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12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

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

19 Plaintiffs,

20 v.

21 METROPOLITAN TRANSPORTATION
COMMISSION,

22 Defendant.
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Case No. C-05-1597-EDL

**PLAINTIFFS' POST-TRIAL BRIEF
(LIABILITY PHASE)**

Date:

Time:

Judge: Hon. Elizabeth Laporte

Trial Date: Oct. 1, 2008

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1 **I. INTRODUCTION**

2 This disparate impact case challenges three facially-neutral practices by which MTC
3 systematically shifts billions of dollars to rail expansion at the expense of cuts to existing bus
4 operations. Those practices are (1) MTC's selection and funding of rail expansion projects over
5 bus projects in Resolution 3434 ("Res. 3434"); (2) its allocation to capital uses of "committed"
6 funds that are eligible by statute for transit operations, and to expansion funds eligible for capital
7 preservation of the existing system; and (3) its assignment in the Regional Transportation Plan
8 ("RTP") of "uncommitted" or Track 1 funds to capital rehabilitation, but not operating, shortfalls.
9 Each is a substantial factor in causing cuts to service that fall disproportionately on minority
10 riders.

11 MTC pursues these practices in the face of a statutorily-required "emphasis" on
12 preserving the operating and capital needs of the existing transit system. Turning that mandate on
13 its head, MTC has made rail expansion its highest priority, to the detriment of productive, cost-
14 effective bus service that promotes important mobility, air quality and other objectives. The
15 record on the three challenged practices is largely undisputed.

16 At this stage, the Court is no longer asked to decide a number of disputes about which
17 evidence was presented. *First*, the path to prima facie liability on allocation of committed funds
18 can be demonstrated with undisputed evidence about just a few funding sources. Plaintiffs focus
19 here on MTC's ability to fund \$40 million a year in AC Transit's operating needs by way of
20 "preventive maintenance" funds, and to backfill AC Transit's capital rehabilitation needs from
21 other sources. As a result, the Court need not wade through the many other funding sources that
22 could be made available, directly or through fund exchanges, to provide for AC Transit's
23 operating and capital replacement needs. *Second*, the Court need not reach the question of
24 MTC's failure to pursue *new* funds for AC Transit through legislation, as required by both its own
25 enabling statute (requiring MTC, "if necessary, [to] recommend appropriate legislation to the
26 Legislature to secure [adequate financing of the system]," Gov't Code § 66512) and by AB 1107
27 (which explicitly provides that it shall be "subject to periodic legislative review and amendment,"
28 Pub. Util. Code § 29140). *Third*, also off the table are a number of disputes that MTC raised at

1 summary judgment. MTC, for instance, has abandoned its contentions about “legally impossible
2 funding sources,” and dropped its claims that AC Transit is a badly run operator that wastes
3 resources.

4 MTC is left ultimately to rely on the defense that its large rail projects serve important
5 objectives. The Court’s role is neither to second-guess those objectives nor to rubber-stamp
6 them—neither to rule on the merits of MTC’s policy decisions nor on its good or bad faith.
7 Rather, governing law requires the Court simply to determine whether MTC has sufficiently
8 proven by empirical studies that a manifest relationship exists between the challenged practices
9 and MTC’s genuine, legitimate transportation objectives. The Court must determine, that is,
10 whether valid empirical studies justify the challenged practices.

11 To this question, there is a straightforward answer: At trial, MTC offered absolutely *no*
12 empirical studies documenting the necessity of any of the challenged practices to the achievement
13 of any important transportation objectives. It undertook no study to determine whether the
14 selection criteria for its expansion program promote any of the stated objectives of Res. 3434,
15 much less preservation of the existing system and other statutory planning factors or the *post hoc*
16 objectives about which Dr. Cervero theorized. The same failure of proof exists for MTC’s
17 justifications of its practices of allocating and assigning committed and uncommitted funds for
18 capital purposes over operations.

19 The Court should, therefore, find that Plaintiffs’ prima facie case of disparate impact
20 discrimination is un rebutted, and schedule a remedial hearing for MTC to propose injunctive
21 relief. *See Brown v. Board of Educ. of Topeka, et al.*, 349 U.S. 294, 300 (1955). This does not
22 mean that the Court should revamp MTC’s operations. It does mean that the Court must assure
23 itself that the challenged practices are enjoined unless properly supported by appropriate
24 empirical studies. Alternatively, MTC may seek to avoid adversely impacting minority riders by
25 using less discriminatory alternatives.

II. THE DISPARATE IMPACT LEGAL FRAMEWORK AND THE RELEVANT UNIVERSE OF COMPARISON

A. Prima facie Case

A plaintiff establishes a prima facie disparate impact case by showing that an outwardly neutral practice causes an adverse impact on a population that is disproportionately composed of minorities. Order Denying Plaintiffs' Motion for Summary Adjudication; Granting in Part and Denying in Part Defendant's Motions for Summary Judgment (Docket No. 258) ("MSJ Order") at 21 (quoting *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997)). Plaintiffs presented evidence of three such practices: (1) MTC's Regional Transit Expansion Program (Res. 3434); (2) MTC's creation of transit operating shortfalls by committing to *capital* use funds that, by statute, are available for operating expenses, and for *expansion* funds that, by statute, are available for existing system preservation; and (3) MTC's use of "uncommitted" funds in the RTP to cover capital, but not operating, shortfalls.

Causation is established when the defendant's conduct is a "substantial factor" in harming the plaintiff. *Maupin v. Widling*, 192 Cal. App. 3d 568, 574 (1987); *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1049 (1991).

Disproportionality resides in a comparison of relative percentages, not absolute numbers, of minorities harmed. *See, e.g., Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 354 n.20 (2000) (disparate impact claims examine the "disproportionate adverse effect on members of the protected class"). A disparate impact inquiry, by its nature, is a comparison of the challenged practice's effect on a group that is disproportionately minority with its effect on a counterpart group that is not. Accordingly, here, as in disparate impact funding cases generally, the relevant comparison is between the defendant's treatment of entities or populations with higher proportions of non-minorities and its treatment of entities or populations with higher proportions of minorities. *Powell v. Ridge*, 189 F.3d 387, 394 (3d Cir. 1999); *Robinson v. Kansas*, 117 F. Supp. 2d 1124, 1140 (D. Kan. 2000), *aff'd* 295 F.2d 1183 (10th Cir. 2002); *Meek v. Martinez*, 724 F. Supp. 888, 899 (S.D. Fla. 1989).

The first practice – MTC's prioritization of rail expansion over bus expansion in Res.

3434— affects bus riders differently than it affects rail riders, without regard to the operator that provides the service. Here, the appropriate comparison is between bus riders as an aggregated group and rail riders as a group. The undisputed testimony is that only 51.6% of rail riders are minorities – some ten percentage points below the 61% regional average minority composition of Bay Area transit ridership (Joint Findings of Fact and Conclusions of Law (Docket Nos. 291, 346, 353) (“JFF”) ¶ 56) – while more than 66% of bus riders are minorities.¹ Tr. 522:4-17. *See* Trial Ex. 774 (Attachment A hereto); FFCL ¶ 564. This spread of fifteen percentage points provides “some distinction” as Mr. Boedeker, MTC’s statistical expert, conceded (Tr. 768:23-769:1 (Boedeker)), and demonstrates that a practice of preferring rail over bus expansion projects has a disproportionate effect on minorities.²

The second and third practices, relating to MTC’s allocation of committed and uncommitted funds to transit operators, affect riders of different *transit operators* differently. Accordingly, the relevant comparison for these two practices is between aggregated groups of *operators* with different racial compositions. The Court’s summary judgment ruling noted that “Defendant has not raised any persuasive argument that [the seven-operator] comparison is invalid” (MSJ Order at 23:10-11) and that “[c]omparing percentages can be an adequate method to show disparate impact.” *Id.* at 32:10. The only triable issue that remained was whether “the disparity in percentages [in the seven-operator universe] is sufficient to establish this element of disparate impact beyond a triable issue of fact.” *Id.* at 32:15-17.

