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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SYLVIA DARENSBURG, VIRGINIA MARTINEZ, and VIVIAN HAIN, individuals on behalf of themselves and all others similarly situated; AMALGAMATED TRANSIT UNION, LOCAL 192; and COMMUNITIES FOR A BETTER ENVIRONMENT,

Plaintiffs,

v.

METROPOLITAN TRANSPORTATION COMMISSION,

Defendant.

Case No. C- 05-1597 EDL

PLAINTIFFS' OPPOSITION TO DEFENDANT METROPOLITAN TRANSPORTATION COMMISSION'S MOTION TO DISMISS

Date: Tuesday, December 20, 2005
Time: 2:00 p.m.
Courtroom: E, 15th Floor
Judge: Hon. Elizabeth D. Laporte

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I. INTRODUCTION

Ignoring the Court's previous Order that issues of standing on a motion to dismiss are properly resolved on the basis of whether allegations are sufficient, Defendant has filed a second dismissal motion that invites the Court to commit error by ruling on the merits in advance of discovery, contrary to the Federal Rules and caselaw. The Court should decline the invitation.

This civil rights action seeks declaratory and injunctive relief against Defendant Metropolitan Transportation Commission ("MTC") continuing to engage in funding practices that channel resources to projects and programs that disproportionately benefit the largely white ridership of Caltrain and BART at the expense of projects and programs that benefit AC Transit riders who are overwhelmingly people of color, in violation of the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, 42 U.S.C. section 2000d *et seq.*, and California Government Code section 11135.

MTC initially filed a motion to dismiss arguing that Plaintiffs failed to show standing, that Plaintiffs were not entitled to injunctive or declaratory relief, and that Plaintiffs could not proceed on a disparate impact theory under Title VI. In its September 19, 2005 Order Granting With Leave to Amend Defendant's Motion to Dismiss ("Order"), the Court ruled that the allegations supporting injunctive and declaratory relief were sufficient, as were the allegations of purposeful discrimination. Order at 13-14. As to standing, the Court found that the allegations in the original Complaint were insufficient, but instructed the parties as to the kinds of amendments sufficient to establish standing for the three types of injury alleged.

As to quality of life injury, the Court ruled that Plaintiffs' allegations of lost employment opportunities; unsafe, less reliable and dirtier conditions; and lengthy commute times were sufficient to constitute injury in fact, but that "Plaintiffs need to amend their complaint to allege that MTC's discriminatory funding is a substantial motivating factor in the inferior quality of AC Transit's services to transit-dependent inner-city residents and to show a substantial probability that the relief they seek will remedy the injury." Order at 11. As to economic injury, the Court found that "[t]he current allegations do not suffice to show economic injury in fact," but that if Plaintiffs did amend to show cognizable economic injury, "similar allegations of causation

and redressability are necessary." Order at 6, 11. As to stigmatic injury, the Court found that the original Complaint alleged discrimination that is "not so immediately apparent" or "obviously demeaning" as a facial racial classification. Order at 5-6.

Following the road map provided by the Court, Plaintiffs filed their First Amended Complaint ("Amended Complaint") on October 11, 2005. *See infra* at 5-9. Faced with these well-pleaded allegations, MTC shifts from the theme of its first motion (that AC Transit, not MTC, is really to blame) and instead advances a new theme: that the allegations of the Amended Complaint are factually unsupported. Defs. Br. 14-17. Contrary to the direction of the Court's Order to focus on the legal sufficiency of allegations for purposes of dismissal, MTC contends that it has not, as a matter of fact, discriminated against Plaintiffs or subjected them to unequal treatment. Such an evidentiary challenge should not be raised in a motion to dismiss, particularly one based on alleged lack of standing, but is properly reserved for a summary judgment motion or trial after factual and expert discovery has been completed. The challenge, in any event, is misdirected and factually erroneous.

Initially, we note that the purpose of the standing doctrine is to ensure that plaintiffs have a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Baker v. Carr*, 369 U.S. 186, 204 (1962). But MTC invokes the doctrine of standing for a purpose that it was never intended to serve – to reach a premature resolution of disputed facts going to the merits of, and evidentiary support for, Plaintiffs' substantive causes of action. The Supreme Court has long warned against conflating the merits and standing inquiries and made clear that a party does not have to establish at the outset a successful claim on the merits in order to have standing to litigate that claim. *See City of Chicago v. Atchison, Topeka and Santa Fe Ry. Co.*, 357 U.S. 77, 83-84 (1957) (In case where plaintiff challenged validity of City ordinance, plaintiff argued that defendant intervenor lacked standing because ordinance was invalid: "[Plaintiff's] argument confuses the merits of the controversy with the standing of [Intervenor] to litigate them. [Intervenor's] standing could hardly depend on whether or not it is eventually held that" the ordinance is valid.). As Justice Brennan once observed in an analogous context, "it

would be strange indeed if, before one could be granted a hearing, one were required to prove that one would prevail on the merits." *Michael H. v. Gerald D.*, 491 U.S. 110, 147 (1989) (Brennan, J., dissenting) (procedural due process case).

It is not surprising that MTC seeks to frame the factual contentions it raises as presenting standing rather than merits issues. In light of the liberal pleading standard generally applicable under the Federal Rules of Civil procedure – and, as the Supreme Court and Ninth Circuit have made repeatedly clear, specifically applicable to discrimination cases – Plaintiffs have clearly placed MTC on fair notice of the basis of their claims and are thus entitled to proceed to discovery. *See, e.g., Swierkiewicz v. Sorema,* 534 U.S. 506, 510-11 (2002); *Kwai Fun Wong v. United States,* 373 F.3d 952, 968-69 (9th Cir. 2004). If governmental defendants could rely on the "causation" prong of the standing inquiry to obtain dismissal of complaints on the ground that they had not actually subjected the plaintiffs to unfavorable treatment, as MTC seeks to do in this case, the liberal pleading standards applicable to discrimination cases would be rendered completely meaningless.

Moreover, even if brought as a summary judgment motion on the merits, MTC's factual contention, that it has, here and there, provided AC Transit with funds, would not undermine the merits of Plaintiffs' discrimination claim. Discrimination claims necessarily involve comparisons. That MTC has provided AC Transit with *some* funding is not inconsistent with Plaintiffs' contention that MTC provides Caltrain and BART with comparatively *more* funding – a contention Plaintiffs are entitled to prove after discovery. *See Powell v. Ridge*, 189 F.3d 387, 396 (3d Cir. 1999) ("The relevance and validity of these comparisons [between school districts' demographics and revenues] goes to the merits of plaintiffs' case, not to the maintenance of their complaint, and should be determined only upon a developed record.").[1]

[1] *Powell* also held that there is a private right of action under regulations promulgated under Title VI of the Civil Rights Act to challenge programs that receive federal financial assistance from engaging in acts that have a disparate racial *impact*. 189 F.3d at 398-99. While the Supreme Court held to the contrary in *Alexander v. Sandoval*, 532 U.S. 275 (2001), nothing in *Alexander* undermines *Powell*'s reasoning or holding on the threshold jurisdictional question of standing to vindicate a claim of governmental discrimination.

