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METROPOLITAN TRANSPORTATION COMMISSION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

METROPOLITAN TRANSPORTATION COMMISSION,

Defendant.

No. C 05 01597 EDL

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT

Date: June 24, 2008
Time: 9:00 a.m.
Judge: Honorable Elizabeth D. Laporte
Trial Date: October 1, 2008

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 24, 2008 at 9:00 a.m. in Courtroom __ of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, Defendant Metropolitan Transportation Commission ("Defendant" or "MTC"), through its attorneys, Hanson Bridgett LLP, will and hereby does move this Court for summary judgment in its favor in this action brought by Plaintiffs Sylvia Darensburg and Hain on behalf of the plaintiff class ("Plaintiffs").

This motion is made on the grounds that plaintiffs have no evidence to establish intentional discrimination by MTC, nor do plaintiffs have the necessary evidence of disparate impact to shift the burden to MTC to justify its policies or funding allocations.

This motion will be and hereby is based on this Notice of Motion and Motion (including the supporting Memorandum of Points and Authorities); the Declarations of Warren R. Webster and others filed herewith, the Request for Judicial Notice filed herewith, all pleadings and papers on file in this action any other matters of which judicial notice may be taken by the Court, and upon such oral argument and documentary evidence as may be presented at or before the hearing.

I. INTRODUCTION

MTC is the Bay Area's Metropolitan Planning Organization. MTC's Regional Transportation Plan ("RTP") is the primary transportation planning and financing document for the entire Bay Area and the twenty six operators operating therein. The RTP reflect region-wide policies and planning. Nevertheless, Plaintiffs have cherry-picked three operators, none of which are parties to this action, and moreover, purport to compare them. But, Plaintiffs ignore the fact that their artificially chosen target, BART, alone carries more members of the protected class at issue than AC Transit. Moreover, Plaintiffs fail to offer a justifiable statistical analysis demonstrating a significant and adverse effect on a protected class. They simply recite the relative percentage of minority riders each of these transit operators carries. Thus, whether analyzed under an 'intentional discrimination' or 'disparate impact' standard, Plaintiffs' claims fail.

II. FACTUAL BACKGROUND

A. The Metropolitan Transportation Commission and the Bay Area

1. MTC's Mission and Statutory Authority

MTC is a metropolitan planning organization ("MPO") that provides comprehensive transportation planning for the region comprised of the nine Bay Area Counties. Cal. Gov. Code §§ 66500 *et. seq*. This MPO region includes 101 cities with 3 major airports, 5 public ports, 8 toll bridges, dozens of highways, hundreds of miles of bicycle and pedestrian routes, thousands of buses, cable cars, rail cars, and ferries, thousands of miles of local streets and roads, and over two dozen independently governed transit operators. (Declaration of Julia Veit Decl. ("Veit Decl.") at ¶ 3, Exh. A (RFA Nos. 8-16.))

2. MTC's Racially Diverse and Complex Jurisdiction

MTC operates in a very complex institutional landscape, more complex than any [transportation planning, finance and operational] setting …across the United States. (Declaration of Warren Webster ("Webster Decl.") at ¶6. Exh D (Robert Cervero Deposition, p.155-156).) MTC is not a transit operator. (Veit Decl. at ¶ 5, Exh. A (RFA No. 4), Rather, twenty-six independently governed agencies operate transit service in the Bay Area. (Veit Decl. at ¶ 3, Exh. A (RFA No. 16). (Declaration of Robert Cerrero ("Cerrero Decl.") at ¶4, Exh. A, p.6).) Three

transit operators provide rail service, 16 provide bus service, 1 operates ferry service, 3 operate either bus and rail or bus and ferry service. (Declaration of Therese McMillan ("McMillan Decl.") at ¶ 3, Exh. A.) The Municipal Railway ("MUNI"), Santa Clara Valley Transit Authority ("VTA"), San Mateo County Transit District ("SamTrans"), Peninsula Corridor Joint Powers Board ("Caltrain"), Golden Gate Bridge Highway and Transportation District ("GGT"), Bay Area Rapid Transit District ("BART") and Alameda Contra Costa Transit District ("AC Transit") are the seven largest operators in the region. (McMillan Decl. at ¶ 3, Exh. B at p. 8 .)

In its 2006 "MTC Transit Passenger Demographic Survey," MTC assessed the racial ridership of the Bay Area's transit operators. (Declaration of Therese McMillan ("McMillan Decl.") at ¶ 4, Exh. B.) The Demographic Survey shows that Bay Area transit operators have very diverse riderships; of the 21 operators surveyed, 19 have a minority ridership of 50% or more. (*Id.*) While the results of the Demographic Survey indicate that AC Transit has the highest percentage of minority riders at 78%, 5 of the other 6 largest operators have at least 50% minority ridership: VTA (70%), SamTrans (70%), MUNI (58%), BART (53%) and Caltrain (50%). (McMillan Decl. at ¶ 5, Exh. B.) Only GGT, at 38%, does not. (*Id.*) In terms of absolute annual numbers, MUNI, BART, and AC Transit serve approximately 220 million, 100 million, and 65 million passengers, respectively. (McMillan Decl at ¶ 3, Exh. A); Plaintiffs' Motion for Summary Adjudication at p. 5.) BART therefore serves some 53 million minority riders, MUNI serves some 127 million minority riders, and AC Transit carries about 50.7 million minority riders. (McMillan Decl. at ¶ 5, Exh. B.)

3. **MTC's Long Range Planning Activities**

Every four years, MTC is required to adopt and submit an updated Regional Transportation Plan ("RTP") *See* 23 U.S.C. § 134; 49 U.S.C. § 5303; Cal. Gov. Code § 65080.Cal. Gov. Code §§ 65080, 66513, 29532. The RTP's establishes the financial foundation for how the Region invests in its transportation system by identifying how much money is available to address critical transportation needs and sets the policy on how this funding is to be spent on transportation needs. (McMillan Decl. ¶ 3 and Exh. A, pp. 1-2 (2007 Transportation Improvement Plan ("2007 TIP"); *see also* SAC 12:23-26.) It is also is a regional long-range

transportation plan and a prerequisite for the Bay Area's projects' qualification for federal funds. 23 U.S.C. § 134(g). The current RTP, adopted in 2005, is entitled *Transportation 2030*. MTC is now preparing the 2009 RTP.

4. **Capital vs. Operating Funds**

As an MPO, MTC programs certain transportation funds, and allocates others. Different rules govern each funding source. Transportation funds fall into two broad categories, operating and capital, and come from two major sources, federal and non-federal. (McMillan Decl. at ¶ 10.) In almost all cases, funds available for operations are from non-federal sources; while the great bulk of capital funds come from federal sources. Except for situations where operational maintenance expenses can be capitalized, "capitalized maintenance," transit operators generally cannot utilize capital funds for operational expenses. (*Id.*)

5. **MTC Discretionary Funds**

Depending in the funding source, MTC has varying levels of authority to program and distribute those funds. Since 2002-03, MTC has published a Discretionary Funding Report reflecting the allocations of funds over which MTC has control.[1] From 2002-03 through 2005-06, MTC provided AC Transit with $484,156,098. (Declaration of Stefan Boedeker ("Boedeker Decl.") at ¶4. Exh A (Expert Report p.16).) BART and Caltrain received less $290,175,760 and $208,504,479, respectively. (*Id.*). AC ranked second to MUNI in total discretionary funds received. (*Id.*).