Here, too, the 61% regional baseline for minority transit ridership serves as a defining benchmark that justifies the grouping of the region’s largest seven transit operators – the

¹ As the Court suggested (Tr. 1377:1-5), Plaintiffs sought MTC’s stipulation to the correction of this figure, which inadvertently understates the minority percentage for bus riders. MTC has not consented to the correction.

² Mr. Boedeker’s invocation of an admittedly small margin of error, which he included nowhere in his two reports, is immaterial since it is inconsistent with the stipulated minority ridership proportions. *See* Tr. 770:7-772:10 (Boedeker). Even if it is properly taken into account, moreover, it does not succeed in blurring this very distinct grouping into a so-called “continuum,” as a 3% margin of error reduces the gap between BART and AC Transit, at most, from 28 percentage points to 26. *Compare* Tr. 736:25-739:16 (Boedeker) *with* JFF ¶ 56 (AC Transit’s ridership is 78% minority).

operators that together account for over 95% of all Bay Area transit trips (JFF ¶ 54) – into a high-minority subset and a lower-minority subset. (See Attachment B hereto); FFCL ¶¶ 53, 56-57. A second important benchmark is the 70% minority threshold that MTC has used since 2001 (Mr. Boedeker was unaware of its source, Tr. 736:25-737:8 (Boedeker)) to analyze disparate impacts for Title VI monitoring purposes. JFF ¶¶ 250-52, 254-56. MTC selected this 70% minority threshold because it meant a population “would have a ‘meaningfully greater’ concentration of minority residents” than the region as a whole. Trial Ex. 32 at MTCP043505; *see also* JFF ¶ 252; FFCL ¶¶ 57, 425.³ Between these two thresholds there is, in Mr. Boedeker’s words, “this huge gap of 10 percentage points of no man’s land.” Tr. 736:25-738:12 (Boedeker). Indeed, the high-minority operators are appropriately grouped together as the proxy group, *both* because they are approximately 10 percentage points above the regional average in terms of minority ridership *and* because they meet MTC’s own Title VI threshold for defining Communities of Concern. The lower-minority operators are appropriately grouped together as the comparison group, *both* because they are all *below* the regional average in terms of their minority riderships *and* because they come nowhere close to meeting MTC’s own Title VI threshold for defining Communities of Concern.

While MTC may argue that these are not the proper comparisons, it failed to provide any reason to analyze the data on an operator-by-operator, rather than an aggregate, basis. In addition, the Ninth Circuit has upheld aggregation as probative in analogous circumstances. *See Paige v. California*, 291 F.3d 1141, 1148-49 (9th Cir. 2002) (approving, in the employment discrimination context, the use of data aggregated across different racial minority groups because

³ MTC may argue that it considers absolute numbers of minorities in *selecting* these “Communities of Concern.” That is untrue. Communities of Concern are selected based solely on percentage thresholds. JFF ¶ 251 (“MTC analyzed ‘Communities of Concern’ that were defined on the basis of proportional geographic concentrations of minority populations and low-income populations. . .”); JFF ¶ 252. Although MTC considered absolute numbers of minorities *within* the universe of Communities of Concern, it did not do so in its definition and selection of those Communities of Concern. JFF ¶ 259.

Equally immaterial is MTC’s protestation that it never applied the 70% threshold to transit riderships, but only to geographic neighborhoods. JFF ¶ 260. The explanation is not that MTC determined that a different threshold would be more appropriate for transit rider populations, but rather that it never conducted an analysis of ridership populations in its Title VI equity reports.

1 “the plaintiff should not be required to disaggregate the data into subgroups which are smaller
2 than the groups which may be presumed to have been similarly situated and affected by common
3 policies”).

4 **B. Business Necessity Burden of Proof**

5 Once a plaintiff has established a prima facie case of disparate impact, the burden shifts to
6 the defendant to prove a “business necessity” for the challenged practice. *Griggs v. Duke Power*
7 *Co.*, 401 U.S. 424, 431 (1971); *see also Larry P. v. Riles*, 793 F.2d 969, 982 & n.10 (9th Cir.
8 1986). To prove business necessity, the defendant must do more than simply “articulate” a
9 justification. It must demonstrate a “manifest relationship” between the challenged conduct and
10 the defendant’s genuine and legitimate business objectives. *Griggs*, 401 U.S. at 432; *Albemarle*
11 *Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). To meet this burden, the defendant must present
12 a proper empirical study to demonstrate that “professionally acceptable methods” validate the
13 challenged practice. *Albemarle*, 422 U.S. at 431; *see also Contreras v. City of Los Angeles*, 656
14 F.2d 1267, 1282 & n.8 (9th Cir. 1981).

15 In deciding whether a defendant meets its burden of proving business necessity, the
16 Court’s role is not to assess whether the challenged practice was motivated by good intentions or
17 constitutes good policy. *See Griggs*, 401 U.S. at 432 (“[G]ood intent or absence of discriminatory
18 intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in
19 headwinds’ for minority groups and are unrelated to measuring job capability.”). The Court need
20 not second-guess whether the defendant’s goals are laudable or beneficial to society. Rather, the
21 Court need only determine whether the practice has a sufficient nexus to a genuine necessity, as
22 validated by a proper empirical study.

23 Failure to present a valid, empirical study justifying a discriminatory practice is fatal to a
24 business necessity defense. In *Griggs*, an employment case, the Court ruled that defendant failed
25 to carry its burden because it did not present an empirical study proving that the challenged
26 selective device was “predictive of or significantly correlated with important elements of work
27 behavior which comprise or are relevant to the job or jobs for which candidates are being
28 evaluated.” *Griggs*, 401 U.S. at 431, 434 n.9 (“Both [devices] were adopted, . . . without

1 meaningful study of their relationship to job-performance ability.”); *see also Albemarle*, 422 U.S.
 2 at 431, *Contreras*, 656 F.2d at 1279. Similarly, in *Larry P.*, a Title VI education case, the Ninth
 3 Circuit held that an IQ test could not be used to place black children in special education classes
 4 because the validity of the test with respect to black students was generally assumed but not
 5 established by empirical analysis. 793 F.2d at 980-81.⁴ In *Albemarle*, the Supreme Court ruled
 6 that the employer failed to establish business necessity where the employer (like MTC and its
 7 expert Dr. Cervero here) conducted no local validation study, but merely relied on national data.
 8 422 U.S. at 428-29.

9 In essence, the Court must be able to tell if the criteria actually considered by the
 10 defendant are sufficiently related to the defendant’s genuine and legitimate objectives by means
 11 of a rigorous study that demonstrates a link between the criteria utilized and the necessity for the
 12 challenged practice. *Albemarle*, 422 U.S. at 433 (finding an expert empirical study inadequate
 13 where the criteria studied were not shown to be sufficiently related to the defendant’s legitimate
 14 interests); *Griggs*, 401 U.S. at 432. A study undertaken “without neutral, on-the-scene oversight,
 15 at a time when th[e] litigation was about to come to trial” is considered “closely controlled by an
 16 interested party in litigation [and] must be examined with great care.” *Albemarle*, 422 U.S. at 433
 17 n.32.

18 Even if the defendant meets its burden, the plaintiff will still prevail by showing the
 19 existence of a less discriminatory alternative. *See id.* at 425.⁵

20
 21 ⁴ As is evident from *Larry P.*, a defendant’s burden of demonstrating a manifest
 22 relationship between the challenged practice and a genuine objective with an empirical study
 23 applies with equal force to disparate impact claims outside of the employment discrimination
 24 context. *See Larry P.*, 793 F.2d at 980-81. The disparate impact burdens set forth in *Griggs* and
 its progeny also apply with equal force to claims under Government Code Section 11135. *See*,
 e.g., *Guz*, 24 Cal. 4th at 354 n.20 (approving the disparate impact theory including the “manifest
 relationship” requirement); *City & County of San Francisco v. Fair Employment & Housing*
Comm’n, 191 Cal. App. 3d 976, 985, 990 (1987) (same).