Moreover, MTC attacks allegations in the Amended Complaint that provide specific examples of MTC's discriminatory conduct. MTC relies on the logical fallacy that by attacking the veracity of allegations regarding individual examples of MTC's discriminatory conduct, MTC can somehow refute the more general allegations regarding MTC's pattern and practice of discrimination.

In the classic unequal funding challenge, school children (directly or through their parents) sue state officials for the discriminatory allocation of funds to the school districts that they attend. While these claims have not always prevailed on the merits, they have not been rejected for lack of standing, let alone for lack of standing at the pleading stage. *See, e.g., Powell* 189 F.3d 387 (students in Philadelphia, a 77-80% minority school district, had standing to sue state and may challenge a state's racially discriminatory funding practices regarding allocation of funds to different school districts); *Northwestern School Dist. v. Pittenger*, 397 F.Supp. 975, 980 (W.D. Pa. 1975) (parent had standing to challenge state funding formula that resulted in lower funding to school district that his children attended, but court rejected on merits equal protection claim predicated on wealth discrimination); *see also Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002) (successful challenge by minority, foreign, and disabled students who attended large, non-affluent school districts to state statute providing for disproportionate allocation of funds to low-enrollment school districts; standing not questioned).

In none of these cases did the fact that the defendant – the central governmental decision maker – provided the funds at issue to a third party – a school district – preclude plaintiffs' standing. In none of these cases did the court require the plaintiff students to show, in order to establish standing, that the school district would improve the quality of education at the particular school, particular grade level, or particular classroom that the students attended, if the non-party district received greater funding from the defendant state. This was so because what the plaintiffs in all of these cases sought to challenge was how they were treated by the central governmental decision maker that controlled all or some of the funds upon which the third party relied to provide the service at issue to the plaintiffs. In reversing a district court's grant of a motion to dismiss, the Third Circuit in *Powell* explained that it was not necessary to show for

standing purposes that plaintiffs' school district would ultimately receive more funding (let alone whether the quality of education provided to plaintiffs would improve as a result of increased funding):

> Here, the plaintiffs complain that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend. A court order directing the state to equalize funding between these school districts would redress this comparative injury, even if other sources of the school district's income were simultaneously reduced.

Powell, 189 F.3d at 403 (reversing grant of motion to dismiss). Like the students in the school funding cases, Plaintiffs simply wish to have redressed in federal court their claim that they are treated less favorably than riders on BART and Caltrain by the central governmental decision maker – here MTC – that controls funds necessary to provide a public service.

Finally, MTC's factual assertions are simply untrue. MTC has presented this Court with a highly misleading account of the facts, citing documents for propositions they plainly do not support and failing to cite other documents which directly support the allegations in the Complaint, thus underscoring the need for discovery and rigorous application of the Federal Rules of Evidence, as well as the inapplicability of the doctrine of judicial notice.

II. FACTUAL ALLEGATIONS

The Court's Order summarizes the relevant facts contained in the original Complaint. Order at 2-3. In light of their amendments, Plaintiffs provide the Court with a supplemental summary of the Amended Complaint.

The San Francisco Bay Area has two separate and unequal transit systems, an expanding, state-of-the-art rail system for disproportionately white, relatively affluent commuters and a shrinking, racially-identifiable 80% minority bus system for predominantly low-income people. *See* Amended Compl. ¶¶ 2-6. MTC has played a substantial role in creating this dual system through its historical and on-going pattern of funding, advocacy, and other decision-making practices. *See id.* MTC's actions have both the purpose and effect of discriminating against Plaintiffs and other bus riders of color. *See id.* ¶¶ 71, 74.

MTC has long known that AC Transit, BART, and Caltrain have historically served and continue to serve racially disparate populations. The passengers of the Bay Area's largest bus-only operator, AC Transit, are disproportionately people of color, while the passengers of the two major rail-only operators, Caltrain and BART, are disproportionately white. *See* Amended Compl. ¶¶ 30, 33-34. The disparity in the racial make-up of the ridership of these three operators is statistically significant. *See id.* ¶ 30. According to two studies commissioned by MTC many years ago, both Caltrain and BART were never designed to meet the travel needs of people of color. *See id.* ¶¶ 31-32.

MTC exerts substantial control over transportation funding in the Bay Area, including the level at which each transit operator is subsidized. MTC plays a substantial role in determining which transportation projects and programs in the region receive funding, and at what level. *See id.* ¶¶ 36, 46. The Complaint identifies specific examples of the ways in which MTC is able and empowered to exercise this control.

- RTP: One of MTC's most significant responsibilities is the adoption of the Regional Transportation Plan ("RTP"). Cal. Gov. Code §§ 66509-13; 49 U.S.C. § 5303. The RTP sets forth the region's long-range plan for transportation development, based on projected available financial resources. 49 U.S.C. § 5303(f); Amended Compl. ¶ 38. New transportation projects simply cannot move forward without MTC's approval because new projects must be reviewed and approved by MTC for inclusion in the RTP in order to be eligible for virtually any state or federal funding, including many Congressional "earmark funds." *See* Amended Compl. ¶ 38; Cal. Gov. Code § 66520; 49 U.S.C. § 5309(d). MTC establishes the project selection and eligibility criteria for the RTP. Amended Compl. ¶ 38.

- Direct programming authority: MTC has direct programming authority over a number of significant funding sources – such as formula grants under 49 U.S.C. § 5307, as well as the Surface Transportation Program ("STP") and the Congestion Mitigation and Air Quality Improvement Programs ("CMAQ") – thus exercising discretion over the allocation of these funds. *See id.* ¶¶ 37-38.

- Direct and indirect control over operators' budgets: MTC exercises direct control over the budgets of transit operators within its jurisdiction by, for example, attaching conditions to the funds that it grants to operators (thus dictating the use of the funds granted) and deciding how much to grant to particular operators (thus affecting the size of that operator's overall budget). MTC by its own account has direct programming and allocation jurisdiction over 40% of AC Transit's budget. *See* Amended Compl. ¶ 41. MTC also exercises indirect control over transit operators' budgets. For instance, by allowing operators to use funds normally reserved for capital

purposes for "preventive maintenance" (otherwise considered an operating cost), MTC indirectly allows the operator to use scarce operating funds for other purposes. Indeed, as discussed below, MTC requires AC Transit to cut service and/or raise fares as a condition of receiving preventive maintenance flexibility. *See infra* at 21; Exh. D at 26, 63, Exh. F at 5, 12. MTC also has the power to reduce the size of the operator's overall budget by not allocating funds within MTC's control to that operator (instead allocating those funds to other operators). *See id.* ¶ 42.