6. **Bay Area Transit Operations Provide Complimentary, Not Competitive Services**

Transportation dollars are scarce. (McMillan Decl. at ¶6) While MTC, as the MPO for the region, does seek funding for the region, transportation funding is often a zero sum game and all twenty plus transit operators have unmet needs. (McMillan Decl. at ¶6). Thus, while all individual transit operators in the Bay Area vie for scarce resources at the public transit funding level, for passengers these transit operations serve more to create a complimentary (cooperative and interconnected) network than as competitors. [Declaration of Robert Cervero ("Cervero

[1] The timing and contents "discretionary funding" reports are mandated by a settlement agreement between MTC and Communities for a Better Environment et al. from a 2002 lawsuit.

Decl.") at ¶5. Exh B (Rebuttal Report, sec. V p.18-24), Webster Decl. ¶6. Exh D (Cervero Deposition, p. 101-102)]

B. AC Transit Autonomy, Service Changes and Ridership Gains

1. AC Transit Alone Determines Its Service Deployment

AC Transit runs busses in Alameda and Contra Costa counties, as well as Transbay service over the Bay and Dumbarton Bridges. (Veit Decl. at ¶3, Exh. A (RFA Nos. 84-86); Webster Decl. at . 84-86, Spencer Depo. at 13:6-19).) AC Transit connects with nine other bus systems, 21 BART stations, six Amtrak stations, and three ferry terminals. (Veit Decl. at ¶3, Exh. A (RFA Nos. 87-90.) AC Transit has a Board of Directors, "the legislative body of the district and determines all questions of policy." *Id.* § 24883; see also §§ 24884-5, 24885, 24506. The Board, of course, is "responsible for the budget…They set fares and they decide on service levels, among other things." (Veit Decl. at ¶4, Exh. B. (Rubin Depo. 33:23-34:6.) AC Transit's Board Policy 550, "Service Standards and Design Policy," governs the allocation and distribution of service, including the December 2003 cuts. (Declaration of Nancy Skowbo ("Skowbo Decl.") at ¶5, Exh. B. (Board Policy No. 550, GM Memo 04-283a); Veit Decl. at ¶8, Exh. F (Bruzzone Depo.at 20:4-22) AC Transit considers route productivity when looking at cuts. (Veit Decl. at ¶8, Exh (Bruzzone Depo. 19:25-20:9).) This is sound policy. (Veit Decl. at ¶4, Exh. B (Rubin Depo. at 57:4-59:1.)

2. Service "Cuts" Cannot Be Attributed To MTC

AC Transit cut service between June 2003 and June 2004 by about 14% (Veit Decl. at ¶8, Exh. F (Bruzzone Depo. at 12:19-13:9), McClain Decl. at ¶_, Exh. A p. vi.), but Plaintiffs' expert believes that the cuts were 10% in Vehicle Revenue Miles (VRM). (Veit Decl. at ¶4, Exh. B (Rubin Depo. at p. 184:15-185:3.). AC Transit's FY 2003-04 cuts were due to the recession. (Skowbo Decl. at ¶7, Exh.D ("SRTP Ch.1").) The recession battered transit operations because 40% of operating revenues come from sales tax revenues. (McMillan Decl. at ¶41, Exh. Z (Res. 3525).) AC Transit's SRTP, its plan for FY 2003-2012, provides:

> [m]ost of AC Transit's operating program revenue originates from fuel, sales, property, or other related taxes and fares…the recession…increased unemployment and stalled consumer spending

> [and] decreases in sales tax revenue. Ridership declined by 10% between FY 2001-02 and FY 2002-03, and fare collections are down. The current economic downturn has had a significant negative impact on District funding....The region relies heavily on sales tax revenues for transit operations, and economic indicators do not forecast a strong recovery for the San Francisco Bay Area for FY 2003-04 or FY 2004-05.

(Skowbo Decl. at ¶7, Exh.D ("SRTP").)

3. **AC Transit Service "Cuts" Protected Heavily Minority Trunk Routes and Increased Ridership**

As to Dec. 2003 and June 2004 cuts, AC Transit:

> We protected the trunks. We protected the low income areas. We *mostly cut service up in the hills*, and we had done analysis previous to that that basically said if we protected the trunks, we were protecting most of the low income riders. We were also protecting most of the riders anyway....[w]e mostly cut low priority lines....we have a list of performance by routes, and we just started at the bottom up and worked our way up.

(Veit Decl. at ¶8. Exh. F (Bruzzone Depo. 22:2-23, 23:7-11) (emphasis added).) With the cuts, ridership increased 4% in FY 2003-04 and fare box recovery also increased. (Veit Decl. at ¶8, Exh. F (Bruzzone Depo. 33:19-24), McMillan Decl. at ¶3, Ex. A (Statistical Summary).):

> we cut service in places where very few people were taking the bus and we protected it where they were....I think the economy started taking an upturn, and so where we protected the service, people were able to keep riding the bus or start riding it some more....My recollection is that ridership did start creeping up.

(Veit Decl. at ¶8, Exh. F (Bruzzone Depo. 33:19-34:12) Thus, service cuts do not "weaken" the system. (Bruzzone Depo. at 51:11-23.)("it just gets rid of stuff that they should have got rid of a long time ago.").)[2] Since June 2004, AC Transit has only *added* service. (Veit Decl. at ¶8, Exh. F (Bruzzone Depo. at 12:19-23.)

Other operators were not so fortunate. For example, SamTrans, a San Mateo bus operator, cut its VRM by some 8.5% and lost 12% of its ridership over the same two-year period. Declaration of James DeHart ("DeHart Decl.") at ¶ 3-8.) GGT, a bus operator in Marin County and the only large operator with a predominantly non-minority ridership, cut its service by 35%

[2] AC Transit conducted a Title VI report on the cuts it made in this period. (Skowbo Decl. at ¶6, Exh. C.)

(Vehicle Revenue Miles (VRM)) and lost 21% of its ridership from 2002-2006. (Declaration of Zahradnik ("Zahradnik Decl.") at ¶ 2-6; Statistical survey.)[3]

C. Plaintiffs' Statistical Case

Plaintiffs statistical expert, Richard Berk, undertook no statistical analyses of any policy or practice associated with MTC. (Webster Decl. at ¶3, Exh.A (Richard Berk Deposition, p. 97:7-24)) Instead, as Mr. Berk readily conceded, he only was asked to address two questions: (1) "[W]hether adverse policies or funding decisions affecting AC Transit would disproportionately affect minority riders," and (2) "[W]hether adverse policies or funding decisions affecting AC Transit would burden its minority riders more than adverse policies or funding decisions affecting BART and Caltrain would burden their minority riders." (Webster Decl.at ¶4, Exh. B (Berk Report, p.1); Webster Decl. at ¶3, Exh. A (Berk Depo., p. 133:21-134:7).)