25 ⁵ On the issue of standing, MTC stipulated to and did not dispute evidence on injury in fact.
 26 Causation is addressed in connection with the merits discussion. Redressability was clearly
 27 established by Mr. Peeples’ testimony about AC Transit’s policies that would guarantee that
 additional funding would be used to benefit the Plaintiff Class with improved transit service.
 Trial Ex. 582. Those policies are currently in effect (Tr. 99:3-5 (Peeples)), and AC Transit plans
 to update them. Tr. 217:16-219:1 (Peeples).

1 III. MTC'S RAIL EXPANSION PRACTICE CAUSES A DISCRIMINATORY ADVERSE IMPACT

2 **First Practice:** The evidence of the first challenged practice is virtually all undisputed.
 3 Res. 3434, which replaced MTC's 1988 rail-only expansion program, is MTC's "strategic master
 4 plan" of transit expansion projects. Tr. 410:24-411:5 (McMillan); FFCL ¶¶ 207, 208, 210-12.
 5 Originally adopted as the "cornerstone" of the 2001 RTP (JFF ¶ 208; Tr. 411:6-10 (McMillan);
 6 Trial Ex. 99; FFCL ¶ 208), Res. 3434 continues to be an MTC priority. Tr. 415:6-9 (McMillan).
 7 Since 2001, Res. 3434 has been amended and updated on several occasions, including in 2006,
 8 and again a few weeks before trial. Tr. 411:16-21 (McMillan); Trial Ex. 98; Def.'s Trial Ex.
 9 1925; FFCL ¶¶ 234, 237. Res. 3434 has two stated goals (Tr. 1262:6-1263:6 (McMillan); FFCL
 10 ¶ 212): to "close[] some key gaps in the transit network" for commuters with access to private
 11 autos (Trial Ex. 99 at MTCP115268; Tr. 414:23-415:1 (McMillan); Cervero Dep. of 3-10-08 at
 12 114:11-115:12 (Attachment H hereto); FFCL ¶¶ 210, 212) and to "coordinate[] regional
 13 priorities" so as to "best position the Bay Area to compete for limited discretionary funding
 14 sources" in Congress. Trial Ex. 99 at MTCP115273; FFCL ¶¶ 212, 215-18, 422. MTC made a
 15 firm, long-term financial commitment to projects included in Res. 3434. Tr. 421:14-18
 16 (McMillan); 423:1-3 (McMillan); FFCL ¶ 215. Since most of these projects could not be built
 17 without funds from MTC, MTC's commitment extended to providing funding from sources under
 18 its control and to seeking project funding in Congress and the state legislature. Tr. 419:16-22,
 19 420:4-11, 420:25-422:3 (McMillan); FFCL ¶¶ 215-18, 412, 422.

20 In 2001, MTC invited project sponsors to submit candidate projects. FFCL ¶ 223. It
 21 assessed those projects against criteria set forth in Res. 3357 (Trial Ex. 104; FFCL ¶ 219), and
 22 published the results of its "Initial Assessment." Trial Ex. 103. The selection process fell far
 23 short of an "objective and [im]partial kind of multi-modal scoring system to evaluate and rank"
 24 projects that Dr. Cervero, MTC's urban planning expert, testified is required. Tr. 1104:22-1107:8
 25 (Cervero); FFCL ¶ 455. In fact, MTC neither scored nor ranked candidate projects for this multi-
 26 billion dollar expansion program (Tr. 1243:15-1244:23 (McMillan); 1222:8-25 (Cervero); FFCL
 27 ¶ 456), nor did it determine in advance how much expansion the region could afford. Tr. 1247:2-
 28 11 (McMillan). Instead, it used a set of highly malleable criteria that it applied in a standardless

1 manner. Cost-effectiveness, for instance, was a criterion in name only, as rail projects that MTC
 2 rated “low” in cost-effectiveness were nonetheless included in the project list. Trial Ex. 99 at
 3 MTCP115275-76; FFCL ¶ 223. Rail projects were not compared to viable bus alternatives. *See*
 4 Tr. 1255:8-1256:19 (McMillan); 1302:9-1303:6 (Peeples); FFCL ¶¶ 219-20. In fact, rail projects
 5 were not compared to bus projects at all, as MTC used different criteria for each. Tr. 1255:8-
 6 1256:8 (McMillan); FFCL ¶¶ 219-20. Nor did MTC compare candidate projects with potential
 7 alternatives to determine whether the need could be met in a more cost-effective manner. Instead,
 8 MTC generally considered bus projects only as interim solutions in corridors in which rail
 9 improvements were planned. Trial Ex. 104; Tr. 1258:16-25 (McMillan); FFCL ¶¶ 221-22.

10 AC Transit submitted three projects⁶ with a total capital cost of over \$1 billion. Tr. 119:5-
 11 8 (Peeples); Trial Ex. 103 at MTCP000982-90; FFCL ¶¶ 227-29. MTC included only two in the
 12 2001 project list: Phase 1 of the BRT project (capital cost \$151 million) and “enhanced bus” on
 13 three of the eight corridors AC Transit had requested: MacArthur, Foothill and Hesperian (capital
 14 cost of \$90 million). JFF ¶ 217; *see also* Tr. 430:12-16 (McMillan); 431:18-20 (McMillan);
 15 FFCL ¶¶ 230-31. MTC included only one-fifth of the \$1.25 billion that AC Transit requested. In
 16 its 2006 amendment of Res. 3434, MTC further reduced the scope of AC Transit’s expansion
 17 priorities by eliminating two of the three “enhanced bus” corridors, leaving AC Transit with only
 18 one enhanced bus corridor in Res. 3434. Tr. 431:21-432:2 (McMillan); FFCL ¶¶ 235-36, 234.
 19 The decision to do so was MTC’s, not AC Transit’s. Tr. 1305:22-1306:6 (Peeples); FFCL ¶ 236.

20 **Disproportionate Adverse Effect:** The disparate effect of Res. 3434 on bus riders is
 21 extraordinary and undisputed: 94% of the \$13.5 billion in project costs were for rail projects, and
 22 less than 5% for bus projects. Tr. 517:8-12 (Rubin); *see* Trial Ex. 770 (Attachment C hereto);
 23 FFCL 428-29. The only dispute at trial was whether the BART extension to San Jose was a
 24 BART project or a VTA project, based on the fact that VTA was the formal project sponsor. Tr.

25
 26 ⁶ The three were its bus rapid transit (“BRT”), Phase 1 project (capital cost of \$104
 27 million); BRT, Phase 2 (\$270 million); and “enhanced bus” on *eight* miscellaneous corridors
 28 (\$906 million). Trial Ex. 103 at MTCP000982-90; Tr. 425:23-426:10, 426:13-20, 427:1-6
 (McMillan); FFCL ¶¶ 227-29.

1 517:19-23, 613:2-23, 615:15-18 (Rubin); FFCL ¶ 224. This dispute, however, is immaterial, as it
 2 is undisputed that BART to San Jose is a rail, not a bus, project.

3 Hence, an additional metric of disparity is the effect of capital shortfalls on rail vs. bus
 4 projects. In the 2006 version of Res. 3434, using the same types of rail/bus allocation
 5 assumptions to which Mr. Rubin testified at trial (Tr. 515:23-517:7 (Rubin)) and included in his
 6 demonstratives, shortfalls for rail projects constituted a far smaller percentage of the capital cost
 7 of those projects compared with bus projects. *Compare* Ex. 99, Attach. C *with* Ex. 98, Attach. C.