- Advocacy for additional funds: MTC is also uniquely situated as the regional transportation planning agency and metropolitan planning organization for the Bay Area to obtain funding from the state and federal governments. As a practical matter, projects often cannot receive funding without MTC's action or support, and so its advocacy on behalf of projects is critical. MTC can thus reduce the overall size of an operator's budget by choosing not to lobby for funding for that operator (instead deploying its political capital to lobby for funds for other operators). In addition, where state or federal legislation earmarks funds, instead of granting MTC discretion, MTC is often responsible for, or is the active advocate behind, the allocation set forth in the legislation. *See id.* ¶¶ 39, 42, 44.

In the exercise of its control over the Bay Area's transportation purse strings, MTC has engaged in a policy, pattern, or practice of discriminatory funding, by which it has consistently channeled and continues to channel more money and support to projects and programs that benefit the disproportionately white riders of Caltrain and BART, at the expense of projects and programs that that benefit Plaintiffs and the 80% minority riders of AC Transit. *See id*. ¶¶ 2-4, 33-36. The Amended Complaint identifies specific components of MTC's discriminatory pattern and practice and further identifies specific examples of MTC's unfavorable treatment of Plaintiffs.

- MTC establishes funding criteria that favor projects and programs that benefit the disproportionately white riders of rail providers such as BART and Caltrain over the disproportionately minority riders of AC Transit. *See id.* ¶ 61.
- MTC applies its own funding criteria inconsistently, to the disadvantage of the disproportionately minority riders of AC Transit. *See id.*
- MTC declines to allocate discretionary funds for the benefit of the disproportionately minority riders of AC Transit in a manner comparable to its allocation of discretionary funds for the benefit of the disproportionately white riders of Caltrain and BART. *See id.*
- MTC advocates with state and federal legislatures more aggressively on behalf of the disproportionately white riders of Caltrain and BART than on behalf of the disproportionately minority riders of AC Transit and exercises its advocacy efforts before those entities in a manner hostile to AC Transit. *See id.* ¶¶ 44, 61.

- MTC has created a two-tiered system for funding capital projects, pursuant to which it selects costly and cost-ineffective rail projects that benefit white riders but vastly underfunds projects that benefit minority passengers. *See id.* ¶ 45.

- MTC imposes far more onerous financial conditions on the funds it grants to the transit system Plaintiffs and other minority riders disproportionately use, AC Transit, than it does on the transit systems disproportionately used by white riders, Caltrain and BART. *See id.* ¶¶ 30, 42.

MTC departs from both procedural and substantive decision-making norms in its funding practices. While federal law requires MTC to include the public in the transportation planning process, MTC routinely ignores public input and constructive criticism aimed at mitigating the harm of MTC's funding practices on Plaintiffs and other low-income communities of color. *See id.* ¶ 55.

MTC also routinely departs from substantive transportation planning norms – such as the guiding principle of long-range transportation planning that transportation projects should provide the greatest benefit to the greatest number of people. *See id.* ¶ 56. Despite the cost-effectiveness of bus over rail (the potential package of new bus projects considered by MTC as a whole in the 2001 RTP was 750% more productive in converting transit funds into new riders than the list of new rail projects), MTC nevertheless consistently channels scarce transportation funds to cost-ineffective rail expansion projects that benefit the disproportionately white riders of Caltrain and BART at the expense of Plaintiffs and other AC Transit riders of color. *See id.* ¶¶ 56-57.

Plaintiffs suffer adverse impacts that take three forms:

- The most appropriate means of measuring subsidization of public transit systems is the metric known as "subsidy per passenger trip" (actual cost of operations and annualized capital investment for each trip a passenger takes, minus the fare paid). The riders of BART, with a white ridership double that of AC Transit, received more than double the subsidy per passenger trip of AC Transit riders, and the riders of Caltrain, with a white ridership triple that of AC Transit, received a subsidy per passenger trip approximately five times that of AC Transit riders. *See id.* ¶¶ 3, 33-34, 46-47.

- In addition, Plaintiffs are subjected to a lower quality and quantity of transit service than the disproportionately white riders of Caltrain and BART. *See id.* ¶ 65 The Amended Complaint identifies specific examples of this lower quality and quantity of transit service, including service cuts;

fare increases; less reliable and less frequent service; less safe, convenient, or pleasant waiting conditions; and dirtier vehicles. *See id*. ¶¶ 65, 67. Service reductions fall harder on Plaintiffs than on the average Caltrain or BART Rider because a majority of AC Transit riders (61%) are transit-dependent (as compared to 22% of BART and 14% of Caltrain riders) and have no alternative means of getting to work, school, or other essential locations. Plaintiffs therefore also suffer lost job opportunities and diminished access to education and health care. *See id*. ¶ 66.

- Finally, Plaintiffs are adversely impacted because they are branded as second class citizens, not worthy of the transit opportunities and benefits afforded the disproportionately white riders of Caltrain and BART. *See id*. ¶ 68.

All of the adverse impacts on Plaintiffs are caused by MTC and would be redressed by this suit. Because MTC exerts substantial control over the funding received by each transit operator in the Bay Area, *see id.* ¶¶ 36-42, it exerts a determinative effect on the subsidy per passenger trip received by the riders of each transit system. *See id.* ¶ 46. And because it is MTC that subjects Plaintiffs to less favorable treatment in its funding practices, it is MTC that causes Plaintiffs to be branded as second class citizens. *See id.* ¶ 68. Furthermore, as the Amended Complaint now makes clear, the fact that AC Transit delivers transit service to Plaintiffs in no way insulates MTC from accountability. The Amended Complaint alleges that, because of MTC's funding decisions, AC Transit has reduced the quality and quantity of service previously available to Plaintiffs, implemented fare increases that injured Plaintiffs, and has been unable to implement new projects that would benefit Plaintiffs. *See id.*¶¶ 43, 48-50, 53.

The Amended Complaint also alleges that if MTC ceased its discriminatory practices, it would provide greater funding for AC Transit, which AC would use to improve transit opportunities for Plaintiffs and thus redress the adverse impact of diminished transit opportunities. These improvements include enhanced routes in the service areas where Plaintiffs reside, a free bus pass for low-income students, such as the Plaintiffs' children, and an affordable fare structure for all other riders, including Plaintiffs. *See id*. ¶¶ 43, 49-54.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss for want of standing, a court must "accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Western Center For Journalism v. Cederquist*, 235 F.3d 1153, 1154 (9th Cir.

2000); *accord Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992); *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see* Order at 3-4. In civil rights cases, of course, "complaints are to be liberally construed." *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992).

IV. SUMMARY OF ARGUMENT

Following the Court's prior order that additional allegations were necessary to plead standing, MTC has brought another motion to dismiss for lack of standing. In response to this motion, we show that the Amended Complaint contains new allegations that address the Court's previously articulated concerns and that easily satisfy the standard applicable to a motion to dismiss. *See Lujan*, 504 U.S. at 561 ("on a motion to dismiss [for lack of standing] we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'") (citation omitted); *see infra* Part V-A. For this reason alone, MTC's motion should be denied.