As to the first question, Plaintiffs statistical expert found that AC Transit's ridership was between 68 and 78% minority [Webster Decl. at ¶4, Exh B (Berk Report, p.2)], and concluded that MTC "policies or practices adversely affecting AC Transit['s] service alone" would "disproportionately affect minority riders." (Webster Decl. at ¶4, Exh. B (Berk Report p.3).) Mr. Berk was unaware of any MTC "adverse policy or funding decision" that would affect *any* transit operator (speculating, at his deposition, that it may include "things like the training of bus drivers") let alone one that would *only* affect AC Transit. (Webster Decl. at ¶3, Exh. A (Berk Depo. p. 29:18-30:17).)

As to the second question, Mr. Berk found that the differences in relative racially minority riderships among AC Transit (68-78%), BART (48-54%)and Caltrain (48-51%), are "statistically significant" and "real." (Webster Decl.at ¶4, Exh. B (Berk Report, p.3.)) He concludes that "similar policy or funding decisions" (*i.e.* limited to BART and Caltrain) adversely affecting BART and Caltrain would not affect BART and Caltrain minorities as much as AC Transit's minorities. [Webster Decl. at ¶4, Exh. B (Berk Report, p.3)] Mr. Berk did not have any way of comparing either quality or quantity of services among Plaintiffs' chosen comparison group.

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[3] SamTrans ridership is 70% minority. GGT's ridership is 38% minority. (Section II(A)(2).)

(Webster Decl. ¶3, Exh. A (Berk Depo. p.58:16-59:15).) In sum, Plaintiffs' statistical expert establishes nothing more than relative minority riderships of AC Transit, BART and Caltrain. (Declaration of Stefan Boedeker ("Boedeker Decl.") at ¶5, Exh. B (Boedeker Rebuttal, p.4)

D. MTC's Statistical Evidence

By contrast, MTC's statistical expert, Stefan Boedeker, has demonstrated numerous statistical deficiencies in Plaintiffs' case, namely that they have provided no statistical evidence of any disparate impact on minority riders. (Boedeker Decl. at ¶5, Exh B (Boedeker Rebuttal p. 4-6, 9, 12, 26).) Namely, MTC has established the following facts: (1) There are more minorities on BART alone than AC Transit (Boedeker Decl. at ¶4, Exh. A (Boedeker Report, p. 11);) (2) Across the three operators chosen by Plaintiffs, AC Transit's share of minority riders is approximately 39% while BART's is 55% (Boedeker Decl. at ¶4, Exh. A (Boedeker Report, p. 13) and ¶5, Exh. B (Boedeker Rebuttal, p.8); and finally, (3) There is no statistical correlation between race of ridership and MTC's discretionary funding (Boedeker Decl. at ¶4, Exh. A (Boedeker Report, p. 20) and ¶5, Exh. B (Boedeker Rebuttal, p.8).) Moreover, Plaintiffs' statistical expert does not challenge any of MTC's statistical analyses, simply stating that Mr. Boedeker's reports are "not responsive to the questions that I was asked." (Webster Decl. at ¶3, Exh. A (Berk Depo. p. 68:15-69:16).) Thus MTC's affirmative analysis of "all other operators" and the subsequent finding that there is no statistical correlation between race of ridership and MTC's discretionary funding is described by Plaintiffs' statistical expert as a "diversion." (Webster Decl. at ¶4, Exh. B (Berk Report, p.2 and 4).)

E. Individual Plaintiffs' Are Both AC Transit and BART Riders

1. Plaintiff Darensburg

Plaintiff Darensburg lives in Oakland and has three children in their late teens or early twenties. (Veit Decl. at ¶10, Exh. H (Darensburg depo 15:4-5, 25:1-6).) Darensburg's son and one of her daughters each has a car. After losing access to a car in 2001, she relies on her children, co-workers, and public transit. (*Id.* at 37:6-14; 84:14-85:7; 92-93, 217:4-23.) Before living in Oakland, Darensburg lived in within 5 to 7 blocks from and used Hayward BART. (*Id.* at 100:2-10; 102:18-103:3; 105:7-16.) Since then, Darensburg has lived in Oakland, either on

MacArthur Boulevard or on 96th Avenue. Darensburg also enjoys access to the BART trains. She estimates that she takes BART 5 to 7 times per week in connection with riding AC Transit. (Veit Decl. at ¶11, Exh. I (Response to Spec. Rogs No. 7, p.15.)

2. **Plaintiff Hain**

Plaintiff Hain lives in Berkeley, some 4 blocks from the North Berkeley BART station. (Veit Decl. at ¶9, Exh. G (Hain depo, 5:22-24; 112:11-13).) From February 2002 through July 2006, Hain lived in east Oakland (*Id.* at 14:24-15:4), and before that she lived on San Pablo near 20th Street. (*Id.* at 13:13-16.) Currently, Plaintiff Hain walks from her home to her local BART station and takes BART to attend a weekly class in San Francisco. (Veit Decl. at ¶9, Exh. G (Hain depo, 111:22-112:13).) Her daughter also rides BART to get to Oakland's School for the Arts. (Veit Decl. at ¶9, Exh. G (Hain depo, 113:1-5).) She and owns a 1986 BMW 325e, which she acquired in 2006. (*Id.* at 64:19-25, 65:19-22.) Since 2001, Hain has owned a car for most of the time. (*Id.* at 78:24-79:5, 74:8-15, 72: 15-22, 70:13-71:12; 79:10-80:1.) When her car is in the shop, Hain uses AC Transit. (*Id.* at pp. 64-79.) Since approximately 2002, Hain has had an unlimited AC Transit bus pass, free bus tickets, or a gas allowance of up to $70 per month. (*Id.* at 47:1-51:10; 69:14-70:9.)

F. The Federal Transportation Administration (FTA) Complaint-Driven Title VI Investigation

In 2000, FTA informed MTC that it had received complaints alleging that MTC's finding decisions favored BART and Caltrain over AC Transit. (McMillan Decl. at ¶35). Following its investigation, on August 19, 2002, FTA released its findings:

> [T]here is also insufficient evidence to corroborate the concern that the reported [funding] disparities have inevitably lead to inequitable or disproportionate funding allocations . . . . A preponderance of evidence reviewed does not suggest that the MTC's actions were racially motivated or in violation of Title VI of the Civil Rights Act of 1964.–[FTA has] determined that [FTA] findings do not establish a violation of Title VI with respect to the issues raised in [these] complaint[s].

(McMillan Decl. at ¶37).

G. Accusations and AC Transit's GM Response

On February 1, 2005, MTC received a letter from Public Advocates, Inc., Communities for a Better Environment (CBE) and Amalgamated Transit Union (ATU) 192, alleging that MTC has historically engaged, and continues to engage" in policies and practices "that benefit the disproportionately white riders of BART and Caltrain [] at the expense of disproportionately minority riders of AC Transit." (McMillan Decl. at ¶38) In response, AC Transit's General Manager Rick Fernandez sent a letter to MTC's Executive Director, apologizing for the Public Advocates, CBE and ATU 192 authors' "ill-informed understanding of [transit] funding practices in the region." Mr. Fernandez wrote that had he been given an opportunity to discuss this with the Public Advocates, CBE and ATU 192 signatories, he "would have pointed out the considerable effort MTC has put forth to assist the AC Transit District with revenue shortfalls." (McMillan Decl at ¶40; Veit Decl. at ¶3. Exh.A (RFA No. 95).) Continuing, AC Transit's General Manager thanked MTC for its actions "to support AC Transit financially throughout the current economic crisis" not the least of which was MTC's preventive maintenance policy that afforded AC Transit "tens of millions in direct operating funds to keep our [bus] service on the street." (McMillan Decl at ¶40;Veit Decl. at ¶3. Exh. A (RFA No. 96).) This remains the sentiment of AC Transit's General Manager to this day. (Skowbo Decl. at ¶8).