8 Bus riders in general, and AC Transit riders in particular, feel the adverse effect of this
 9 practice in two distinct ways. First, it deprives them of an equal opportunity for expanded
 10 service. AC Transit's proposed expansion projects would not only have enabled AC Transit to
 11 provide better service at lower cost (Tr. 601:25-602:22 (Rubin); FFCL ¶¶ 83-85), but may
 12 actually have restored service that was previously cut. Tr. 1386:14-25 (Rubin). Second, MTC's
 13 funding strategy for Res. 3434 significantly restricts the region's pool of transit operating funds.
 14 For instance, Ms. McMillan agreed that BART's fleet of rail cars has grown as it opened new
 15 stations and that this expansion has increased the region's future capital replacement needs. Tr.
 16 412:10-413:1 (McMillan); FFCL ¶ 248. The impact of BART's enormous capital shortfall on the
 17 availability of funds to meet AC Transit's existing operating needs was undisputed, and is
 18 discussed further in Part V, below. And, as discussed in Part IV, below, it is also undisputed that
 19 Res. 3434 directs to expansion substantial amounts of funds that, by statute, are eligible to be
 20 used for capital rehabilitation, *i.e.*, preservation of the existing system. Trial Ex. 98 at
 21 MTCP239004. Because of its focus on expansion, MTC also directs its advocacy efforts to locate
 22 funds for expansion projects instead of for more critical operating and capital rehabilitation needs.
 23 Tr. 422:4-9 (McMillan); 380:5-9 (McMillan); FFCL ¶¶ 153, 212, 215, 217-18.

24 **Causation:** Finally, MTC directly caused the adverse impact. The entire transit
 25 expansion process is MTC's, from the creation of the criteria to the selection of projects, and
 26 from the ongoing elimination of AC Transit projects to the commitment of "discretionary" funds
 27 and priorities for legislative advocacy.

28 Plaintiffs have proven a *prima facie* case that this practice causes a disproportionate

adverse impact on minorities: bus ridership is significantly more minority, by at least 15 percentage points, than rail ridership; MTC's Res. 3434 has prioritized rail expansion projects over bus projects by nearly twenty to one; and that priority harms minority bus riders not only by depriving them of bus service expansions, but also by driving up the costs of system preservation while depleting the revenues available to meet those costs.

IV. MTC'S PRACTICE REGARDING "COMMITTED" FUNDS CAUSES A DISCRIMINATORY ADVERSE IMPACT

Second Practice: It is MTC's practice to commit to capital use funds that are, by statute, eligible for transit operations, and to commit to expansion funds that are eligible for capital rehabilitation. The overall effect is to shift funds away from operating the existing transit system and into expansion projects, including those in Res. 3434. Despite MTC's earlier protestations about "legally impossible funding sources" (*see* Docket Nos. 275, 308), at trial the evidence of both prongs of this practice was undisputed. *See* Trial Ex. 767 (Attachment D hereto).

On the first prong, it is undisputed that MTC prioritizes federal formula funds under §§ 5307 (urbanized area) and 5309 (fixed guideway modernization) for capital rehabilitation (Trial Ex. 504; JFF ¶¶ 126 & 127; FFCL ¶¶ 271, 276, 296), but that those funds are by statute eligible for preventive maintenance (Tr. 230:5-14 (McMillan); JFF ¶ 131), an operating expense. JFF ¶ 131; Tr. 1268:19-1269:2 (McMillan); FFCL ¶¶ 273, 294. MTC exercises its discretion to program § 5307 funds in accordance with its Transit Capital Priorities ("TCP") policy (JFF ¶ 126; Tr. 234:22-235:25 (McMillan); FFCL ¶¶ 267, 270), a policy that is not required by statute. JFF ¶ 126; Tr. 235:17-22 (McMillan) (confirming that federal law "does not stipulate any specific methodology that must be applied for anybody in the country" with respect to programming § 5307 funds); FFCL ¶ 270. There is no statutory cap on the amount of § 5307 funds that MTC may dedicate to preventive maintenance. Tr. 233:25-234:5 (McMillan); FFCL ¶ 275. In fact, MTC could program all § 5307 funds to preventive maintenance if it so chooses. Tr. 234:14-17 (McMillan); FFCL ¶ 275. Under MTC's TCP process, revenue vehicle replacement, which receives the highest score (16), is one example of a high-scoring capital rehabilitation need, while preventive maintenance receives a low score of 9. Tr. 238:2-15, 241:18-19, 242:1-4 (McMillan);

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1 FFCL ¶ 271. Since, in the San Francisco/Oakland urbanized area (“SF/O UZA”)—the only
 2 urbanized area in which AC Transit is eligible for § 5307 funds – projects with scores under 16
 3 rarely if ever receive funding under MTC’s policy, MTC does not generally fund preventive
 4 maintenance needs in that urbanized area with § 5307 funds. Tr. 240:13-22 (McMillan); FFCL ¶¶
 5 268, 276.⁷

6 The complementary prong – that MTC can shift funds from expansion to backfill capital
 7 rehabilitation needs – is equally undisputed. FFCL ¶ 277. One example is STIP/RTIP
 8 (State/Regional Transportation Improvement Program) funds. *Id.* The region receives \$165-\$180
 9 million in STIP/RTIP funds annually, approximately \$50 million of which are dedicated to
 10 transit. Tr. 293:14-294:13; 960:22-25 (McMillan); FFCL ¶ 404. MTC has control over these
 11 funds (Tr. 292:14-22, 293:10-13 (McMillan); FFCL ¶¶ 404, 405, 407, 413), which can generally
 12 be used for capital rehabilitation. Tr. 294:14-20 (McMillan); FFCL ¶ 403. While projects are, in
 13 the first instance, selected by county “congestion management agencies,” MTC is charged with
 14 evaluating those projects for consistency with the RTP. Tr. 960:9-16 (McMillan); Gov’t Code §
 15 65089.2; FFCL ¶¶ 408, 413. “If [MTC] finds the program [of county projects] is inconsistent
 16 [with the RTP], it may exclude any project in the congestion management program from inclusion
 17 in the regional transportation improvement program.” Gov’t Code § 65089.2(b); FFCL ¶ 408. In
 18 the exercise of its statutory control, MTC assigned \$518 million in STIP/RTIP funds for capital
 19 expansion in the 2006 version of Res. 3434. Trial Ex. 98 at MTCP239004; Tr. 958:5-959:10
 20 (McMillan); FFCL ¶¶ 406, 409, 410.⁸

21 ⁷ MTC has discretion to allocate other funds to AC Transit’s operating needs. These
 22 include STA population-based funds (Tr. 309:20-310:5, 316:6-8 (McMillan); FFCL ¶¶ 313)
 23 which are generally unavailable to AC Transit as a matter of MTC policy. Tr. 311:1-312:20,
 24 314:16-318:3, 320:21-321:1 (McMillan); FFCL ¶¶ 318-21, 331. They also include other sources,
 discussed in Plaintiffs’ Opposition to MTC’s Motion in Limine to Exclude Evidence of so-called
 “legally impossible funding sources.” See Docket No. 308; see FFCL ¶¶ 350-53, 383, 385.

25 ⁸ Two other funding sources over which MTC has significant influence are § 5309 earmarks
 26 (New Starts and Bus Discretionary funds) and County sales tax measures, both discussed below.
 27 MTC allows Bus Discretionary funds to be used for expansion purposes despite the fact that
 nothing prohibits their being instead used for capital rehabilitation. Tr. 273:8-274:10 (McMillan);
 FFCL ¶¶ 300-302, 413-14 (bus discretionary funds eligible for bus replacement and preventive
 28 maintenance); see *id.* at 488:9-20 (Rubin); FFCL ¶¶ 217, 277, 298.

1 **Causation:** MTC’s “committed” fund policies create the “box” within which AC Transit
 2 must live. *See* Tr. 1316:5-1317:2 (Peeples); FFCL ¶¶ 196, 278. MTC’s Transit Capital Priorities
 3 policy, in conjunction with its policies that devote to expansion funds that are eligible for capital
 4 rehabilitation, means that MTC does not fund operating needs on par with capital rehabilitation
 5 needs. *See* FFCL ¶¶ 403, 406, 270, 276. Inadequate operating funding directly causes service
 6 cuts. *E.g.*, Tr. 1202:10-25 (Cervero); FFCL ¶¶ 181, 182, 192, 193; *see generally* causation
 7 discussion in Part V, below. Like MTC’s expansion policies, these policies are purely the
 8 decision of MTC. FFCL ¶¶ 270, 281, 282-88, 406, 407.