MTC's current motion, however, is not what it purports to be, *i.e.*, a motion to dismiss for lack of standing. Rather than attempting to demonstrate that the Amended Complaint does not contain legally sufficient allegations to support Plaintiffs' standing to bring this action, MTC instead challenges the factual bases for those allegations by presenting the Court with an alternate account of the facts.[2] MTC's alternate factual account speaks not to the sufficiency of the standing allegations, but instead attacks the *merits* of Plaintiffs' claims of discrimination and labors to *prove* that MTC has not "*in fact*" treated Plaintiffs unfavorably or otherwise discriminated against them. The Court should not permit MTC to call into question the merits of and evidentiary support for Plaintiff's substantive causes of action, under the guise of a motion to dismiss for lack of standing. Plaintiffs, however, do not wish to leave MTC's claims unanswered. Accordingly, we show that, with respect to the *merits* of Plaintiffs' claims, the Amended Complaint clearly states claims for relief and more than satisfies the liberal notice pleading requirements of the Federal Rules of Civil Procedure. *See, e.g., Swierkiewicz*, 534 U.S. at 510-

[2] Thus, MTC claims that the allegations are "too conclusory" because they have "no factual underpinning." Mtn. at p. 3, ll. 5-6. According to MTC, the allegations do not provide "sufficient detail" to provide it with adequate notice of what Plaintiffs are claiming. *Id*. at p. 3, ll. 6-8. Finally, MTC claims that the allegations "misstate" what the true facts are. *Id*. at p. 2, ll. 9-11.

11; *see infra* Part V-B. Moreover, we show that MTC's *factual* assertions and inferences are inaccurate and would not, in any event, suffice to defeat the truth of Plaintiffs' claims of discrimination. MTC's basic contention that it provided AC Transit with *some* funds in a *few* instances is not inconsistent with Plaintiffs' assertion that MTC declined to provide AC Transit with funds in many *other* instances, or that it provided BART and Caltrain with *comparatively more* funds. *See infra* Part V-C.

Finally, we conclude by showing that MTC statute of limitations argument is without merit. *See infra* Part V-D.

V. ARGUMENT

A. Plaintiffs Have Standing To Litigate Their Well-Pleaded Claims Of Discrimination

1. MTC Injures Plaintiffs Because Its Actions Cause Them to Receive Inferior Transit Opportunities and Benefits

Plaintiffs have standing on the basis of the injuries they suffer to their well-being and quality of life, in the form of inferior transit opportunities and benefits. This Court previously found that these injuries constitute injury in fact, and that the causation allegations in the original Complaint approached the requisite showing. Order at 7-8. Plaintiffs have now amended the Complaint to make clear that MTC's actions at a minimum constitute a "substantial factor motivating" the unequal provision of service to Plaintiffs by AC Transit. Order at 8 (quoting *Tozzi v. U. S. Department of Health and Human Services*, 271 F.3d 301 (D.C. Cir. 2001).

MTC's funding practices create an ever-expanding rail system with, by MTC's own admission, unsustainable and ever-increasing needs for both operating and capital subsidies. In this fashion, MTC limits the pool of funds available to improve bus service through new projects while simultaneously starving the existing bus system of funds for basic operations. *See* Amended Compl. ¶ 58. Thus, MTC causes harm to AC Transit riders in two ways: cuts and fewer improvements in service. First, because of MTC's funding decisions, such as decisions to deprive AC Transit of operating funds and/or flexibility, AC Transit has been forced to reduce the quality and quantity of service previously available to Plaintiffs, to implement fare increases that

injured Plaintiffs, or a combination of the two. *See id*. ¶¶ 43, 49. According to AC Transit's financial projections, if MTC does not provide AC Transit with additional funding, AC Transit will have to make further service cuts. *See id*. ¶ 53. Second, because of MTC's funding decisions, including, *inter alia*, its refusal to allocate AC Transit any of the $55 million in "strategic expansion" CMAQ and STP funds that it recently allocated (without any public process or input), AC Transit has been unable to provide Plaintiffs with new service that AC Transit has planned to implement, as described in its "Strategic Vision," and that would benefit Plaintiffs in particular. *See id.* 48-49, 50-53. This of course is juxtaposed against the ever expanding rail service enjoyed by the disproportionately white riders of Caltrain and BART. *See id*. ¶¶ 3-4.

Just as AC Transit cannot provide service if it lacks the funds to do so, the amount of service it provides would increase if it had additional funds, and so the allegations establish redressability. *See id*. ¶ 43; Order at 11 ("Plaintiffs' argument that more money flowing to AC Transit is likely to benefit its inner city patrons is plausible."). MTC now appears to concede the point. Defs. Br. at 23 ("more money from one source could translate into more and/or better service to Plaintiffs"). Moreover, as noted above, AC Transit has formally adopted a "Strategic Vision" Plan and is thus committed to implementing the improvements set forth therein if MTC allocates it sufficient funding to do so. *See id*. ¶ 50. These planned improvements seek to improve service not just for the entire AC Transit network, but for the very areas where each of the individual Plaintiffs lives. *See id*. ¶¶ 48, 50. The Strategic Vision plan also seeks to institute a free bus pass for low-income students, such as the children of the individual Plaintiffs, and an affordable overall fare structure for all passengers, including Plaintiffs. *See id*. ¶ 50. None of the ten bus routes slated for enhancements is a Transbay route. *See id.* Any service improvements will therefore benefit not only all AC Transit riders, but minority transit dependent riders in particular, consistent with AC Transit procedures in place to ensure that any changes it institutes with respect to service or fares benefit minority riders to at least the same extent as other riders. *See id.* ¶ 52.

Thus, the Amended Complaint sufficiently alleges "a substantial probability that the relief [Plaintiffs] seek will remedy the injury." *See* Order at 11. It bears emphasis that even

in cases involving the actions of a third party, plaintiffs need only establish that it is "substantially likely" that the relief sought would redress the injury. *Compet. Enterp. Inst. v. NHTSA*, 901 F.2d 107, 117 (D.C. Cir. 1990) (where third party involved, plaintiffs had standing because relief in case was "substantially likely to redress" the injury; no need for plaintiffs to "guarantee" injury would be redressed).

In order for redressability to be lacking in this case, one would have to speculate (contrary not only to logic, but also to the allegations of the Amended Complaint that set forth AC Transit's plan for spending additional funding) that AC Transit would decline to spend *any* portion of additional funds from MTC on service improvements or fare reductions to benefit Plaintiffs and the 80% of its riders who are people of color. "Nothing in [the Supreme Court's] prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78 (1978).

2. Plaintiffs' First Amended Complaint Alleges Direct Economic Injury

Direct economic injury is a sufficient basis for standing. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *see* Order at 6. Plaintiffs allege that MTC's discriminatory funding practices cause Plaintiffs and members of the proposed plaintiff class to receive a lower subsidy per passenger trip than is received by the disproportionately white riders of BART and Caltrain. Amended Compl. ¶ 64. Plaintiffs maintain that this constitutes a direct economic injury inflicted by MTC.

