**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN FRANCISCO**

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

Plaintiffs,

v.

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

Defendants.

Case No. CGC-19-575842

**ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

On July 9, 2019, this Court heard and considered Plaintiffs' motion for preliminary injunction in this action. Daniel Mason, Quentin Kopp, and Thomas Jackson appeared on behalf of Plaintiffs. Robert Naeve and Nathaniel Garrett appeared on behalf of Defendants. After considering the papers and evidence submitted in connection with the motion, as well as oral argument of counsel, this Court hereby denies Plaintiffs' motion for a preliminary injunction for the reasons set forth below.

Plaintiffs are eight retired Superior Court judges who are dissatisfied with recent changes in the eligibility requirements for the Temporary Assigned Judges Program (TAJP) announced and implemented by Defendants the Judicial Council of California and Chief Justice Tani G. Cantil-Sakauye, in her official capacity as the chair of the Judicial Council. They seek a preliminary injunction enjoining Defendants from retroactively enforcing against them one of those changes, which with certain exceptions limits participation in that program to a lifetime total of 1,320 working days. For the following reasons, Plaintiffs' motion for a preliminary injunction is denied.

The TAJP sets forth the structure by which the Chief Justice of California temporarily assigns retired judges to fill judicial vacancies and to cover for vacations, illnesses, disqualifications and other absences. It is authorized by article VI, section 6(e) of the California Constitution, which requires the Chief Justice to "seek to expedite judicial business and to equalize the work of judges." Section 6(e) authorizes the Chief Justice to "provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court." (Cal. Const., art. VI, § 6(e).) The program is also subject to statutory requirements set forth in Article 2, Chapter 2 of the Government Code, "Assignment of Judges," Gov. Code §§ 68540.7-68550, as well as Article 2, Chapter 11, "Retirement for Service," Gov. Code §§ 75025-75035.

Plaintiffs seek to enjoin the retroactive application to them of Defendants' change to the TAJP, effective January 1, 2019, that limits the total number of days a retired judge can participate in the AJP to 1,320 days, the equivalent of the six-year term of a full-time, elected superior court

judge. They allege that they are retired judges who have participated in the TAJP, and who as of January 1, 2019, had already worked on assignments for more than 1,320 days, and therefore are precluded from continuing to participate in the AJP. They seek to state two causes of action. First, they claim that the new lifetime cap constitutes illegal employment discrimination on account of age in violation of the Fair Employment and Housing Act (FEHA), Gov. Code § 12940(a). (Am. Compl. ¶¶ 29-31.) Second, they assert that the new policy violates article VI, section 6 of the California Constitution because (a) it does not "seek to equalize the work of judges," as required by section 6(e), and (b) the alleged violation of FEHA is inconsistent with the requirement in Section 6(d) that the rules adopted by the Judicial Council "shall not be inconsistent with statute." (Am. Compl. ¶¶ 32-34.) Plaintiffs seek to recover back pay, front pay, interest, declaratory and injunctive relief.

Because Plaintiffs have failed to show a reasonable probability, or at least "some possibility," of prevailing on the merits of their claims, the Court does not reach the issue of balancing of interim harm. (*Butt v. State of California* (1992) 4 Cal.4th 668, 678 ["A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim."]; *Aiuto v. City and County of San Francisco* (2011) 201 Cal.App.4th 1347, 1355, 1361 [reversing order granting motion for preliminary injunction, applying "the well-established principle that a preliminary injunction granted without a showing of a likelihood of success on the merits is an abuse of discretion and will be reversed"].)[1]

[1] The Court notes that although Plaintiffs have all exceeded the 1,320-day limit, that has not necessarily precluded them from serving as temporary assigned judges since that limit became effective earlier this year. Two exceptions from the limit were requested for Judge Lacy, both of which were granted; 16 of 17 requested exceptions were granted for Judge Lebov; 2 of 3 for Judge Mahler; 7 of 8 for Judge Poole; and 6 of 8 for Judge Sapunor. (Belloli Decl. ¶ 11.) Likewise, the Chief Justice's March 28, 2019 letter responding to Judge Nadler's letter reflects that over a three-month period, the Chief Justice approved all 88 exception requests that were forwarded to her for decision. (Conger Decl., Ex. A.) Thus, although the Court does not decide the issue, it is open to doubt whether Plaintiffs have shown that the adoption of the 1,320-day lifetime limit presents them with any serious risk of irreparable harm.