III. PROCEDURAL BACKGROUND

On April 19, 2005, Plaintiffs, ATU 192, CBE and three individual plaintiffs brought suit against MTC challenging that MTCs' transit funding decisions were inequitable to AC Transit compared to BART and Caltrain. (Case Doc. No. 1-2 (Complaint, filed 4/19/2005).) Specifically, under their operative (second amended) complaint (SAC), Plaintiffs' bring three causes of action (1) 42 USC 2000d *et seq.* ("Title VI"); (2) The Equal Protection clause of the Fourteenth Amendment / 42 USC § 1983; and (3) California Government Code ("GC") § 11135. (Case Doc.

No. 137 (SAC, filed 11/01/2007).) Per the SAC, MTC "discriminates against [plaintiffs] by denying [them] equal treatment in its funding, planning advocacy, and other decision-making policies and practices, most notably through the alleged "policy and practice of [MTC] funding capital shortfalls but not operating shortfalls" on the bases of Plaintiffs' race. (Case Doc. No. 137 (SAC, para 6, 12,13, 17, 19).) Plaintiffs allege that "[a] majority of the riders of AC Transit, Caltrain and BART, taken together, are people of color. However, the passengers...of AC Transit are disproportionately people of color, while the passengers of...Caltrain and BART are disproportionately white." (Case Doc. No. 137 (SAC, para 32).) These alleged "funding disparities" result in "repeated [AC Transit] bus service cuts[,] fare increases[,]" and a "lower quality of service." (Case Doc. No. 137 (SAC, para 12, 13).)

Plaintiffs ask this Court to permanently enjoin MTC "from making any funding decision that causes (a) AC Transit to experience an unfunded transit operating shortfall while not causing operating shortfalls that affect BART or Caltrain, or while funding capital shortfalls that disproportionately benefit BART or Caltrain. (Case Doc. No. 137 (SAC, Prayer, para 5).)

The parties stipulated to a class of Black, Hispanic, Asian or Pacific Islander and American Indians or Alaskan natives, limited to patrons of AC Transit. Case Doc. No. 145 ([Class] Stipulation and Order, filed 12/10/2007).)

IV. MOTION FOR SUMMARY JUDGMENT LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ. P. 56(c) The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). However, the moving party has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need only point out to the court that there is an absence of evidence to support the non-moving party's case. *Id.* at 325

V. ARGUMENT

Plaintiffs' federally-based claims, Title VI and Equal Protection, require proof of

intentional discrimination. (Case Doc. No. 137 (SAC).) Similarly, whether regulations promulgated under Government Code §11135, California's sister statute to Title VI, support a private right of action is doubtful given the Supreme Court's interpretation of Title VI.

A. Federal Claims

There is no private right of action to enforce disparate-impact regulations promulgated under Title VI. *Alexander v. Sandoval*, 532 U.S. 275 (2001). In order to prevail on a Title VI claim, a plaintiff must prove: (1) that he is an "'intended beneficiary' of the federally funded program" the defendants participated in[4]; and (2) that the defendant intentionally discriminated against him. *See e.g. The Epileptic Foundation v. City & Co. of Maui*, 300 F.Supp.2d 1003, 1011 (D. Haw. 2003). The second element requires that plaintiffs establish not only that they were treated differently, but that defendant acted with improper discriminatory intent. *Id.* at 1013.

Similarly, proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. *See Hispanic Taco Vendors of Washington et al. v. City of Pasco*, 994 F.2d 676, 679 (9th Cir. 1993). As with Title VI claims, to state an equal protection claim under section 1983, a plaintiff must show that the defendant acted with an intent or purpose to discriminate based on membership in a protected class. *Committee Concerning Community Improvement et al., v. City of Modesto, et al.*, 2007 U.S. Dist. LEXIS 50258 at 16[5].

1. Plaintiffs Cannot Show Any Intentional Discrimination And Thus Their Federally-based Claims Fail as Matter of Law

In order to state a prima facie case, Plaintiffs must show MTC acted with an intent or purpose to discriminate against the them based on their membership in a protected class. *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Committee Concerning Community Improvement*, 2007 U.S. Dist. LEXIS 50258 at 1. Under both Title VI and the Equal Protection clause, official action is not unconstitutional solely because it results in racially disproportionate impact. *Id.* at 10; *Committee Concerning Community Improvement et al., v. City of Modesto, et al.*, 2007 U.S.

[4] For purposes of this motion only, MTC does not contest that individual plaintiffs are "intended beneficiaries" for Title VI purposes. ATU 192 and CBE entities are not "intended beneficiaries" under Title VI. (Declaration of Adam Hoffman at ¶ 16, Exh N, ¶ 21, Exh. S)

[5] Accordingly, under 1983, "[A] plaintiff must plead and prove: (1) a municipal custom or policy and (2) that this custom or policy was 'the cause of and moving force behind the depravation of constitutional rights.'" *Id.* at 18-19 (quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 819 (1985)

Dist. LEXIS 39099 at 17. Where no competent evidence exists directly demonstrating a "discriminatory purpose and intent" through any governmental policy or program, the Court may turn to the "totality of the relevant evidence to determine whether invidious discrimination was a motivating factor for the decision." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. §252 §266, 429 U.S. at 266 (1977). Accordingly, the court first looks to: (1) the discriminatory effect of the official action; and then to (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) departure from the normal procedural sequence; (5) departures from the normal [substantive standards]; and (6) the legislative or administrative history of the decision. *Id.*

Plaintiffs here have not alleged nor can they produce *direct* evidence a discriminatory purpose and intent underlying any MTC policy or practice, pointing to no evidence suggesting that any MTC official act was motivated by racial animus. *City of Cuyahoga Falls v. Buckeye Comm. Hope Foundation*, 538 U.S. 188, 195 (2003). Moreover, Plaintiffs do not and can not present evidence such that *Arlington Heights* factors would apply to this case. *See e.g. Committee Concerning Community Improvement*, 2007 U.S. Dist. LEXIS 61195 at 14

Here, it is undisputed that MTC is the Bay Area's MPO, which coordinates regional transportation planning and that its sphere of influence is the Bay Area. ((II)(A)(2)). There are twenty six transit operators in the Bay Area (II(A)(2)); That Plaintiffs lawsuit excludes twenty three of the twenty six operators from comparison. ((II)(C) and (D), (III)); That Plaintiffs' lawsuit seeks to compare only AC Transit vs. BART and Caltrain (*Id.*), and; That AC Transit carries only 39% of minorities even among, and when only comparing, AC Transit, BART and Caltrain. (II)(D).