In its September 19th Order, the Court ruled that Plaintiffs' original Complaint was insufficient because it failed to allege that the "low subsidy translated into personal economic harm such as excessive fares or reduced property values." Order at 6. Plaintiffs' Amended Complaint directly addresses this insufficiency by including specific allegations that MTC's discriminatory policies and practices have "repeatedly forced AC Transit to increase fares Plaintiffs and Plaintiff Class members pay for bus service." *Id.* ¶ 49. Because the Plaintiffs and many members of the Proposed Plaintiff Class are transit-dependent bus riders, they have no choice but to pay the higher fares that MTC forces on them. *Id.* In addition, the Amended

Complaint alleges that Defendant MTC has, as a result of its discriminatory policies and practices, failed to adequately fund a free bus pass program that would economically benefit members of the Proposed Plaintiff Class. *Id.* ¶ 57. These both constitute direct economic injuries affecting Plaintiffs' "pocketbooks." *See* Order at 6.

In addition, the Amended Complaint alleges that these pocketbook injuries are caused by MTC's discriminatory practices, and would be redressed by an order requiring cessation of the illegal conduct. Amended Compl. ¶ 49 ("Because Defendant MTC has engaged, and continues to engage, in its discriminatory . . . decisionmaking practices, . . . AC Transit has repeatedly been forced to . . . implement fare increases that injure Plaintiffs and Plaintiff Class members"); *id.* ¶ 52 ("If Defendant MTC ceased its discriminatory . . . decisionmaking practices, AC Transit would provide improved services and/or reduced fares that would directly benefit Plaintiffs"). These general allegations suffice to establish standing at this early stage of the litigation. *See Lujan*, 504 U.S. at 561; Order at 4.

3. MTC's Intentional Discrimination Inflicts Direct Stigmatic Injury On Plaintiffs

In its previous Order, the Court noted that the discrimination alleged in the original Complaint was not so "obviously demeaning" or "immediately apparent as to automatically confer a badge of inferiority upon people of color who use AC Transit." Order at 5-6.

The allegations of discrimination in the Amended Complaint are now sufficient to plead such stigmatic injury. It alleges that MTC has deliberately discriminated against the Plaintiffs and the proposed class of minority bus riders by systematically channeling resources away from projects that benefit them in favor of projects that benefit non-minorities. *See* Amended Compl. ¶¶ 1-6, 36, 48-49. The Amended Complaint also alleges that MTC has explicitly created a two-tiered approach to funding transit projects – selecting projects that benefit whites and underfunding projects that would benefit minorities – and that its intentionally discriminatory policy and practice disadvantage and stigmatize transit-dependent minorities just as would an overt racial classification. *See id.* ¶¶ 45, 63. The disproportionately white riders of Caltrain and BART are treated more favorably than the 80 % minority riders of AC Transit. *See*

id. ¶¶ 1-6, 36, 45, 48-49. MTC's open favoritism for the disproportionately white rail riders stigmatizes Plaintiffs and the proposed class of minority bus riders as second class citizens. *See id.*¶ 68 (MTC's discriminatory policies and practices "sends the message that . . . they are not equal participants in the community and worth less than their white counterparts on Caltrain and BART.").

Thus, the discrimination alleged by the Amended Complaint is so "obviously demeaning" and "immediately apparent" as to constitute stigmatic injury. *See* Order at 6. It should also be noted that the Northern California ACLU has submitted an amicus brief arguing that claims of stigmatic injury are not limited to Equal Protection classification claims involving facial racial classifications. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (administration of a facially neutral San Francisco city ordinance with an "evil eye and an uneven hand" to the detriment of Chinese laundrymen based upon "hostility to the race and nationality to which [they] belong" was unconstitutional).

B. Plaintiffs' Complaint Easily Satisfies Notice Pleading Requirements

Contrary to MTC's assertion that Plaintiffs' general factual allegations are too "conclusory," the allegations contained in the Amended Complaint easily satisfy notice pleading requirements. Both the Supreme Court and the Ninth Circuit have repeatedly made clear that discrimination plaintiffs need only provide, consistent with Federal Rule of Civil Procedure 8(a), "a short and plain statement of the claim showing that the pleader is entitled to relief," and that discrimination plaintiffs need not allege in a complaint the specific elements of a prima facie case of discrimination. *Swierkiewicz v. Sorema*, 534 U.S. at 510-11; *Kwai Fun Wong v. United States*, 373 F.3d 952, 968-69 (9th Cir. 2004); *McGary v. City of Portland*, 386 F.3d 1259, 1262 (9th Cir. 2004); *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061-62 (9th Cir. 2004); *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

A liberal pleading standard governs discrimination cases, not only because that standard is required by the Federal Rules, *Swierkiewicz*, 534 U.S. at 513, but also because "the prima facie case is 'an evidentiary standard, not a pleading requirement,' and often requires discovery to fully adduce." *McGary*, 386 F.3d at 1262. As the Supreme Court explained,

"[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the [evidence required] in a particular case. . . . This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 512. To filter out claims at the pleading stage, before discovery, would present a "daunting hurdle" in discrimination cases because, in many instances, evidence in support of plaintiffs' claims lies within the control of the defendant. *Powell*, 189 F.3d at 396; *see also Edwards*, 356 F.3d at 1061 ("discovery [is] often necessary to uncover a trail of evidence regarding the defendant's intent in undertaking allegedly discriminatory action"); *Gilligan*, 108 F.3d at 250 (requiring detailed allegations in discrimination cases would force "plaintiffs to plead facts they may have no way of knowing").

MTC cannot seriously argue that the Amended Complaint is too conclusory to effectively provide it with notice of Plaintiffs' claims because MTC obviously understands the claims quite well – well enough to contest them. *See* Defs. Br. at 18-19. MTC's argument is not so much that Plaintiffs' allegations are conclusory, but that they are factually incorrect, an argument that plainly does not support a motion to dismiss. *See, e.g., Conely v. Gibson*, 455 U.S. 41, 45-46 (1957).

Like the plaintiffs in *Powell*, Plaintiffs raise a claim of unequal funding. The Amended Complaint alleges that MTC treats AC Transit, a transit system 80% of whose riders are people of color, less favorably in its funding decisions than it treats Caltrain and BART, transit systems disproportionately used by white riders, by providing AC Transit with less funding; that these disparities in funding are caused by MTC's discriminatory practices; and that these funding disparities limit the transit opportunities and benefits of Plaintiffs and other minority transit riders. *See Powell*, 189 F.3d at 395 (plaintiffs stated claim of unequal funding); *see also* Order at 4 (motion to dismiss cannot be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.") (citation omitted).

While Plaintiffs, like the *Powell* plaintiffs, have satisfied the requirement of notice pleading, and even though no more is required, *see Swierkiewicz*, 534 U.S. at 510-11, the

Amended Complaint goes further and identifies specific examples of its general factual allegations. These specific allegations support a prima facie case of federal law intentional discrimination and state law disparate impact discrimination.