"'The manner, method, or criteria for selection of duly qualified assigned judges is within the inherent power of the Supreme Court and within the discretion of the Chief Justice in the exercise of her constitutional authority to make the assignments.'" (*People v. Superior Court (Mudge)* (1997) 54 Cal.App.4th 407, 412, quoting *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 483 [invalidating statute permitting parties to veto Chief Justice's assignment of retired assigned judge, which was a substantial and impermissible impairment of the judiciary's independence by the Legislature]; see also *People v. Ferguson* (1932) 124 Cal.App. 221, 231 [Chief Justice has "discretion of the broadest character" in the assignment of judges and her determination is conclusive "in the absence of clear and unequivocal showing of abuse of discretion"].) The Constitution confers a "sweeping power" of judicial assignment on the Chief Justice, limited only by the eligibility criteria for judicial office. (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 869.) Likewise, the Judicial Council has broad authority under the Constitution to adopt rules, constrained only by specific statutory provisions to the contrary. (See *Vidrio v. Hernandez* (2009) 172 Cal.App.4th 1443, 1458 [rejecting argument that Judicial Council exceeded its authority by adopting a rule providing for monetary sanctions for violations of the Rules of Court, although it was not expressly authorized by statute, holding that the Council's constitutional authority to adopt rules for court administration, practice and procedure "necessarily includes the concomitant authority to create the means to enforce those rules, provided only that '[t]he rules adopted shall not be inconsistent with statute.'"].)

In view of this broad constitutional grant of authority, Plaintiffs' burden in seeking extraordinary injunctive relief is not insignificant. A trial court must proceed with caution when asked to enjoin a public officer or agency from performing duties explicitly conferred upon her by the California Constitution or by statute. (See *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1464 ["our Supreme Court has emphasized that 'principles of comity and separation of powers place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other branches or officials.'"]; see also *Tahoe Keys Property*

*Owners' Assn. v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1471 ["There is a general rule against enjoining public officers or agencies from performing their duties."].) Further, Plaintiffs are seeking a mandatory preliminary injunction to compel the Judicial Council and the Chief Justice to disregard, as to them, a key element of the eligibility criteria for the TAJP that has been in effect for more than six months, since January 1, 2019. "The granting of a mandatory injunction pending trial 'is not permitted except in extreme cases where the right thereto is clearly established.'" (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625.) The Court concludes that Plaintiffs have not met their burden, for several independent reasons.

At the threshold, the doctrine of legislative immunity bars actions against judicial officers when they act in a legislative capacity. (See *Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1784.) The rule applies to suits for declaratory and injunctive relief, as well as suits for damages. (*Id.*) While the doctrine is most commonly applied to legislators, "it is well-settled that when judges perform legislative functions, they too may be entitled to legislative immunity." (*Schmidt v. Contra Costa County* (9th Cir. 2012) 693 F.3d 1122, 1133.) Thus, in *Schmidt*, which is closely analogous, plaintiff unsuccessfully challenged a sitting superior court judge for his seat in a local election while she was serving as a temporary superior court commissioner. Soon after, the superior court's executive committee adopted a policy rendering plaintiff ineligible to continue to serve as a temporary commissioner. Plaintiff filed suit and sought monetary and injunctive relief under 42 U.S.C. § 1983 against the court's executive officer and a number of individual judges in their official and individual capacities, alleging that the executive committee adopted the policy in retaliation for her challenge to the incumbent judge, in violation of her free speech rights under the federal and state constitutions. The Ninth Circuit affirmed the district court's grant of summary judgment to the judge defendants, holding that "the Judge Defendants enjoy absolute legislative immunity for the adoption and application of the Policy." (*Id.* at 1132.) The court reasoned first that the superior court had the authority to regulate the minimum qualifications of subordinate judicial officers, explaining that to merit legislative immunity, "government officials must act