9 MTC’s main defense to causation has been to take – for litigation purposes – a very
 10 restrictive view of the scope of the funding sources over which it has “discretion.” For purposes
 11 of this case, it asked its statistical expert to rely solely on the sources included in its four annual
 12 “Discretionary Funding Reports.” Trial Ex. 454; Tr. 764:10-19 (Boedeker); FFCL ¶¶ 263, 434-
 13 39. Both Ms. McMillan and Ms. Bockelman, however, testified that the sources MTC includes in
 14 those reports were selected in negotiations to settle a CEQA lawsuit, whereas “for purposes of the
 15 long range plan, [MTC] had a separate definition.” Tr. 360:2-363:14 (McMillan); *see* Tr. 818:19-
 16 819:5 (Bockelman); FFCL ¶ 263. Ms. McMillan was quite emphatic in stating that, for MTC’s
 17 purposes, the “Master Scan of RTP Funds” (Trial Ex. 455), based on that “separate definition,”
 18 more accurately reflects “what degree of influence or discretion MTC, as a Commission, had over
 19 those funds.” Tr. 361:2-9 (McMillan); FFCL ¶ 264. Notably, this “Master Scan” confirms that
 20 MTC has at least “partial influence” over fund sources that are not included in the “Discretionary
 21 Fund” reports, including § 5309 earmarks. Trial Ex. 455; Tr. 360:16-363:14 (McMillan); FFCL ¶
 22 264. Indeed, MTC originally included both § 5309 Bus Discretionary and New Starts funds in its
 23 annual “Discretionary Funding” reports. Tr. 779:1-10 (Boedeker); FFCL ¶ 435.

24 MTC’s influence over § 5309 earmarks is quite significant. FFCL ¶¶ 217-18, 422. While
 25 the region may on occasion not receive those funds for a project that MTC identified as a priority,
 26 it has *never* received them for a project that MTC did *not* so identify. Tr. 1323:9-15 (Peeples);
 27 FFCL ¶ 424. In particular, a project is not eligible for a § 5309 earmark at all unless MTC
 28 includes it in the RTP and TIP. Tr. 1321:10-16 (Peeples); *see* FFCL ¶¶ 208, 300. MTC’s

influence over County sales tax expenditure plans is also considerable. FFCL ¶ 411. MTC has an outright veto under one of the two authorizing statutes. Pub. Util. Code § 131053; Tr. 924:8-25 (McMillan); FFCL ¶ 411. More importantly, it is undisputed that local sales tax funds alone cannot cover the costs of a major capital project. Tr. 419:16-22, 420:7-11 (McMillan); FFCL ¶ 412. Without MTC funding, that project would have to be excluded from the fiscally-constrained RTP, a step that would trigger the reassignment of sales tax revenues to other purposes. *See* Pub. Util. Code § 180207. FFCL ¶ 412. In sum, it is MTC that enables the use of \$5.5 billion in sales tax funding for Res. 3434 expansion projects. Trial Ex. 98 at MTCP239004; FFCL ¶ 412.

Disproportionate Adverse Effect: The evidence at trial established both that high-minority transit operators have a disproportionate need for operating revenues to continue to provide existing levels of transit service, and that those operators are affected disproportionately by the operating shortfalls that MTC's committed funding practices cause. *See* discussion of disproportionality in regard to Third Practice in Part V, below; FFCL ¶¶ 426-27, 430.

Any suggestion that MTC's past programming of preventive maintenance to AC Transit eliminates the adverse impact would be simply incorrect. The preventive maintenance flexibility that MTC provided to AC Transit gave it no new net operating revenue. Tr. 249:16-250:14 (McMillan); FFCL ¶ 280. In fact, in nearly every case, MTC merely effectuated a swap that allowed AC Transit to use other operating funds for bus purchases. Tr. 177:19-179:15 (Peeples); FFCL ¶ 280. Preventive maintenance is an operating expense in transit operators' budgets (Tr. 1269:3-7 (McMillan); JFF ¶ 131; Bockelman Dep. of 8-29-07 at 366:5-10 (Attachment I hereto)); in the case of AC Transit, the need amounts to over \$40 million a year. Tr. 126:3-9 (Peeples); FFCL ¶ 280. MTC's policy of allocating formula funds to the highest ranking capital rehabilitation needs means that AC Transit must fund its preventive maintenance needs out of its unrestricted "general fund" dollars – dollars that could otherwise be used to operate more service. FFCL ¶¶ 108-12. MTC's ad hoc actions to allow AC Transit to use § 5307 funds for preventive maintenance – while they have had the effect of allowing AC Transit to buy Van Hool buses (Tr. 178:2-179:1 (Peeples)) – have not allowed it to operate more service. Tr. 249:16-250:14 (McMillan); FFCL ¶¶ 280, 282. They have simply allowed it to use those "general fund" dollars

1 for bus replacement instead of preventive maintenance. Tr. 243:21-23; 244:4-15 (McMillan).
 2 Since MTC never backfilled AC Transit's capital rehabilitation needs, AC Transit had no
 3 additional funds that it could devote to operations. Tr. 249:21-250:1 (McMillan); FFCL ¶¶ 280,
 4 282. The swap has had no effect on AC Transit's overall operating revenues.⁹ FFCL ¶ 280. In
 5 any event, MTC's ad hoc programming of preventive maintenance to AC Transit will not
 6 continue under the current TCP policy, Res. 3688 (Trial Ex. 504, 505; FFCL ¶ 290). Res. 3688
 7 precludes MTC from programming preventive maintenance funds to any operator for more than 2
 8 out of 12 years, regardless of how great an operator's need is for additional operating funds. Trial
 9 Ex. 504, 505; Tr. 253:7-14; 259:24-260:3 (McMillan); FFCL ¶ 288.

10 Plaintiffs have established a prima facie case that MTC has a practice of shifting funds
 11 (such as § 5307 formula funds) away from transit operations and into capital replacement, and
 12 shifting other funds (such as STIP/RTIP) away from replacement and into expansion, and that its
 13 practice has a disproportionate adverse impact on riders of high-minority operators.

14
 15 **V. MTC'S PRACTICE OF FAILING TO COVER TRANSIT OPERATING SHORTFALLS WITH**
 16 **TRACK 1 OR "UNCOMMITTED" FUNDS CAUSES A DISCRIMINATORY ADVERSE IMPACT**

17 **Third Practice:** At summary judgment, the Court ruled that Plaintiffs had shown a
 18 facially neutral practice of failing to cover operating shortfalls in the RTP. MSJ Order at 22:9-10.
 19 The evidence at trial was undisputed that MTC funded some or all of the transit capital shortfalls
 20 in its last three RTPs with "uncommitted" or Track 1 funds, while never funding any of the
 21 *operating* shortfalls with those funds. Tr. 407:18-408:9 (McMillan); FFCL ¶¶ 144, 361-62, 365-
 22 72, 464, 465.

23 **Disproportionate Adverse Impact:** The impact of this practice, like that of MTC's
 24 "committed" fund practice, falls disproportionately on the riders of high-minority operators, like
 25 AC Transit, as Mr. Rubin demonstrated using several different metrics. AC Transit's operating

26 ⁹ By changing its preventive maintenance policy, MTC would benefit not only AC Transit,
 27 but the entire region. Indeed, using § 5307 funds for operating expenses to a greater extent would
 28 actually *increase* the amount of money coming into the region. See FFCL ¶¶ 291-92.

1 shortfall as a percentage of its operating budget (7.91%) was higher than any of the lower-
 2 minority operators, and the average for all high-minority operators was almost *three times* that for
 3 all lower-minority operators. Trial Ex. 113, ¶ 101, Ex. E; *See* Trial Exs. 772 & 773 (Attachments
 4 E & F hereto); FFCL ¶ 430. On a per rider basis, the shortfalls of high-minority operators were
 5 *more than five times* larger on average than lower-minority operators. Trial Ex. 113, ¶ 101, Ex.
 6 G. MTC funded more than *three times* the total shortfall (operating plus capital) of lower-
 7 minority operators than the high-minority operators. Tr. 530:5-531:1 (Rubin); Trial Ex. 113,
 8 ¶102, Ex. H; FFCL ¶ 430.