The Amended Complaint places MTC on fair notice of Plaintiffs' intentional discrimination claims. As the Court previously found, the original Complaint sufficiently alleged intentional discrimination in support of the federal claims. Order at 14. Not only does the Amended Complaint allege that MTC's actions have the purpose of discriminating against them on the basis of racial and national origin animus, *see* Amended Compl. ¶ 71, 74, it also contains specific factual allegations that support an inference of prohibited animus, such as the adverse impact on Plaintiffs, the historical background of MTC's funding decisions, and MTC's substantive and procedural departures from normal decision-making protocols. *Compare id*. ¶¶ 3, 30-34, 45, 46-47, 61, 65-68 *with Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252, 267 (1977) (discussing factors that support inference of discriminatory intent).

Similarly, the Amended Complaint also places MTC on fair notice of Plaintiffs' disparate impact claims. A *prima facie* case of disparate impact discrimination requires a plaintiff to identify the defendant's allegedly harm-causing practices, to show that the practices have an effect on plaintiffs that is disproportional and adverse, and to establish causation. *See, e.g., Rose v. Wells Fargo & Co*., 902 F.2d 1417, 1424 (9th Cir. 1990).[3] The Amended Complaint identifies some of the specific practices in which MTC engages that Plaintiffs contend harm them. *See supra* at 8-9; *see also Powell*, 189 F.3d at 397 ("plaintiffs did not need to identify in the complaint a particular portion of [defendant's practices] as objectionable to plead a disparate impact claim"). As set forth above, the Complaint also alleges that (1) the impact on Plaintiffs and other minorities is disproportional because AC Transit serves a population that is 80%

[3] Plaintiffs disparate impact claim arises under Cal. Gov. Code §11135 and its implementing regulation. Where, as here, the federal and state laws are parallel, *compare* 22 C.C.R. 98101(i)(1) (state disparate impact regulation), *with* 28 C.F.R. 42.104(b)(2) (Title VI disparate impact regulations), 49 C.F.R. 21.5(b)(2) (same), federal precedent is persuasive with respect to the state law. *See Guz v. Bechtel Natl'l, Inc.*, 24 Cal.4th 317, 354 (2000) (applying Title VII of Civil Rights Act to California Fair Employment and Housing Act); *Larry P. By Lucille v. Riles,* 793 F.2d 969, 982 n.9 (9th Cir. 1984) (applying Title VII disparate impact caselaw to Title VI).

minority while Caltrain and BART serve populations that are disproportionately white; (2) the impacts on Plaintiffs are adverse because Plaintiffs receive a lower subsidy per passenger trip, and inferior transit opportunities and benefits than the disproportionately white riders of Caltrain and BART, and are stigmatized as second class citizens not worthy of treatment by MTC comparable to that extended to the disproportionately white riders of Caltrain and BART; and (3) these impacts are caused by MTC. *See supra* at 7-9**.**

C. MTC's Factual Assertions Do Not Support A Motion To Dismiss For Lack Of Standing

As set forth above, Plaintiffs in this unequal funding case clearly have standing to challenge MTC's discriminatory treatment of them and moreover have easily satisfied the liberal pleading standards applicable by stating claims for relief. As we show below, each of MTC's factual assertions bears directly on the merits of a plaintiff's well-pleaded claims and is, in any event, untrue. If a defendant could attack the merits of plaintiffs' claims at the pleading stage, as MTC seeks to do, the liberal pleading standards applicable to discrimination cases would have no meaning. Neither the doctrine of standing nor the device of judicial notice was intended as a means of circumventing liberal pleading standards, discovery, and the Federal Rules of Evidence.

Going beyond the requirements of notice pleading, the Amended Complaint includes a number of specific examples—by no means exhaustive of all examples—of MTC's discriminatory policies and practices. MTC makes no effort to contest the truth of the general allegations, which are presumed to embrace those specific facts necessary to support the claim. *Lujan*, 504 U.S. at 561; Order at 4. Rather, its motion rests on the logical fallacy that it may ignore the general allegations if it can refute some of the specific examples.[4]

MTC channels funds to projects and programs that benefit the disproportionately white riders of Caltrain and BART, at the expense of the 80% minority riders of AC Transit. Amended Compl. ¶3. Rail riders reap these disproportionate benefits because MTC endorses their projects through its RTP and its RTEP,[5] channeling large sum of funds to new expansion

[4] Plaintiffs' objections to MTC's request for judicial notice ("Pltfs' Objections") are set forth in a separate pleading filed concurrently with this opposition brief.

[5] MTC not only puts Caltrain and BART expansions at the top of its list of priority transit

projects, while taking actions to shore up existing service without repeated cuts and fare increases, *id*. ¶58, in contrast to how MTC treats AC Transit riders. As a direct result, Caltrain and BART riders enjoy a higher quality and quantity of transit service than do riders of AC Transit. *Id.* ¶4.

These rail expansions serve the needs of people who are not "transit-dependent." *Id.* ¶63. AC Transit aspires to provide the same world-class transit service to its minority, transit-dependent riders, as set forth in a detailed Strategic Vision, Exh. J at 30-37, which it developed to "demonstrate how—*given adequate funding*—we can achieve this goal." *Id*. at 31 (emphasis added). Implementation of AC Transit's plan would "provide fast, frequent, reliable service on a wide variety of routes with attractive vehicles and an easy-to-use fare structure at affordable levels." *Id*.; Amended Compl. ¶50. The plan also contemplates a free annual bus pass for low-income students. Exh. J at 35. Phase One of the plan would provide "comprehensive enhancements throughout the [AC Transit] system," with buses operating every 15 minutes, and every 7.5 minutes on the busiest corridors.[6] *Id*. at 31.

MTC's discriminatory policies and practices leave AC Transit unable to implement its plan to provide "truly world-class service," *id.*, and instead force AC Transit instead to cut service and to raise fares in order to close persistent gaps in its operating budget. An order halting these policies and practices would enable AC Transit to improve the vital services on which Plaintiffs are dependent. *See* Amended Compl. ¶¶ 49-54.

MTC's neglect of its "Lifeline Transportation Network" program is an example of one of MTC's discriminatory practices: a two-tiered funding system, by which it prioritizes the

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expansion projects, the Regional Transit Expansion Program ("RTEP," adopted by Res. 3434 [Exh. A at 1-24]), but also includes those projects in its RTP, meaning that it has identified full funding for them. Exh. A at 28. Thus, in the 2001 RTP, MTC selected BART and Caltrain expansion projects as six of its top seven projects in the RTEP, and planned to include all six as fully-funded with no "shortfall" in the 2001 RTP. Exh. A at 22. These six projects alone accounted for $7.2 billion or nearly 70% of the $10.5 billion RTEP package. *Id*; *see also* Pltfs' Objections at 9.