within their defined or delegated legislative powers." (*Id.*) Next, the court applied the test for legislative immunity under § 1983, which considers four factors including (1) whether the act involves ad hoc decisionmaking, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation. (*Id.* at 1135.) It concluded first that the superior court's policy was not an ad hoc decision, because it was creating a binding rule for all attorneys serving the superior court as temporary judges, commissioners and referees. (*Id.* at 1136.) Second, it found that because the policy affected every such person appointed after its effective date, and all such future appointments, it was legislative in character. (*Id.* at 1136-1137.) Third, the policy was approved at a formal meeting after a vote, which also weighed in favor of legislative immunity. (*Id.* at 1137.) Fourth, it bore "the hallmarks of traditional legislation," including "the use of discretion, the making of policy that implicates budgetary priorities and the provision of services, and prospective implications that reach beyond the particular persons immediately impacted." (*Id.* at 1137.) In short, all four factors supported the court's determination that the policy adopted by the superior court's executive committee was legislative in character, and the judge defendants therefore were entitled to legislative immunity for their role in adopting and applying the policy. (*Id.* at 1138.) As to plaintiff's claims under the California Constitution, the court reached the same conclusion, holding that the judge defendants were entitled to legislative immunity under California law. (*Id.* at 1138-1139.)[2]

[2] See also, e.g., *Gallas v. Supreme Court of Pennsylvania* (3rd Cir. 2000) 211 F.3d 760, 773-777 [justices of Pennsylvania Supreme Court were entitled to absolute legislative immunity from claims of judicial district's executive administrator arising from elimination of his position as a result of their order reorganizing the district]; *Abick v. State of Michigan* (6th Cir. 1986) 803 F.2d 874, 877-878 ["The Michigan Supreme Court's promulgation of rules of practice and procedure is a legislative activity"]; *Esparza v. County of Los Angeles* (2014) 224 Cal.App.4th 452, 459-462 [pursuant to Gov. Code § 818.2, which provides that "[a] public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law," county was entitled to immunity for liability under FEHA, including injunctive relief, from legislative decision to dissolve office of public safety in order to merge its functions with that of sheriff's department].)

Precisely the same conclusion follows here: the Judicial Council and the Chief Justice, as its chair, enjoy legislative immunity from Plaintiffs' statutory and constitutional claims, including their requests for injunctive and declaratory relief. Unlike *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 547, which involved an adverse employment action by a court against a specific plaintiff, Defendants' challenged actions in modifying the rules governing the TAJP constitute an act of rulemaking expressly grounded in the Judicial Council's and the Chief Justice's constitutional authority which has all the hallmarks of a legislative action: detailed policy analysis, use of discretion, implication of budgetary priorities, and prospective application. Contrary to Plaintiffs' position, the legislative immunity "extends beyond the adoption of the enactment to its implementation." (*Esparza*, 224 Cal.App.4th at 462.) That immunity constitutes a bar to Plaintiffs' claims.[3]

[3] Plaintiffs' reliance upon *Supreme Court of Virginia v. Consumers Union of United States, Inc.* (1980) 446 U.S. 719, is misplaced. There, Consumers Union brought an action under 42 U.S.C. § 1983 against the Virginia Supreme Court and others arising out of the court's adoption of disciplinary rules governing the conduct of attorneys which included a strict prohibition against attorney advertising. Observing that "the Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code," the Court concluded that "the Virginia Court and its members are immune from suit when acting in their legislative capacity." (*Id.* at 734.) Thus, the Court made clear, "[if] the sole basis for appellees' § 1983 action against the Virginia Court and its chief justice were the issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit against appellants." (*Id.*) The Court held only that "the Virginia Court and its chief justice properly were held liable in their enforcement capacities," by virtue of their authority to initiate proceedings against attorneys, and therefore were proper defendants in a suit for declaratory and injunctive relief. (*Id.* at 736; see also *id.* at 738 ["Although the Virginia Court and its chief justice were subject to suit in their direct enforcement role, they were immune in their legislative roles."].) Moreover, the Court went on to find that although attorneys' fees could be awarded against enforcement officials in appropriate circumstances, "it was an abuse of discretion to award fees because the Virginia Court failed to exercise its rulemaking authority in a manner that satisfied the District Court." (*Id.* at 739.)