As demonstrated more fully below, and with so limited a comparison, Plaintiffs can not show and do not even allege that an official action by MTC "bears more heavily on one *race* than another." *Arlington Heights,* 429 U.S. at 266. Thus, there is no "important starting point" for the Court to even look for circumstantial proof of invidious discrimination. *Id.*

Nevertheless, even if Plaintiff could somehow present a racially discriminatory effect, they offer only spurious, if any, evidence of: (1) the "historical background" of any MTC

"decision;" (2) the "specific sequence of events" leading up to any "challenged decision;" (3) departures from the normal procedural sequence; (5) departures from the "normal substantive standards;" or (6) the legislative or administrative history of any "decision." *Arlington Heights*, 429 U.S. at 266. The specific transportation planning reflected in the RTPs is predicated on specific funding allocations, yet Plaintiffs proffered transportation expert, Rubin, evaluated the alleged inadequacies of MTC's funding policies, but his opinions are based on insufficient facts. Despite the myriad of funding sources and complexities, Rubin did not know what funding AC Transit had asked MTC for or what AC Transit was statutorily eligible to receive. His extensive failure to discuss the "historical background," the "specific sequence of events" or any "departures form normal substantive standards" regarding funding decisions leading up the RTPs precludes an Analysis under *Arlington Heights*. (See Defendant's Motion to Exclude Expert Testimony, and Objections To Evidence both filed and served herewith)

Because Plaintiffs cannot demonstrate MTC acted with an intent or purpose to discriminate against them based on their membership in a protected class, and because their claims set forth only the most narrow of comparisons among Bay Area transit operators, they fail to state a prima facie case under both Title VI and the Equal Protection clause. Accordingly, MTC is entitled to partial summary judgment for Plaintiffs' First and Second causes of action. *See Committee Concerning Community Improvement*, 2007 U.S. Dist. LEXIS 61195 at 18.

B. California Government Code § 11135

The issues raised under Gov't Code §11135: (1) whether Plaintiffs are foreclosed from pursuing a disparate impact claim under Gov't Code §11135 regulations; and (2) whether a purported violation of Gov't Code §11135 requires a nexus between a state-funded program or activity and the alleged discrimination, are addressed in MTC's Opposition to Plaintiffs'MSA, a motion based entirely on Gov't Code §11135. However, the Court need not decide these state law issues, because all of plaintiffs claims suffer the same logical and logistical shortfalls that renders insufficient each of Plaintiffs' claims whether under 'intentional discrimination' or the lesser 'discriminatory impact' standard, which they allege applies to their §GC 11135 claim. *See Committee Concerning Community Improvement,* 2007 U.S. Dist. LEXIS 61195. In addition, the

'discriminatory impact' analysis (below) sets out more fully the reasons Plaintiffs can not show and do not even allege that an official action by MTC "bears more heavily on one *race* than another." *Arlington Heights,* 429 U.S. at 266.

C. Disparate Impact

In general, discriminatory impact cases have three distinct stages and the burden of persuasion always remains with plaintiffs. *Wards Cove Packing Co v. Atonio,* 490 U.S. 642 (1989); *see also Committee for a Better North Philadelphia v. Southeastern Pennsylvania Transp. Authority*, 1990 U.S. Dist. LEXIS 10895 (ED Pa.) (*aff'd, Committee for Better North Philadelphia v. Southeastern Pennsylvania Transp. Authority*, 935 F.2d 1280 (3d Cir. 1991). First, Plaintiff must: (1) prove the existence of and adverse effects of a policy or practice (2) on a protected class such that the population in general is not affected by the policy to the same degree and, (3) must prove that the adverse effects are significant. Second, should plaintiff satisfy the first requirement, and thus his prima facie case, defendant must show that its conduct was based upon legitimate, non-discriminatory reasons. Having accomplished this, the burden is on plaintiff to demonstrate that a feasible, yet less onerous alternative exists." *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989); *New York Urban League v. Pataki,* 71 F.3d 1031 (2nd Cir.1995) (applying U.S. Dept. of Transportation regulations promulgated under Title VI in the public transportation context)(*citing Larry P. v. Riles,* 793 F.2d 969 (9th Cir. (1984)[6].)

1. Plaintiffs Have Not Demonstrated an Actual Policy or Practice on Which This Suit Can be Based

First, Plaintiffs' identification of a policy or practice is deficient. Plaintiffs SAC contains the overarching allegation that MTC's policy or practice is to "cover" or "fund" projected transit capital [rehabilitation] shortfalls but not to "cover" projected transit operating shortfalls" in the RTPs. (III). Thus, the allegation that MTC "cover[s]" or "fund[s]" transit capital rehabilitation

[6] The *Larry P.* Court found that under Title VI regulations specifically "in the educational situation, the defendant must [] show that any given requirement has a manifest relationship to the education in question (*i.e.* an "educational necessity"), thus limiting a defendant's requirement of demonstrating the "necessity" of a program or policy to limited instances that are not presented in this matter. *Compare e.g., Coalition of Concerned Citizens Against I-670 v Damian*, 608 F.Supp. 110, 127 (SD Ohio, 1984) requiring under Title VI that defendant need only "present a justification" or "articulate a legitimate nondiscriminatory reason" for the location of a Interstate 670.

shortfalls in the RTP is demonstrably false, even among the limited comparison group--According to Plaintiffs, "[a]ll three operators [AC transit, BART and Caltrain] had capital rehabilitation shortfalls in the three most recent RTPs" with "BART and Caltrain's capital rehabilitation shortfalls [being] substantial." ((Ptfs' Case Doc. No. 175 MSA) p.12:21-23.) But Plaintiffs fail to show what policy MTC has that demonstrates MTC "covers" or "funds" capital rehabilitation shortfalls. Next, even among Plaintiffs comparison group, projected operational shortfalls are not limited to AC Transit--The 2005 RTP "reflects an operating shortfall for Caltrain." ((Ptfs' Case Doc. No. 175 MSA,) p12:15). Moreover, Plaintiffs do not even question whether adequate available funding exists for MTC to "cover" all operating and capital shortfalls.

2. The Definite and Significant Adverse Impact Must be Demonstrated on a Protected Class

More importantly, the intent of a disparate impact analysis is to determine whether "the impact of the official action...'bears more heavily on one race than another.'" *Arlington Heights*, 429 U.S. at 266 (under an intentional discrimination analysis, this provides only "an important starting point.") Thus, for example in the employment context, a plaintiff establishes a prima facie case of disparate impact by showing a significant disparate impact on a protected class caused by a specific, identified, employment practice or selection criteria. *Stout v. Potter* 276 F.3d 1118, 1121 (9th Cir. 2002)(emphasis added); *see also Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990)(statistical evidence must demonstrate that the practice in question has caused the plaintiffs' alleged harm "because of their membership in a protected group").

