
10 States Constitutions because its actions and inaction demonstrate an anti-Latino intent to  
11 discriminate against plaintiffs and the members of the putative class. The analysis regarding the  
12 intentional discrimination (disparate treatment) claim under Govt Code 11135 applies to the  
13 constitutional intentional discrimination (disparate treatment) claim. The demurrer to the eighth  
14 cause of action is OVERRULED.  
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16  
17 NINTH CAUSE OF ACTION – SUBSTANTIVE DUE PROCESS

18 The ninth cause of action asserts a claim under Cal Const Art I, sec 7(a) for a denial of  
19 substantive due process. The demurrer to the ninth cause of action is OVERRULED.

20 The substantive due process claim concerns DHCS’s administrative decisions. In this  
21 context, “[T]he determination of when a substantive due process violation occurs is contextual.  
22 ... [A] substantive due process violation is not ordinary government error but conduct that is in  
23 some sense outrageous or egregious-a true abuse of power. ... the mere finding that a  
24 government decision is arbitrary or capricious is not sufficient to establish a substantive due  
25 process violation. ... Only a substantial infringement of state law prompted by personal or  
26

1 group animus, or a deliberate flouting of the law that trammels significant personal or property  
2 rights, qualifies for relief ... Inadvertent errors, honest mistakes, agency confusion, even  
3 negligence in the performance of official duties, do not warrant redress [for a substantive due  
4 process violation].” (*Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1032-1034.)

5         The substantive due process claim does not concern the constitutionality of a statute or  
6 regulation. Therefore, it appears that the court does not need to address the nature of the right at  
7 issue and whether it is regular right that is reviewed under the rational basis standard or is a  
8 fundamental right or liberty interest that is subject to enhanced scrutiny. (*Duarte Nursery, Inc. v.*  
9 *California Grape Rootstock Improvement Com.* (2015) 239 Cal.App.4th 1000, 1008-1010.)

10         The substantive due process claim is based on administrative action or inaction that  
11 allegedly resulted in (1) inadequate financial reimbursement rates; (2) failing to monitor and  
12 enforce the minimum standards; and (3) creating and permitting administrative burdens. (3AC,  
13 para 245-246.)

14         The analysis regarding the disparate impact and intentional discrimination (disparate  
15 treatment) claims supports a substantive due process claim based on “a substantial infringement  
16 of state law prompted by personal or group animus.”

17         The 3AC also contains allegations that could support a finding of “a deliberate flouting of  
18 the law that trammels significant personal or property rights.” Specifically, the 3AC asserts that  
19 DHCS set reimbursement rates below the cost of care, failed to annually review and adjust rates,  
20 failed to monitor compliance with network adequacy, and permitted managed care organizations  
21 with insufficient networks to participate in Medi-Cal. (3AC, paras 95-118 and 132-135.) These  
22 allegations are not conclusory. The 3AC references a Legislative Analyst Office report stating  
23  
24  
25  
26

1 that there is “no rational basis” for the rate-setting system (para 106), a 2015 State Auditor report  
2 (para 132) and a DMHC report (para 133)

3 The allegations are adequate at the pleading stage. As with the claims for discrimination,  
4 the court notes that this is a demurrer and the court accepts the allegations of the complaint as  
5 true and construes them in favor of plaintiffs.  
6

7  
8 **TENTH CAUSE OF ACTION – TAXPAYER CLAIM**

9 The tenth cause of action asserts a claim under CCP 526a for expenditure of tax money in  
10 an illegal manner. This is derivative of causes of action 3-4 and 7-8. The demurrer to the tenth  
11 cause of action is OVERRULED.  
12

13 **ELEVENTH CAUSE OF ACTION –PETITION FOR WRIT**

14 The eleventh cause of action is a petition for a traditional writ of mandate under CCP  
15 1085 seeking a writ requiring the State to comply with a ministerial duty to comply with the law.  
16 This is derivative of causes of action 3-4 and 7-8. The demurrer to the eleventh cause of action is  
17 OVERRULED.  
18

19  
20 **FURTHER PROCEEDINGS**

21 The DHCS must file an answer on or before 7/19/19.  
22

23  
24 Dated: June \_\_, 2019

\_\_\_\_\_  
25 Winifred Smith  
26 Judge of the Superior Court