The instant case involves the Judicial Council's exercise of rulemaking authority governing the TAJP, not its exercise of enforcement authority against individuals, and therefore falls squarely within the doctrine of legislative immunity recognized in *Consumers Union.*

Even assuming that immunity does not apply, Plaintiffs have failed to show a likelihood of prevailing on their substantive statutory and derivative constitutional claim.[4] Plaintiffs' theory of age discrimination is that the lifetime cap to which they object "has a disparate impact on plaintiffs and other persons of their age." (Am. Compl. ¶ 24.) However, as one of Plaintiffs' own authorities explains, "Statistical proof is indispensable in a disparate impact case: The plaintiff must begin by identifying the specific employment practice that is challenged. Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." (*Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 650 [internal quotations omitted].)

Plaintiffs offered no such evidence in support of their motion for preliminary injunction, which was supported only by Judge Gary Nadler's February 20, 2019 letter to the Chief Justice and by a single declaration, that of Plaintiff James H. Poole (Ret.). Neither contains *any* statistical evidence regarding the effect of the lifetime cap, which as noted has been in effect for more than six months. Judge Nadler's letter, to which Plaintiffs devote several pages of their moving papers, does not address any age discrimination issue at all. Rather, it expresses concerns regarding the effect of the lifetime cap on the courts and the manner in which it has been implemented, and asks that it be reconsidered. Judge Poole's declaration offers primarily anecdotal data as to how the eligibility requirement affects him, which by definition is inadequate to make out a disparate impact claim. (See *Sakellar v. Lockheed Missiles & Space Co.* (9th Cir. 1985) 765 F.2d 1453, 1456-1457 [a plaintiff cannot make out a prima facie case of age discrimination under a disparate impact theory by presenting "no evidence . . . of the rule's impact on anyone other than himself" or by "circumstances raising merely a bare inference of discriminatory impact"].) Beyond that, Judge

[4] At oral argument, Plaintiffs conceded that their constitutional claim in the second cause of action has no independent vitality, but depends entirely on their statutory age discrimination claim.

Poole asserts only that the lifetime cap "will directly and most severely adversely impact older judges—including myself—because only we would have reached the 1,320 day limitations—and the younger judges will have not." (Poole Decl. ¶ 8.) However, experience may but does not necessarily correlate with age, because age and work experience are analytically different. (See *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 611["Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'"].) Plaintiffs offered no evidence regarding the number of affected retired judges, their ages, or any other relevant factor bearing on their claim. Plaintiffs' sparse factual showing (which did not even include the May 2018 memorandum and email announcing the changes to the TAJP to which Plaintiffs object) was insufficient even to set forth a prima facie case, much less to establish a likelihood of success on the merits.

Plaintiffs sought to remedy these shortcomings by submitting new evidence with their reply papers, which is improper. "The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers. . . . '[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case . . .' and if permitted, the other party should be given the opportunity to respond." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538; see also *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308 [in preliminary injunction proceeding, "the trial court had discretion whether to accept new evidence with the reply papers"].) In view of the fact that the changes to the TAJP to which Plaintiffs object were announced more than one year ago in May 2018, and went into effect more than six months ago on January 1, 2019, the Court is unable to discern any compelling reason for it to exercise its discretion to consider the statistical analysis and other new evidence belatedly included with Plaintiffs' reply papers.

But even if the Court were to exercise its discretion to consider that new evidence, Plaintiffs still fail to show a probability of success on their claim because it does not establish a disparate

impact on account of age. Defendants' factual showing establishes that of the 349 retired judges currently enrolled in the TAJP, 65 (or 18.6%) have reached the 1,320 day lifetime limit. (Belloli Decl. ¶ 6.) However, that population does not necessarily correlate with age: some participants who have reached the cap are younger than others who have not. (*Id.*) As Defendants convincingly show, a given judge's lifetime cumulative number of days served on assignment—and whether he or she has reached the 1,320 day limit—does not depend on age, but rather on factors including (1) length of service in the TAJP, which depends in part on length of service on the bench before retirement; (2) how quickly the judge enrolls in the program upon retirement; (3) how quickly the judge begins accepting assignments after enrolling in the program; (4) number of days served on assignment per year; (5) whether the judge lives near a court with a judicial deficit, resulting in greater need for TAJP assignments; (6) whether the judge lives near a court with a large allocation of assignment days under the TAJP; and (7) whether exceptions to the various programs have been requested and granted. (*Id.*) Defendants provide various examples, surveying all the participating retired judges including some of the Plaintiff judges themselves, which reflect that whether a given retired judge has already reached the 1,320 limit does not correlate to his or her age or even to the number of years he or she has served in the Program. (*Id.* ¶¶ 7-9 & Ex. A.)