It is not sufficient to present evidence raising an inference of discrimination on a disparate impact claim. The plaintiff "must actually prove the discriminatory impact at issue." *Stout*, 276 F.3d at 1121-22. A prima facie case of disparate impact is "usually accomplished by statistical evidence showing 'that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants.'" *Id.* For example, "[m]ere references to imbalances of minorities within a work force or to higher concentrations of minorities into lower job levels do not in themselves, however, establish a prima facie case of racial discrimination. The evidence must establish significant disparities in treatment between

minorities and nonminorities." *Agarwal v. Arthur G. McKee & Co.*, 19 Fair Empl. Prac. Cas. (BNA) 503; 16 Empl. Prac. Dec. (CCH) P8301 (ND Cal. 1977).

The purpose of anti-discrimination laws are to protect members of a "protected class." *Stout*, 276 F.3d at 1121-22. To state a prima facie case, a plaintiff must identify a specific, seemingly neutral practice or policy that has a "significantly adverse impact on persons of a protected class." *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (1993). In *Garcia*, the Ninth Circuit held that plaintiffs had failed to make out a prima facie case challenging their employer's English-only policy. The Court noted that "the requirements of a prima facie disparate impact case . . . are in some respects more exacting than those of a disparate treatment case.'" *Id.* That is, in the disparate treatment context,[7] a plaintiff can make out a prima facie case merely by presenting evidence sufficient to give rise to an inference of discrimination. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973).) In a disparate impact case, plaintiffs must do more than merely raise an inference of discrimination before the burden shifts; they "must actually prove the discriminatory impact at issue." *Id.* (citing *Rose*, 902 F.2d at 1421).

In the typical disparate impact case, in which the plaintiff argues that a selection criterion excludes protected applicants from jobs or promotions, the plaintiff proves discriminatory impact by showing statistical disparities between the number of protected class members in the qualified applicant group and those in the relevant segment of the workforce. *Id.* (citing *Wards Cove*, 490 U.S. at 650) Whether the protected group has been disadvantaged turns on quantifiable data and the plaintiff may not merely assert that the policy has harmed members of the protected group to which he or she belongs. *Id.* "Instead, the plaintiff must prove the existence of adverse effects of the policy..[on] the protected class, must prove that the adverse effects are significant, and must prove that the [] population in general is not affected by the policy to the same degree." *Id.*

[7] In the employment context, proscribed discrimination comes in two forms. In disparate *treatment* cases, the plaintiff alleges that an employer has treated him or her less favorably than others due to race, color, religion, sex or national origin, and the plaintiff must prove a discriminatory intent or motive. In disparate *impact* cases, by contrast, the plaintiff alleges and proves, usually through statistical disparities, that facially neutral employment practices adopted without a deliberately discriminatory motive nevertheless have such significant adverse effects on protected groups that they are "in operation . . . functionally equivalent to intentional discrimination." *Harris v. Civil Serv. Com*, 65 Cal. App. 4th 1356, 1365 (Cal. Ct. App. 1998)(citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985-987 (1988).)

Thus, in *New York City Envir. Justice Alliance v. Giulliani*, 214 F.3d 65, 70 (2nd Cir. 2000), under a Title VI disparate impact standard, plaintiffs were required in the course of attempting to establish causation to employ facts and statistics that "adequately captured" the impact of the City's plans on similarly situated members of protected and non-protected groups. *Id.* (citing *New York Urban League*, 71 F.3d at 1037). The plaintiffs therefore had to show that specific actions of the defendants would cause a disparate effect on similarly situated people to the detriment of a protected group." *Id.* at 69 (disparate impact requires a causal connection between a facially neutral policy and a disproportionate and adverse impact *on minorities*") (emphasis added).[8] Thus, assuming Plaintiffs have chosen a valid measure of a policy or practice that can be quantified across a valid comparison group (discussed below), the Court must look to whether it "'bears more heavily on one race than another,'" *Arlington Heights*, 429 U.S. at 266.

a. **Plaintiffs Do Not Allege That An MTC Policy or Practice Favors One Race Over Others**

The core of Plaintiffs' case stems from the alleged that MTC's generalized funding practices reflected in the RTPs harm AC Transit minority riders. (III). Plaintiffs' case depends not only on artificially pitting one transit operator against two of the twenty odd potential others, it purports to only compare the "white riders" of BART and Caltrain against non-white riders of AC Transit while completely ignoring the non-white riders of BART and Caltrain, the white riders of AC Transit, and the entirety of the remainder of the Bay Area's minority transit riders. (II(C), III, Ptf's Motion, Doc. No. 175)

b. **Plaintiffs Ignore the Fact That More Minorities Ride BART and Caltrain Than AC Transit and Impermissibly Dismiss The Supposed Impact MTC's Alleged Policies Also Have On Minority BART and Caltrain Riders**

Even in their chosen comparison group, Plaintiffs fail to allege or demonstrate an adverse impact on a protected class. In *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2nd Cir. 2007), plaintiffs claimed defendant's employment practices had a disparate impact on pilots aged 55 and

[8] "In order to make out a prima facie case of disparate impact, plaintiffs must show "a significantly discriminatory impact." *Connecticut v. Teal*, 457 U.S. 440, 446 (1982)(**Title** VII case)); *see also New York Urban League*, 71 F.3d at 1036 (courts in Title VI disparate impact cases look to ***Title*** VII cases for guidance)." *New York City Envir. Justice Alliance v. Giulliani*, 214 F.3d 65, 70-71 (2nd Cir., 2000).

older (*i.e.* a subset of a larger protected group, aged 40 and older). The Court there held, however, that disparate impact must be alleged for the "entire protected group, *i.e.* workers aged 40 and older." *Id.* at 105 ("hiring scheme had no negative impact on the overall [protected] group.") Similarly, the Court in *Carter v CB Richard Ellis, Inc.*, wrote:

> The varnish of plaintiff's words about the law's prohibition of discrimination against women and those over 40 was used as a diversionary tactic to conceal the real complaint--an adverse employment action taken against a very limited subset of the protected group--because of their status as members of the limited subset [(administrative managers)]. Thus plaintiff attempt[s] to establish disparate impact by the same false logic as did the plaintiff in *Katz [v. The Regents of the University of California, et al.* 229 F.3d 831 (9th Cir. 2000)]. But the *Katz* court recognized, and so do we, that disparate impact is not proved merely because all members of a disadvantaged subgroup are also members of a protected group.

Carter, 122 Cal.App. 4th 1313, 1326 (2004).

The "pool" that plaintiffs have chosen here contains riders of three transit operators, AC Transit BART and Caltrain. (II(C), III). The undisputed facts are that, among plaintiffs' chosen comparison pool, BART and Caltrain combined carry more minority riders than AC Transit, with BART alone carrying more minority riders than AC Transit. ((II)(D)). Using plaintiffs chosen comparison grouping, the simple fact is that more minority riders benefit from BART and Caltrain services than they do from AC Transit. ((II)(D)).