9 Mr. Rubin's analyses were undisputed (*see* Tr. 792:11-25 (Boedeker)), with just one
 10 exception. Mr. Rubin adjusted the operating shortfall of AC Transit to account for the fact that a
 11 \$20 million a year reduction in its existing "baseline" level of service was factored into its 25-
 12 year cost projections. FFCL ¶ 165. The evidence supporting this adjustment was undisputed
 13 (Trial Ex. 251 at 2 (showing 2 service reduction line items); Tr. 448:9-450:5; 834:8-836:22
 14 (Bockelman); FFCL ¶ 163), and MTC's counsel expressly agreed that AC Transit's "\$64 million
 15 shortfall includes the cuts. There is no dispute there." Tr. 836:21-22. MTC objected only that
 16 Mr. Rubin did not make corresponding adjustments to any of the other six large operators' RTP
 17 shortfalls. However, the evidence showed that adjustments for the other operators were not
 18 warranted. Ms. Bockelman testified that MTC asked operators to provide cost data based on
 19 2002-03 service levels "to establish accurate base year information" for the RTP shortfall
 20 projections, (Tr. 826:18-827:7 (Bockelman); Trial Ex. 382; FFCL ¶ 157), and that the operator
 21 narratives in the 2005 RTP Project Notebook (Trial Ex. 213) set forth the service level
 22 assumptions on which the shortfall calculations were based. Tr. 829:15-830:4; 831:11-832:24;
 23 837:14-841:25 (Bockelman); *accord* 368:22-369:1 (McMillan); FFCL ¶ 170. The Project
 24 Notebook makes it clear that only AC Transit's shortfall incorporated assumptions of a reduced
 25 baseline. *See* FFCL ¶¶ 171-76. No operator witness testified to the contrary. *See e.g.*, Tr.
 26 985:17-20 (Zahradnik); FFCL ¶ 176.

27 **Causation:** Although disputed at summary judgment, it was virtually undisputed at trial
 28 that MTC's practice of failing to fund projected transit operating shortfalls is "a substantial

factor” in causing AC Transit to cut service. *See* FFCL ¶¶ 181-82, 187-88, 190-92, 193. Ms. McMillan testified that these projections are a “flag” that “provide[s] a guide” by giving a picture of what the future could look like (Tr. 383:5-25 (McMillan); FFCL ¶ 185), and that MTC relies on them to make important decisions involving billions of dollars (Tr. 384:5-390:3 (McMillan); FFCL ¶ 186). In fact, MTC relied on a long-term projection of transit *capital* shortfall data (made on the same basis MTC uses for operating shortfalls) when it took immediate action to address BART’s capital shortfall – a shortfall that was not projected to “arrive” until 2013. Tr. 1237:20-1239:22 (McMillan); 825:4-18 (Bockelman); Trial Ex. 521; FFCL ¶¶ 393, 466. That MTC is now considering covering transit operating shortfalls in its upcoming 2009 RTP (Tr. 1245:11-1246:5 (McMillan)) is a further admission of the importance and feasibility of funding projected operating shortfalls. FFCL ¶ 466.

Significantly, MTC recognized that projected operating shortfalls showed “some dangerous lines down the road” and insisted that affected operators “deal with it now.” Tr. 393:15-394:20, 395:18-397:3 (McMillan); Trial Ex. 100. Transit operator witnesses agreed that they follow MTC’s instruction to take these projections seriously, and make plans to cut service well in advance. *E.g.*, Tr. 134:8-17 (“So probably a year or two out we would go from there merely being red flags to actually trying to plan what we were going to do in terms of service cuts or additional income.”) (Peeples); 893:21-894:10 (McAvoy) (SamTrans and Caltrain policy is to plan ahead to address projected deficit, not wait until deficits arrive); *see also* Tr. 984:16-985:11 (Zahradnik) (same regarding Golden Gate); FFCL ¶¶ 187-88. Finally, both sides’ experts also agreed. Tr. 1202:10-1203:1 (speaking of AC Transit’s service cuts, Dr. Cervero testified “That’s what deficits, shortfalls prompt you to do.”) (Cervero); Sanchez Dep. of 3-12-08 at 98:7-11 (Attachment J hereto) (operators “can only put the equipment out there if they’ve got that funding or if there’s that commitment. And if there isn’t that commitment in the future, they’re not going to be – they’re probably not going to be providing that [service] today.”); Tr. 1345:19-21 (Rubin) (agreeing that shortfalls cause service cuts); FFCL ¶ 182.

The period of three to four years between two RTPs is where the impact of projections is most acute, since short-term projections are much more reliable than those in distant years. Tr.

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1 1072:5-24; 1235:18-25 (McMillan). The evidence was undisputed that AC Transit's projected
 2 operating shortfalls were front-loaded in the early years of the RTP (Tr. 1380:13-20; 1384:7-
 3 1385:12; 1446:17-22 (Rubin); Trial Ex. 717; FFCL ¶ 163) – and thus significantly higher than the
 4 \$2.5 million annual average that would have existed had they been spread evenly over the 25 year
 5 period. Trial Ex. 213 at MTCP003296; *see* Tr. at 551:3-5 (Rubin). While the lower-minority
 6 operators gained 2% in baseline service levels from the 2005 RTP to the 2009 RTP, the high-
 7 minority operators *lost* nearly 8.5%. (*See* Attachment G hereto). Notably, this measure does not
 8 rely on operating shortfall projections at all, but simply compares *actual* baseline service levels
 9 going into each of the two RTPs.

10 With the role of shortfalls essentially undisputed, the causation disputes at trial centered
 11 around whether there might be *additional* factors at play, such as economic conditions. These
 12 disputes, however, are immaterial. The applicable legal standard requires only that Plaintiffs
 13 demonstrate that MTC's practice is *a substantial factor* – not that it is the *only* factor. While
 14 MTC demonstrated that revenues from certain sources (farebox and sales tax) can be lower than
 15 *projected* as a result of an economic downturn, a shortfall is the gap between *projected* revenues
 16 and costs. Tr. 372:23-25 (McMillan); FFCL ¶¶ 34, 148-50. If revenues come in *lower* than
 17 projected, the gap will, of course, widen, but that incremental gap does not erase the substantial
 18 impact of MTC's failure to provide funds to close the initial gap in causing the harm. Tr. 531:2-
 19 533:8 (Rubin); Trial Ex. 112, ¶ 22. Moreover, Ms. McMillan's own testimony about "arrows in
 20 the quiver" of operators demonstrated that operators who, like AC Transit, go into hard economic
 21 times with a pre-existing expectation of insufficient operating funds, have fewer "arrows" or
 22 resources with which to cushion the economic blow. Tr. 911:20-912:22; 914:8-915:11
 23 (McMillan); FFCL ¶¶ 108, 110.

24 Conversely, not every operator's service cut is caused by inadequate operating funding.
 25 Golden Gate cut bus service because of declining bus ridership, a steady decline that began *before*
 26 the recession. Stipulation Regarding Ridership, Vehicle Miles (Docket No. 371), Ex. C; *see* Tr.
 27 909:6-16 (McMillan) (economic downturn occurred after 2001); FFCL ¶¶ 135, 177. And
 28 SamTrans, while it had no projected operating shortfall in the 2005 RTP, cut service because it

1 was required to subsidize under-performing BART service in San Mateo County to the tune of
 2 \$10 million a year. Tr. 416:11-417:21 (McMillan); 678:2-679:5 (Rubin); 895:7-21 (McAvoy);
 3 Trial Ex. 213 at MTCP003315; FFCL ¶¶ 126-28.

4 Plaintiffs have established a prima facie case that MTC's undisputed practice of funding
 5 projected transit capital shortfalls, but not operating shortfalls, causes the affected operators to
 6 look ahead to cut service before the projected deficits actually arrive and that those cuts fall
 7 disproportionately on the riders of high-minority operators.