[6] The Strategic Vision also identifies ten bus routes for "enhanced" bus service, not one of them a Transbay route. Exh. J at 31, 33. Nine of those ten routes serve Oakland, where Plaintiffs Darensburg and Hain live. One of those ten routes serves Richmond, where Plaintiff Martinez lives. *See* Pltfs' Objections at 6-10.

needs of disproportionately non-minority rail riders over transit-dependent minority bus riders. *Id.* ¶45. MTC selects for inclusion in its list of priority transit improvement and expansion projects, the RTEP, those rail expansion projects that benefit non-minority riders, while it relegates transit-dependent minorities to "Lifeline."[7] Completed in 2001, MTC's "Lifeline" study identified numerous gaps in the transit safety-net: inadequate frequency and inadequate hours of service on the routes on which transit-dependent riders relied. It identified gaps in fully 53 of the 67 Lifeline routes served by AC Transit—nearly 80% of its safety-net service.[8] Thus, the link between Plaintiffs' claims and MTC's failure to implement and fund the Lifeline program is hardly "attenuated," as MTC asserts. Defs. Br. at 17.

Overall, MTC found that "an additional 1.55 million service hours" would be needed to fill the safety-net service gaps throughout the region, which would translate into $109 million a year if fixed route service were implemented.[9] MTC's motion, Docket No. 35 (filed Oct. 28), at 4.[10] Over the 25-year life of the RTP, $109 million a year comes to $2.725 billion—yet MTC admits that (after a four-year delay) it only put $216 million toward Lifeline in the 2005 RTP. Defs. Br. at 4 (citing 2005 RTP at 52-55). Contrary to MTC's assertion, Defs. Br. at 17, Plaintiffs' allegation of a shortfall of "well over a billion dollars," Amended Compl. ¶45, is not only true, but greatly understated.

Indeed, MTC has failed to carry through even on the $216 million it promised in

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[7] MTC asserts that it included two AC Transit projects in the 2001 RTEP, Defs. Br. at 17, but neglects to point out that those projects had a funding shortfall of $63 million. Exh. A at 22. Its statement is overstated in other respects as well. *See* Pltfs' Objections at 7-9.

[8] Of 67 Lifeline routes that AC ran in 2001, MTC found that only 14 "fully meet[] Lifeline objectives" in terms of frequency and service hours. LTN at App. D; *see also* table at p. 23. MTC does not attach its Lifeline study as an exhibit to its voluminous Request for Judicial Notice, but gives its web address instead. Defs. Br. at 4, n.2. Significantly, MTC's definition of adequate Lifeline service falls far short of AC Transit's definition of "world-class" service. *See* Pltfs' Objections at 12, n.13.

[9] MTC's Lifeline study asserted that "[a]lternatives to fixed route service can and should be pursued where fixed route does not appear cost effective," LTN at 27, giving as an example of an alternative "taxi vouchers … with an average cost per trip ranging from $15-$50." *Id*. at 27-8. In AC Transit's densely-populated urban service area, fixed route service costs only about $3.99 per trip. MTC, "Statistical Summary of Bay Area Transit Operators Fiscal Years 1998-99 Through 2002-03" at 4 (available at http://mtc.ca.gov/library/statsum/statsum.htm).

[10] MTC deleted this admission from the amended brief it filed on Nov. 1 (Doc. No. 45).

the 2005 RTP. Four years later, MTC has not provided any Lifeline funding to fill any of the gaps in AC Transit's safety-net service that MTC itself identified in 2001. *See* Defs. Br. at 17 ("there was no commitment on behalf of MTC to provide the funds"). Instead, AC Transit now has even more gaps in safety-net service: As MTC itself admits, AC Transit cut service by 14% in 2003 alone. Defs. Br. at 18 (citing Exh. J at 12).[11]

When AC Transit cuts service and raises fares, it is often complying with conditions that MTC sets. One example is MTC's requirement that AC Transit cut service and increase fares in order to receive the "preventive maintenance" funding that it needs to help close repeated shortfalls in its operating budget.[12] In 1998, Congress expressly authorized the use of §5307 funds not only for capital projects, but also for preventive maintenance, an essential cost of operating transit. 49 U.S.C. § 5302(a)(1)(E). But MTC—far from "creatively enabl[ing]" AC Transit to access these essential funds, Defs. Br. at 6—has instead imposed daunting conditions on AC Transit's congressionally-authorized access to them. MTC, however, fails to inform the Court of these restrictive conditions. For example, MTC refuses to program preventive maintenance flexibility to an operator unless that operator can demonstrate that it faced an operating shortfall after implementing "all reasonable cost control and revenue generation strategies." Exh. D at 26 (Res. 3688, 2005). MTC first imposed this requirement in 2002, when it decreed that an operator seeking to use §5307 funds for preventive maintenance must show "a significant service reduction beyond service adjustments already planned as part of the FY 2003-04 budget process." Exh. D at 63 (Res. 3580). Starved for operating funding, *see* Amended Compl. ¶ 58, AC Transit is left no choice but to meet MTC's conditions. It cut service (by 14% in 2003 alone, Exh. J at 12), and raised fares (as recently as September),[13] all to the detriment of Plaintiffs. Had MTC allowed AC Transit ready access to preventive maintenance funds, as permitted by federal law, some of these service cuts and fare increases would have been averted.

[11] MTC states that AC Transit's service cuts are due to a poor economy, Defs. Br. at 18, but fails to note or explain that BART and Caltrain, which operate in the same economy, have not had to cut service and raise fares year by year.

[12] MTC has imposed other draconian restrictions, as well. *See* Pltfs' Objections at 12-16.

[13] On September 6, 2005, local AC Transit bus fares for adults rose by 17%, the third increase in six years. http://www.actransit.org/news/articledetail.wu?articleid=5c33f006.

Moreover, MTC has now imposed an absolute cap on AC Transit's future receipt of those funds, limiting it to two of the next 12 years, regardless of the severity of its operating shortfalls. Amended Compl. ¶ 43; Exh. D at 26.

MTC's preventive maintenance policy is but one example of its discriminatory refusal to allocate discretionary funds for the benefit of the disproportionately minority riders of AC Transit. That practice is also illustrated by three other examples in the Amended Complaint:

- MTC ranked a bus project, known as the "Intra West Contra Costa" project, as the most cost-effective project considered for the 2001 RTP, yet failed to fund it. Amended Compl. ¶48.[14] At a total cost (operating cost plus amortized capital cost) of only $0.75 per new rider, that project would have provided service within ("intra") West Costa Contra County, on the I-80 "Corridor." Exh. L at 9.

  Asserting that MTC funded another operator, WestCAT, to provide that service, Defs. Br. at 8, 16, MTC points to a *different* project, one that provided service between West Contra Costa (Richmond and environs) and Central Contra Costa (Martinez), on a completely different "Corridor" ("SR [state route] 4," not Interstate 80). Exh. I at 6, H at 15. That project, moreover, was estimated to cost between $1.25 and $1.60 in operating costs alone, Exhs. I at 6, 99—more than twice the *total* cost (including annualized capital cost) of the $0.75 per new rider intra West Contra Costa project cited in the Amended Complaint. Amended Compl. at ¶ 48, 57.[15]

- MTC inadequately funded a free bus pass for low-income students. Amended Compl. ¶57. MTC responds with Exh. M, which reflects that it provided $1 million per year for two years for a pilot student bus pass program. MTC does not mention, however, that the success of the program, according to Alameda and Contra Costa County Supervisors, required MTC to provide $3.75 million a year for three years. Pltfs' Objections, Exh. B.