Thus, the shortcomings illuminated by the *Criley* and *Carter* courts are even more apparent here. Plaintiffs are not only asserting that non-white riders of AC Transit are adversely affected because they are riders of AC Transit, they asserting that the non-white riders of BART and Caltrain can not be similarly adversely affected (because they constitute a relatively smaller majority among these artificially chosen operators) by the same policies or practices. (Webster Decl. T. at ¶1, Exh. #, Sanchez Report, p.102). The plaintiffs case here rests not on the race of AC Transit's riders, but the fact that they are AC Transit riders. ((II)(C)). There is no basis in law for Plaintiffs' purported comparison. *See e.g. Criley,* 119 F.3d 102. And, it "[r]eflects a basic misunderstanding of the meaning of disparate impact." *George Frank, et al. v. Co. of Los Angeles, et al.*, 149 Cal.App. 4th 805, 818 (2007). Still, even if Plaintiffs could demonstrate

inequitable funding among these all predominantly-minority ridership transit operations, "the law does not prohibit discrimination" against transit systems. *Carter*, 122 Cal.App.4th at 1321.

Plaintiffs have intentionally couched this lawsuit, which in essence is about a preference for funding for AC Transit that happens to have predominantly minority riders, in terms of racial discrimination. It is not logically and legally appropriate to exclude BART and Caltrain minorities from a analysis of whether an general MTC policy had disparate impacts on minorities. *See e.g. Criley,* 119 F.3d 102.

c. **Both Class representatives Enjoy the Supposedly Illegitimate "Benefits" Conferred Upon BART riders**

Plaintiffs cannot possibly demonstrate a disparity between minorities and non-minorities even within their artificially chosen universe of transit operators and do not attempt to do so. Furthermore, the class of plaintiffs here could not possibly be harmed. Both Ms. Darensburg and Ms. Hain are BART riders. This comes as no surprise for, as Plaintiffs succinctly summarize, "BART's geographical service are overlaps extensively with that of AC Transit." (Ptfs' Case Doc. No 175, MSA p.4:16) Specifically, Darensburg enjoys access to the BART trains and takes BART 5 to 7 times per week in connection with riding AC Transit. ((II)(E)(1)). Hain uses BART to attend class in San Francisco on a weekly basis. ((II)(E)(2)).

According to Plaintiffs, when MTC allegedly benefits BART riders, it does so at the expense of AC Transit riders. (Ptfs' Case Doc. No. 175 MSA) Thus, under Plaintiffs rubric, both Darensburg and Hain simultaneously enjoy the benefits conferred upon BART riders they would otherwise receive as AC Transit riders. To properly statistically analyze disparate impact, no member of the protected class can be a member of the comparison group. (II)(D)), *Garcia,* 998 F.2d at 1486.

3. **A Prima Facie Case Requires a Definite, Significant Adverse Impact Taking Into Account All Relevant Bases of Comparison**

A prima facie disparate impact case also requires a *significantly adverse or disproportionate impact* on persons of a particular type produced by the defendant's facially neutral acts or practices." *See e.g. Gamble v. City of Escondido* 104 F.3d 300, 306 (9th. Cir. 1997). Plaintiffs must establish that the proposed administrative action involves "some definite,

measurable disparate impact." *Coalition of Concerned Citizens against I-670,* 608 F. Supp. at 127.[9] (citing *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1332 (3rd Cir. 1981)); *see also, South Bronx Coalition for Clean Air v. Conroy*, 20 F.Supp.2d 565, 572-3 (SD N.Y. 1998) ("disparate impact under Title VI requires 'a reliable indicator of disparate impact' and 'an appropriate statistical measure' that takes into account all relevant bases of comparison).) The burden is on Plaintiffs to prove that the measurement employed is meaningful. *See New York City Envir. Justice Alliance v. Giulliani*, 214 F.3d 65, 70 (2nd Cir., 2000).

For example, in *New York City Envir. Justice Alliance v. Giulliani*, 214 F.3d 65, (2nd Cir., 2000), plaintiffs alleged that the City's proposed sale or changed use of lots in predominantly minority communities (from community gardens leased to individuals and community groups under the City's "Green Thumb" program to housing and retail space). *Id.* at 70. There, under a Title VI disparate impact standard,[10] the Court held that "the plaintiffs were required in the course of attempting to establish causation to employ facts and statistics that "adequately captured" the impact of the City's plans on similarly situated members of protected and non-protected groups. *Id.* (citing *New York Urban League*, 71 F.3d at 1037). The plaintiffs therefore had to show, "using an 'appropriate measure,' that specific actions of the defendants would cause a disparate effect on similarly situated people to the detriment of a protected group." *Id.* at 69. Plaintiffs' declarations, however, "made no such showing" because as with Plaintiffs' transportation experts' reports here, the declarations included a "wide variety of arguments and data" touching on diverse subjects, but did not show sufficient detriment across a protected group. *Id. at* 70. There, although plaintiffs "unquestionably submitted evidence that community gardens are disproportionately located in minority neighborhoods and demonstrated that of the gardens "at imminent risk of sale or destruction," over 86% are found in districts whose populations are more than two-thirds minority, the court concluded that plaintiffs had "not demonstrate[d] the appropriateness of their proposed measure, of the disparate impact". *Id. at* 70-71.

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[9] (applying Title VI disparate impact regulations promulgated under Title VI in a pre- *Alexander v. Sandoval* decision.)

[10] At the time, the now foreclosed issue of whether a private right of action may be brought to enforce (disparate impact) regulations issued under Title VI "remaine[d] an open one." *Id.* at 73.

As demonstrated below, even of they could demonstrate an adequate base, Plaintiffs fail to demonstrate a definite and significant measure of impact.

a. Plaintiffs Do Not Justify Their Limited Comparison Of AC Transit to BART and Caltrain

At the outset, comparing a "bus" system to a "rail" system, at best, is an inherently difficult exercise for transportation planners (and experts), let alone this Court. Addressing a similar "threshold legal issue" in *New York Urban League, Inc. v. State of New York et al.*, 71 F.3d 1031 (2nd Cir. 1991), the court questioned whether subsidies to the "two different transportation systems" being compared (the "predominantly minority" New York City bus and subway vs. the "overwhelmingly white" commuter rail lines) was even actionable under disparate impact regulations. The court found that it need not address this "threshold" issue because plaintiffs' measure, the "farebox recovery ratio," did "not reveal the extent to which one system might have higher costs associated with its operations." *Id.* at 1038.

Plaintiffs appear to offer no reasonable justification as to why it is appropriate to begin comparing these systems, let alone to the exclusion of others, other than that each operates in a "single mode" and "serve multiple counties." (Ptfs' Case Doc. No. 175, MSA p.6). The justification for purportedly examining these three different, yet overlapping (in the case of BART and AC Transit and BART and Caltrain) operators is unavailing. First, there are other "single mode transit operators and others that serve more than one county, including Samtrans, and GGT. ((II)(A)(2)). There are even other single mode bus operators (Samtrans) that Plaintiffs do not include in their comparison. ((II)(A)(2)).

Moreover, as detailed above, plaintiffs purported 'statistical analysis' consists of no more than the recitation of the relative percentage of minorities in an artificially chosen group. ((II)(D)). The only finding Plaintiffs put forth as "statistically significant" is that the relative percentages of minorities on AC Transit, BART and Caltrain, all of which have predominantly minority riderships, is "real." ((II)(C)). This is of no great import as the relative percentage of minorities is not in dispute, nor is the fact that each of these systems has a predominantly minority riderships–The relative percentage of riders does not speak to the whether minority

riders within the appropriate comparison group suffer adverse impact from a common policy or practice compared to riders in non-protected groups using an appropriate measure.