8 **VI. MTC DID NOT CARRY ITS BURDEN OF DEMONSTRATING BUSINESS NECESSITY WITH**
 9 **PROPER EMPIRICAL STUDIES**

10 Because Plaintiffs established a prima facie case of disparate impact discrimination, it is
 11 MTC's burden to demonstrate business necessity. As noted above, the business necessity
 12 requirement shifts the focus from an open-ended assessment of subjective professions of good
 13 faith and policy to an inquiry into whether an objective, empirical study was conducted that
 14 demonstrates a manifest relationship between the challenged practice and MTC's genuine goals.
 15 *Griggs*, 401 U.S. at 432; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). MTC has
 16 failed to present any empirical validation studies and has thus failed to meet its burdens of both
 17 production and persuasion as to each challenged practice. Ignoring *Griggs*, MTC's business
 18 necessity defense consisted of professions of its good faith and good policy. *See, e.g.*, FFCL ¶¶
 19 451-53, 480-84. This is not sufficient to meet MTC's burden of production much less persuasion.
 20 We address each practice in turn.

21 **Selection of Res. 3434 Transit Expansion Projects:** MTC's burden was to show,
 22 through an empirical, professionally acceptable study, that the criteria it used to select or exclude
 23 (and fund) projects, as well as the way it applied those criteria, had a manifest relationship to a
 24 transportation necessity. MTC presented no such study. It conducted none at the time it adopted
 25 the selection criteria in Res. 3357 (Trial Ex. 104). Indeed, despite the admitted importance of
 26 cost-effectiveness, MTC determined how much of the region's scarce funds would be devoted to
 27 expansion projects based on political horse-trading rather than on any objective study. Tr.
 28 406:13-18 (McMillan); FFCL ¶ 452. Moreover, MTC's experts conducted no such study for the

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1 litigation. In particular, while Dr. Cervero testified to various theoretical benefits of rail
 2 expansion, he conducted no empirical studies for this case whatsoever. Tr. at 1183:6-11 (“You
 3 keep on mentioning empirical studies. That was not the role I was asked to bring to this.”)
 4 (Cervero); FFCL ¶¶ 453-54, 456. *See Albemarle*, 422 U.S. at 428-29 (mere reliance on national
 5 data not validated locally not sufficient). Nor did Mr. Boedeker, who conceded that he had no
 6 transportation expertise (Tr. 733:25-734:3; FFCL ¶ 433) and that he was not even aware of the
 7 specific practices Plaintiffs were challenging. Tr. 774:25-775:19 (Boedeker); FFCL ¶ 432.

8 MTC cannot even claim that its selection criteria were based on any of the objectives to
 9 which Dr. Cervero testified. Most of those were not related to MTC’s genuine objectives, as
 10 stated in Res. 3434, much less to statutory planning factors such as preservation of the existing
 11 system, including operations. *See* Trial Ex. 373 at 5-6; FFCL ¶¶ 450-52. Dr. Cervero testified
 12 about benefits that could theoretically accrue in the areas of air quality, energy consumption,
 13 “smart growth” and traffic congestion (Tr. 1103:24-25; 1138:15-20; FFCL ¶¶ 453-54, 456), but
 14 the selection criteria that MTC actually used did not purport to analyze a project’s impact in any
 15 of these areas. Trial Ex. 99 at MTCP115274-76; FFCL ¶¶ 455-56. Ms. McMillan conceded that
 16 MTC had no idea whether rail expansion would reduce freeway congestion. Tr. 1264:11-21
 17 (McMillan); McMillan Dep. of 11-15-07 at 603:12-22 (Attachment K hereto) (“Certainly what
 18 we hoped to do was to provide an option to travelers that they could avoid congestion by taking a
 19 transit option. The degree to which that actually reduces congestion, is due to a whole host of
 20 other factors.”)

21 As for “smart growth,” MTC specifically rejected a “smart growth” alternative to the 2005
 22 RTP because it would require a new approach to local land use that MTC did not have the
 23 regulatory power to effectuate. Tr. 1242:18-1243:3 (McMillan); FFCL ¶ 462. While MTC
 24 included a “supportive land-use” criterion in Res. 3434, that criterion – consistent with MTC’s
 25 hands-off approach to land-use – only looked at whether the transit station would be located in an
 26 area of urban, suburban or rural density, with no evaluation of whether it might produce any
 27 beneficial impacts in terms of land-use. Trial Ex. 99 at MTCP115274-76; FFCL ¶ 454. As with
 28 cost-effectiveness, a rating of “low” did not disqualify a project. *Id.*

1 While Dr. Cervero testified that increasing transit ridership was not MTC's objective (Tr.
 2 1095:3-1097:25), MTC disagreed. Tr. 1243:4-14 (McMillan). And where Dr. Cervero testified
 3 about the importance of an "objective and [im]partial kind of multi-modal scoring system to
 4 evaluate and rank" projects (Tr. 1107:5-8; 1128:6-7; FFCL ¶ 455), MTC admitted that it neither
 5 numerically scored nor ranked candidate projects (Tr. 1244:5-23 (McMillan); 1222:8-13
 6 (Cervero); FFCL ¶ 456) and that no criterion was a "pass/fail." Tr. 423:18-424:7 (McMillan);
 7 FFCL ¶ 456. The recent letter from the California Attorney General (expressing concern that
 8 expansion dollars be shifted to transit system preservation so as to reduce greenhouse gas
 9 emissions) criticizes MTC's failure to score and analyze "low-performing" expansion projects.
 10 Tr. 1271:6-1276:9 (McMillan); Trial Ex. 763; FFCL ¶¶ 467-68.

11 **Allocation of "Committed" Revenues:** MTC's burden here was to show that
 12 systematically shifting funding away from transit operations and toward transit expansion was
 13 required by a business necessity. Again, MTC presented no evidence of any pre-litigation
 14 empirical study, and Dr. Cervero specifically testified that he did not conduct any empirical
 15 studies analyzing MTC's allocation of committed funds. Tr. at 1167:10-14 (Cervero); FFCL ¶
 16 458.

17 Apart from its disproven "legally impossible funding sources" defense, MTC articulated
 18 only two justifications for this practice. Neither is a genuine, legitimate objective appropriate for
 19 an empirical study analyzing whether the allocation of committed funds is correlated with a
 20 transportation necessity. First was the idea that it is necessary to act on the basis of a regional
 21 "consensus" and that its "committed" funding policies, such as its policy on "preventive
 22 maintenance," represented the consensus of the Bay Area Partnership. "Consensus" is plainly not
 23 one of the statutory planning factors that guides MTC and is so amorphous that it conceivably
 24 could justify *any* practice. It is undisputed, moreover, that the Partnership does not require
 25 unanimity in its deliberations, as Mr. Scanlon, the former chair of the Partnership, testified. Tr.
 26 862:22-864:8 (Scanlon); FFCL ¶¶ 476-78. The Partnership, in any event, is an advisory
 27 committee with no authority to make policy decisions. *See* Tr. 235:8-16 (McMillan); Heminger
 28 Dep. of 12-6-07 at 81:15-16, 81:20-25, 82:1-9 (Attachment L hereto); FFCL ¶¶ 475-76. The

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1 Innes and Gruber study to which Dr. Cervero referred – a study based on personal observation of
 2 Partnership meetings and interviews with the participants (Tr. 1194:10-1195:3 (Cervero);
 3 1196:15-23, 1197:12-15 (Cervero); FFCL ¶¶ 479) over a period of years (Tr. 1194:12-14
 4 (Cervero); FFCL ¶ 479) – concluded that in actual practice, political horse-trading and staff edicts
 5 “tended to crowd out the efforts of genuine dialogue and collaboration.” Tr. 1190:22-23
 6 (Cervero). (Dr. Cervero faulted the study on the ground not that its criticisms were mistaken, but
 7 that they “could be made about virtually any MPO in the country.” Tr. 1195:14-17 (Cervero);
 8 FFCL ¶ 479.) Most telling, there are no empirical studies in the record demonstrating any
 9 manifest relationship between the challenged practices and MTC’s version of “consensus.”