  As AC Transit explains in its Short Range Transit Plan, it "was unable to mitigate the revenue loss associated with the [student bus pass] program

[14] MTC erroneously asserts that "[t]he ministers' Letter does not request funding for any particular service", Defs. Br. at 1, an error resulting from its selective inclusion of only part of the correspondence. To the contrary, in response to the letter of MTC Chair Sharon Brown (which MTC does include, Exh. G at 6), the ministers wrote that "MTC should fund the 'Intra West Contra Costa County Rapid Bus' proposal, the most cost effective project in MTC's 'Blueprint.'" Pltfs' Objections, Exh. A (letter of Apr. 30, 2001).

[15] MTC asserts that in "AC Transit's own requests for funds, there is no mention of the Richmond bus project extension." Defs. Br. at 16. In support, it cites Exh. A at 108-16. This mixes apples and oranges, since these pages of Exh. A constitute AC Transit's request for the inclusion of projects in the RTEP, a long-range list of priority expansion projects. *See* Exh. A at 28. By contrast, the WestCAT documents in Exh. H are a response to MTC's "call for projects" in regard to an immediate State funding opportunity. Exh. H at 4. MTC does not include in its exhibits either its "call for projects" or AC Transit's response to that call for projects. *See* Pltfs' Objections at 16-19.

through grants and regional subsidies and was forced to eliminate it due to budget deficits." Exh. J at 22. The requirement of additional grants and subsidies was imposed by MTC, which not only refused to fund the program adequately, but also required AC Transit to come up with a "50/50 local match," with "AC Transit providing a minimum of $400,000 per year from its own district funds." Exh. M at 1. As a result of inadequate funding by MTC, the pilot project lasted only a year.

- MTC failed to allocate to AC Transit any of a $100-plus million "windfall" in federal STP and CMAQ funds last Spring. Amended Compl. ¶48.

  MTC's response is that these "funds were directed to several categories of projects," and that AC Transit did not have any projects that met the criteria in these categories. Defs. Br. at 17 (emphasis added). In fact, it was MTC in the exercise of its discretion that directed the money to those particular categories, as its documents make clear. *See, e.g.*, Exh. C at 1 (MTC "staff developed a program" for allocating these funds); *id.* at 3 ("MTC has developed policies and procedures to be used in the selection of projects to be funded with STP and CMAQ" funds).[16] Thus, this instance also illustrates MTC's discriminatory practice of establishing funding criteria that favor projects and programs that benefit rail riders over bus riders. Amended Compl. ¶61.

Finally, Plaintiffs allege, as an example of MTC's disparate lobbying practices, that MTC successfully urged Congress to change the criteria for allocating funds under JARC ("Job Access and Reverse Commute"), a federal Welfare-to-Work transit program. Amended Compl. ¶39. Previously, AC Transit had received a significant share of JARC funds, based on the recognized transportation needs of AC Transit's low-income riders. As a result of the change to a formula basis (lobbied for by MTC), AC Transit has now lost several million dollars a year of its prior appropriations. *Id*. MTC could have lobbied Congress to *benefit* transit-dependent AC Transit riders; instead, it chose to lobby to *injure* them. MTC does not dispute the facts, instead professing modesty about the effectiveness of its lobbying, Defs. Br. at 16, although its own documents paint a different picture. In fact, MTC wrote its plan to lobby Congress for this precise change *into its RTP* earlier this year. 2005 RTP at 55 (emphasis added). It is not enough for MTC to claim that Congress, not MTC, makes federal law. Plaintiffs allege that MTC's voice carries "significant influence" with state and federal legislatures, Amended Compl. ¶44, and that

[16] Even with respect to the purported federal constraint that the money "be obligated in FY 2004-05," MTC had flexibility. Its own documents state that this requirement was only "to the extent possible," and also acknowledge MTC's ability to shift other funds around "as a bridge." Exh. C at 1.

it chooses to wield that influence to the advantage of disproportionately white rail riders, at the expense of transit-dependent bus riders of color. *Id.* ¶61. Its role in the JARC amendment is a clear example of this pattern.

In sum, the factual assertions made by MTC do not support its motion to dismiss for lack of standing.

D. Plaintiffs' Claims Are Not Barred By Statutes Of Limitations Because They Seek Injunctive Relief From Present And Ongoing Injury

MTC appears to argue that Plaintiffs' claims are barred by applicable statutes of limitations. This is incorrect. Plaintiffs are not seeking retrospective, damages relief. Rather, Plaintiffs have brought an equitable challenge to MTC's present and ongoing policy of discriminatory funding. Amended Compl. ¶¶ 1-6, 70-78. Plaintiffs seek an injunction from this Court that forces MTC to cease and desist from continuing to engage in the challenged misconduct. *See* Pltfs' Prayer For Relief. In part, Plaintiffs seek this relief based upon a theory of intentional discrimination under the Equal Protection Clause. Proving the existence of discriminatory intent requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights* 429 U.S. at 266.

A challenged practice or policy's "historical background," along with historical evidence regarding "[d]epartures from the normal procedural sequence," are key sources of evidence in an intentional discrimination case. *Id.* at 267-68. Plaintiffs have included extensive historical information in their Amended Complaint in order to support their claim for intentional discrimination. *Id*. ¶¶ 40-43, 49-69. There is no requirement that such historical information be restricted to the period covered by the applicable statute of limitations. In fact the exact opposite is true as recognized by the case cited by Defendant. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004) (acts occurring outside of statutory period "may be relevant background material in support of its timely claim."); *cf.* Order at 13 ("[P]ast wrongs are probative of whether there is a real and immediate threat of repeated injury").[17]

[17] Evidence of discrimination prior to the liability period is often probative of liability itself, particularly in pattern or practice cases in which systemic discrimination is alleged. *See, e.g.*, *Bazemore v. Friday*, 478 U.S. 385 (1986) (finding evidence that employer had engaged in

VI. CONCLUSION

For the above reasons, MTC's second motion to dismiss should be denied. Now that Plaintiffs have submitted a well-pleaded complaint in compliance with the Court's September 19, 2005 Order, the proper course is for the parties to proceed with discovery.

Dated: November 29, 2005

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discrimination prior to the passage of Title VII to be "quite probative" to establish that current conduct was discriminatory in pattern or practice case); *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (finding in a Title VII case that a "discriminatory act which is not made the basis of a timely charge . . . may constitute relevant background evidence in a proceeding in which the status of the current practice is at issue"); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1062 (9th Cir. 2002) (stating in a race discrimination claim that "even if not actionable in and of themselves, untimely claims serve as relevant background evidence to put timely claims in context"); *Butler v. Home Depot, Inc.*, 1997 WL 375285 (N.D. Cal. 1997) (holding that evidence of a time-barred discriminatory act by an employer was "admissible to demonstrate traditional patterns of discrimination that have continued into the liability period" in a class action).

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