Transit operators excluded from Plaintiffs' rubric demonstrate the lack of depth and merit to Plaintiffs' claims For example, the MUNI system ignored by Plaintiffs carries the most minority passengers of the Bay Areas 26 systems and far more than AC Transit. ((II)(A)(2)). Despite MUNI's dominance in total number and minority patrons over any other system, and despite the fact that AC Transit, MUNI and BART are eligible for certain AB 1107 funds, MTC splits these eligible AB 1107 among only AC Transit and Muni, giving 50% to each. (McMillan Decl.¶13.) This distribution "policy" totally excludes BART and wildly disfavors MUNI on a per capita (and per minority) basis in favor of AC Transit. (Webster Decl., at ¶8, Exh. F (Deposition of Randy Rentschler, p.269:14-276:8.).)

Moreover, when compared to Golden Gate Transit, which carries the highest percentage of white riders, Plaintiffs argument proves to be even more disingenuous. In fact, AC Transit's cuts pale in comparison to GGT cuts over the same period. From 2002 through 2006, GGT cut its service (VRM) by 35% and lost 21% of its ridership. ((II)(B)(3)).

b. Even in the Limited Comparison Grouping, Plaintiffs Fail to Demonstrate a Reliable Indication of Disparate Impact

Moreover, even if the Court could be presented with an appropriate comparison group that took into account all relevant bases of comparison, Plaintiffs' evidence lacks a reliable indicator of disparate impact and an appropriate statistical measure. *See New York City Envir. Justice Alliance v. Giulliani*, 214 F.3d 65, 71 (2nd Cir., 2000). Thus, while Plaintiffs allege disparities in the quantity, quality, and fares of transit services, none of these provides a appropriate or adequate statistical measure on which a prima facie case can be based in this case and none are demonstrated here. *See Id. at* 70-71. Plaintiffs statistical expert engaged in no analysis of any of these metrics and there is no evidence, even if taken as true and reliable, that any differences among these operators is statistically significant. ((II)(C) and (D)).

(i) Plaintiffs Provide No Evidence or Comparisons of "Higher Fares"

Plaintiffs complain that MTC policy or practice has resulted in higher fares for AC Transit

riders as opposed to BART and Caltrain riders. (III). They have failed to engage in any meaningful analysis in that regard. The unexamined and non-established fare structure or changes thereto of any operator obviously cannot serve as "a reliable indicator of disparate impact" and "an appropriate statistical measure." *Id* at 71. Moreover, it is unclear that higher fares would impact Plaintiffs class in any event. For example, since 2001, class representative Vivian Hain has the option of receiving free AC Transit (via a "bus pass" under a county welfare program) service or a gas stipend for her car. ((II)(E)(2)). Whether she chooses one or the other, obviously, the effects of changes in AC Transit fares, if any, are mitigated by the ability to use AC Transit service for free.

(ii) Plaintiffs Provide No Evidence or Comparisons of Transit "Quality"

Similarly, Plaintiffs SAC asserts that BART and Caltrain riders enjoy a superior "quality" of service to that of AC Transit. (III). Again, Plaintiffs have presented no competent evidence in this regard, and certainly no statistical evidence.

(iii) Plaintiffs Purported Comparisons of "Quantity" are Inadequate

The closest Plaintiffs come to presenting a quantifiable metric of disparate impact falls under the category of "service." In this regard, they assert only a comparison of vehicle revenue miles (VRM) ((Ptfs' Case Doc. 167-2, MSA) (Rubin Report, p.44).) Leaving aside whether VRM, by itself is an appropriate measure of 'equity' between 'rail' and 'bus,' let alone between AC Transit, BART and Caltrain, VRM is but one quantitative measure that can be employed in the transportation field. Webster Decl. at ¶6, Exh. D. (Cervero Depo p234:1-238:14) But, even still, as used by Plaintiffs here VRM only shows only an aggregate measure of revenue miles, not the effects on AC Transit's minority riders.

However, it is undisputed that during the service "cuts" of which Plaintiffs complain, AC Transit "protected the [predominantly minority and most populous] trunks" and cut service "in the [less minority and less populous] hills. ((II)(B)(3)). Plaintiffs completely fail to account for the actual effect on AC Transit's minority riders.

Thus, the VRM metric, even if it alone was a valid measure of equity, necessarily fails to

capture the actual effects of service changes on AC Transit's protected classes. That is, we know the VRM generated by Plaintiffs fails to consider the established fact that AC Transit service changes tended to adversely affect sections of AC Transit's service area with lower minority ridership before it affected, if at all, the vast majority of minority riders that use AC Transit's "protected" trunk routes. ((II)(B)(3)).

c. There is No Correlation Between Race and MTC's Discretionary Funding

Finally, not only do Plaintiffs' claims fail under any civil rights standard, MTC's statistical expert has demonstrated there is no *correlation* between MTC's allocation of discretionary funds and race using each of the discretionary Funding Reports from 2003-04 through 2005-06. ((II)(D)). While Plaintiffs' proferred expert, Berk, doubted Boedeker's detailed analysis, he did not challenge Boedeker's conclusion in this regard stating "I have not done that analysis." ((II)(C)).

D. Plaintiffs specious Claims invites this court to substitute its judgment for that of state and federal governments, MTC, local governments and politicians , Transit Agencies, and voters

It is well-settled that courts are ill-equipped to address complex social issues like transportation funding and finance, and are, in the vast majority of cases, not the proper forum. *See Dandridge v. Williams*, 397 U.S. 471, 487 (1970)("the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973)(education finance policy); *Committee for a Better North Philadelphia v. SEPTA* (transportation finance policy).

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of transportation policy, another area in which this Court's lack of specialized knowledge and experience counsels against interference with the informed judgments made at the federal, state, regional and local levels. Like public education finance and public welfare benefits policies, public transportation planning and finance presents a myriad of "intractable economic, social, and even philosophical problems." *Dandridge*, 397 U.S. at 487. As with education finance

policy, the very complexity of the problems of planning, financing and managing the Bay Areas' transportation network system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, MTC's efforts to tackle these problems should be entitled to respect. *San Antonio,* 411 U.S. at 48.

Sanctioning too low a legal standard for inferring discriminatory motivation would encourage harassing, baseless lawsuits, force public agencies to justify their conduct upon only the "slim reed of the highly speculative inference" and would thrust the federal courts directly into the business of prescribing comprehensive, detailed, objective and mandatory guidelines in the dynamic and complex realm of public transportation planning and finance. *See e.g. Gay v. Waiters' & Dairy Lunchmen's Union,* 694 F.2d 531, 555 (9th Cir. 1982). Furthermore, the specter of endless lawsuits based on mere disproportional impacts could actually serve to discourage public entities from taking measures designed to benefit protected groups. *See e.g. New York City Envir. Justice Alliance,* 214 F.3d at 71. Nevertheless, under any civil rights standard, Plaintiffs have failed to and cannot raise a triable issue of fact regarding alleged racial discrimination.

VI. CONCLUSION

For the foregoing reasons, MTC's Motion should be granted.

DATED: April 22, 2008

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