Plaintiffs' analysis, contained in a declaration from Dr. Bruce Hoadley, Ph.D, does not overcome this showing. That is because for purposes of his analysis, Dr. Hoadley did not survey *all* retired judges who participate in the TAJP,[5] but only a subgroup of affected judges, which he defined as the "hardworking assigned judges." Thus, that group is affected by the application of the lifetime cap not because its members belong to a protected group, but because of factors unrelated to age: its members decided to enroll in the program soon after retirement, and/or were offered and accepted assignments more often than other retired judges. (Belloni Decl. ¶¶ 6-9). The

[5] Of course, *all* retired judges fall within FEHA's protections against discrimination on the basis of age, which apply to all employees who have reached their 40th birthday. (Gov. Code § 12926(b); see Gov. Code § 75025(h) [age and service qualifications for retirement, ranging from age 60 to age 70 or older].) Plaintiffs' claim here apparently is that the 1,320-day limit discriminates against the oldest members of the larger group of retired judges eligible to serve on the TAJP.

fact that members of the group also belong to a protected class does not show that they were affected *because* they belong to a protected class. (See *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 817 ["[D]isparate impact is not proved merely because all members of a disadvantaged subgroup are also members of a protected group."] [reversing judgment on jury verdict where plaintiffs failed to establish a basis for disparate impact as a matter of law]; *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1322, 1324 [female employee failed to establish prima facie case of disparate impact discrimination against her employer, where she showed that managers adversely affected by employer's administrative reorganization were almost all women and over half were over 40, without showing impact to women and employees throughout the entire workforce].) As Defendants aptly observe, Dr. Hoadley's artificially limited analysis reflects statistical "cherry-picking." Certainly, there is no basis for the Court to find that the minor purported disparities he found "have such significant adverse effects on protected groups that they are 'in operation . . . functionally equivalent to intentional discrimination.'" (*Frank*, 149 Cal.App.4th at 817.)

Thus, Plaintiffs have failed to show that the lifetime cap limit has any adverse impact on retired judges because of their age, such that it would support a finding of likelihood of success on their claim of discrimination. Because of Plaintiffs' deficient showing with respect to their statutory FEHA claim, their constitutional claim also fails.

This Court shares Judge Nadler's view that the Temporary Assigned Judges Program is "an essential program to permit functioning of the courts." The Court readily acknowledges that sitting judges on this bench, and throughout the State, as well as the litigants and counsel who appear before us, owe Plaintiffs and other retired judges who have participated in that Program a debt of gratitude. "History has shown that assigned retired judges sitting at all levels of the California judiciary have performed with the highest levels of integrity, fairness, and scholarship. As stated by the late Chief Justice, Phil S. Gibson, retired judges 'render valuable assistance to the courts with savings to the taxpayers.'" (*People v. Superior Court (Mudge)* (1997) 54 Cal.App.4th 407,

413.) Plaintiffs' concerns regarding the changes to the TAJP, which echo those expressed in Judge Nadler's letter, may be well-founded; indeed, as Plaintiffs point out, the Chief Justice herself has acknowledged that she shares certain of those concerns. Plaintiffs also may be correct that there could be other ways of administering the Program that would achieve its goals while preserving retired judges' ability to continue making meaningful contributions to the administration of justice in California. Absent a showing of some likelihood of success on the merits of their statutory and constitutional claims, however, Plaintiffs are not entitled to injunctive relief constraining the Chief Justice's and Judicial Council's discretion to implement the policy choices they have made in administering that Program.

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction is denied.

**IT IS SO ORDERED.**

Dated: July 10, 2019

ETHAN P. SCHULMAN
JUDGE OF THE SUPERIOR COURT

**CGC-19-575842 GLENN MAHLER ET AL VS. JUDICIAL COUNCIL OF CALIFORNIA ET AL**

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on July 10, 2019 I served the foregoing **order denying plaintiffs' motion for preliminary injunction** on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: July 10, 2019

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