10 Apart from the absence of any study to justify MTC’s preventive maintenance policy, an
 11 internal document in which Ms. McMillan reported to Mr. Heminger about MTC’s concern to
 12 avoid “the potential for a complete jailbreak from” MTC’s preventive maintenance policy by
 13 operators (Trial Ex. 1438 at MTCP086353; FFCL ¶ 478), undermines the idea that a “consensus”
 14 ever existed about this specific policy, while corroborating Mr. Peebles’ testimony that MTC’s
 15 “consensus is often heavily coerced” as a general matter. Tr. 167:18-168:5 (Peebles); FFCL ¶
 16 477.

17 MTC’s other purported justification is equally without basis, namely, its suggestion that
 18 funding 10% of the preventive maintenance needs of the San Francisco urbanized area with
 19 § 5307 funds would increase the transit capital rehabilitation shortfall by almost half a billion
 20 dollars in ten years. Tr. 260:15-261:24 (McMillan); FFCL ¶ 459. While MTC prepared a
 21 calculation, it did not argue that this calculation was an empirical analysis correlating allocation
 22 of § 5307 funds with a transportation necessity. FFCL ¶ 459. MTC, moreover, considered §
 23 5307 funds in a vacuum and did not consider the availability of other funding sources to backfill
 24 the increased capital rehabilitation needs (such as STP or STIP/RTIP, which is regularly
 25 dedicated to expansion). Tr. 261:19-262:8 (McMillan); FFCL ¶ 459. MTC also assumed that
 26 every operator in the SF/O UZA would claim § 5307 funds for 10% of its preventive maintenance
 27 needs (Trial Ex. 1891 at MTCP206686-88), when the reality is that many of those operators have
 28 no operating shortfall. Tr. 1378:1-10 (Rubin). Indeed, MTC’s policy to allow operators a 10%

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flexible set-aside of § 5307 funds empirically refutes its own argument. Trial Ex. 504 at PL023937-38; Tr. 250:19-251:5 (McMillan). If MTC is concerned about any one operator's preventive maintenance needs consuming all the funds, it can place reasonable caps on the amount of funds any one operator can claim, as it has done with vehicle replacement costs. Trial Ex. 504 at PL023930; Tr. 240:23-241:16, 260:10-25 (McMillan); FFCL ¶ 275.

Finally, any suggestion of a necessity to direct all \$518 million in STIP/RTIP funds to transit expansion is belied by MTC's admission that approximately \$50 million in RTIP funds are dedicated to transit on an annual basis in the Bay Area region. Tr. 960:22-25 (McMillan); FFCL ¶ 404. Thus, in the 25 to 30 year time horizon of Res. 3434 (Tr. 1063:6-13 (McMillan); FFCL ¶ 28), approximately \$1.25 billion in RTIP funds would be available for transit use according to MTC's projections. This is far greater than the amount actually dedicated to transit expansion in Res. 3434, providing MTC with ample ability to shift RTIP funds to capital rehabilitation needs.

Assignment of "Uncommitted" or "Track 1" Funds in the RTP: Ms. McMillan conceded that no business necessity prevented MTC from funding AC Transit's operating shortfalls in any of its RTPs. Tr. 1231:18-1233:24 (McMillan); Trial Ex. 283 at 7-9; FFCL ¶ 463. MTC offered no evidence that its policy of covering transit capital shortfalls, but not operating shortfalls, had a manifest relationship to any transportation necessity. FFCL ¶¶ 460, 461, 464. Notwithstanding MTC's prior position (Motion in Limine No. 6 (Docket No. 275)), it was undisputed at trial that the STP funds MTC applies to projected RTP capital shortfalls are statutorily eligible for preventive maintenance operating purposes. Tr. 277:18-24 (McMillan); FFCL ¶ 384. Far from presenting any empirical study (*see* Tr. 1166:20-24 (Cervero); FFCL ¶ 460), MTC's own witnesses confirmed that the process by which it made decisions to assign uncommitted funds was not objective but based on political give and take. Tr. 406:1-22 (McMillan); FFCL ¶ 461. Most notable was Ms. McMillan's admission, on the penultimate day of trial, that MTC is now considering funding AC Transit's operating shortfall in the upcoming 2009 RTP. Tr. at 1245:11-1246:5 (McMillan); FFCL ¶ 466. The practice of not funding those shortfalls is plainly not justified by any business necessity.

1 **VII. LESS DISCRIMINATORY ALTERNATIVES ABOUND.**

2 Even if MTC could show a manifest relationship between any of the challenged practices
3 and a genuine and legitimate business necessity, Plaintiffs should prevail because there are less
4 discriminatory alternatives that meet the articulated needs.

5 **Selection of Res. 3434 Transit Expansion Projects:** As Mr. Rubin and Mr. Peeples
6 testified, protecting the existing bus service on which minority riders depend is consistent with
7 expansion that is cost-effective in getting people out of their cars and onto transit. *E.g.*, Tr.
8 674:1-13 (Rubin); 1308:4-1309:7 (Peeples); FFCL ¶¶ 42, 43, 222, 223, 243. The obvious less
9 discriminatory alternative to Res. 3434 is an expansion program that is governed by meaningful
10 and measurable criteria that have a manifest relationship to genuine and legitimate transportation
11 needs. MTC could take Dr. Cervero's (and the California Attorney General's) advice to score
12 and rank proposed projects based on how well they perform against criteria that actually have a
13 relationship to improved air quality, cost effectiveness and other regional (and statutory)
14 objectives. *See* Tr. 1107:1-8 (Cervero); Trial Ex. 763 at 5, 6; FFCL ¶¶ 452-53, 455-56, 467-68.
15 Moreover, rather than evaluating candidate rail projects in a vacuum, MTC could evaluate
16 alternatives before selecting projects, applying the same objective criteria to both bus and rail
17 projects. *See* Tr. 1255:8-10 (McMillan); FFCL ¶¶ 219-20.

18 **Allocation of "Committed" Revenues:** The evidence at trial established that MTC has
19 enormous flexibility in the use of "committed" funds, well beyond the funding sources singled
20 out for discussion here. FFCL ¶¶ 262, 265, 267, 270, 275, 282-87, 295-97, 307, 310, 312, 318-
21 19, 329-31, 334-36, 344-48, 350, 356. MTC also has great flexibility to *exchange* funds so as to
22 make additional operating funding available. *E.g.*, Trial Exs. 515, 523 (MTC's programs to
23 provide "clean," unrestricted local funds in exchange for federal funds); *see* Tr. 464:1-465:5,
24 465:10-18, 466:17-23 (Bockelman); FFCL ¶¶ 303-306, 329, 389-402. Even if it were not true
25 that MTC could meet all of AC Transit's \$40 million in annual preventive maintenance needs
26 through § 5307, it can plainly meet some of them, while backfilling the additional capital shortfall
27 out of other funding sources, such as STIP/RTIP and CMAQ. FFCL ¶ 277. Notably, since AC
28 Transit only competes for § 5307 funds in a single urbanized area, MTC would only have to alter

1 its TCP policy for that one area. FFCL ¶¶ 268, 276.

2 **Assignment of “Uncommitted” or “Track 1” Funds in the RTP:** Finally, MTC can
3 plainly fund transit operating shortfalls on at least equal footing with capital shortfalls. The
4 evidence before this Court definitively refutes MTC assertions that its hands are tied by statutory
5 restrictions that prevent it from funding transit operations to a greater extent. Tr. 277:18-24
6 (McMillan) (STP eligible by statute for preventive maintenance); FFCL ¶¶ 377, 384.

7 **VIII. CONCLUSION**

8 At the liability phase of this case, the Court should determine that Plaintiffs have
9 demonstrated that each of the three challenged practices has a prima facie disparate impact for
10 which MTC has demonstrated no necessity. The Court should schedule a remedial hearing for
11 MTC to propose injunctive relief.

1 Dated: October 30, 2008

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2 *I, Neha M. Marathe, am the ECF User whose*
3 *ID and password are being used to file this*
4 *Plaintiffs' Post-Trial Brief. In compliance with*
5 *General Order 45. X.B., I hereby attest that all*
6 *counsel has concurred in this filing.*

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