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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

METROPOLITAN TRANSPORTATION COMMISSION,

Defendant.

Case No. C-05-1597-EDL

PLAINTIFFS' COMBINED REPLY MEMORANDUM AND OPPOSITION RE MOTIONS FOR SUMMARY JUDGMENT AND SUMMARY ADJUDICATION

Date: July 24, 2008
Time: 9:00 a.m.
Judge: Hon. Elizabeth Laporte
Trial Date: Oct. 1, 2008

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STATUTES

I. INTRODUCTION

This combined brief replies to MTC's opposition to Plaintiffs' partial summary judgment motion regarding one of MTC's discriminatory funding practices ("Plaintiff's Motion") (Part II.A.&B. below). It further responds to MTC's several motions for summary judgment on intentional discrimination (Part II.C. below), individual Plaintiffs' standing to sue (Part II.D. below), and on associational standing of the two organizational Plaintiffs, the Amalgamated Transit Union, Local 192 ("ATU") and Communities For A Better Environment ("CBE") (Part II.E. below).[1]

Plaintiffs' Motion has demonstrated a prima facie case of disparate impact discrimination arising out of MTC's consistent practice of failing to fund operating shortfalls it identifies in the RTP. The material factual record regarding this discrete issue is undisputed. As we show below, MTC's opposition rests on a serious misreading of the plain language of Gov. Code § 11135 and its implementing regulations, ignoring controlling and persuasive Ninth Circuit authority on proof of prima facie disparate impact, and seeking to prop up immaterial factual disputes. In particular, Plaintiffs show that a prima facie case is established *both* under Plaintiffs' original comparison of AC Transit, BART and Caltrain *and* by a comparison of the top seven operators that together serve 95% of the region's transit ridership.[2] The two analyses show that high minority transit operators consistently suffer from far larger operating shortfalls than lower-minority operators. Thus, under either analysis, MTC's practice of funding capital but not operating shortfalls disproportionately disadvantages minority riders. Plaintiffs' partial summary judgment motion on the prima facie case of disparate impact discrimination should therefore be granted.

MTC's motion on Plaintiffs' intentional discrimination claims ignores the compelling record that the parties have compiled for trial. While admitting that the Court must conduct a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," *Vill.*

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[1] Because some of the factual bases of the standing motions are presented in the disparate impact and intentional discrimination sections below, we discuss standing after presenting those facts in the earlier parts of the brief.

[2] Charts appended to this brief show the seven-operator comparison. (*Source*: Rubin rebuttal report (Dkt. 167, Ex. 2).)

of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977), MTC ignores that record in its motion papers. Below, we summarize the extensive evidence in the record regarding actual and foreseeable disparate impact, historical background, and departures from substantive and procedural protections and norms. This substantial and compelling showing, and Ninth Circuit law requiring the "cumulative impact" of the evidence of intent to be weighed, establishes that trial is required and that MTC's summary judgment motion on intentional discrimination claims should be denied.

Renewing its challenge to the standing of the individual Plaintiffs, MTC again has made no convincing arguments to defeat standing. Under the framework that the Court recognized in its prior standing rulings on stigmatic injury, quality of life injury and economic harm, the evidence shows that Plaintiffs and the Class suffer injury in fact, that the injury is fairly traceable to the conduct challenged and that the remedy sought is likely to redress those injuries. The factual showing of injury is more than sufficient to withstand MTC's summary judgment motion.

Because the individual Plaintiffs have standing, the Court need not reach the question of associational standing. The record, in any event, plainly shows that ATU 192 and CBE have standing. The record also shows that neither the applicable statute of limitations nor a narrow waiver provision in a prior settlement bar CBE's claims.

II. LEGAL DISCUSSION

A. STATE LAW PROVIDES A RIGHT OF ACTION TO ENFORCE THE PROHIBITION AGAINST DISPARATE IMPACT DISCRIMINATION BY RECIPIENTS OF STATE FUNDS.

MTC's arguments regarding Section 11135 in opposition to Plaintiffs' Motion ignore the plain language of the statute and its implementing regulations.

1. The Legislature Established A Private Right Of Action To Enforce Section 11135 And Its Implementing Regulations.

In asserting that there is no private right of action to enforce Section 11135's implementing regulations which prohibit disparate impact discrimination (Dkt. 197 at 15),[3] MTC

[3] MTC does not deny that Section 11135's implementing regulations prohibit disparate impact discrimination, and they clearly do. *See* 22 Cal. Code Regs. § 98101(i) (prohibiting

ignores the Legislature's 1999 amendment of the statutory article that includes Section 11135 to expressly provide that: "This article *and regulations adopted pursuant to this article* may be enforced by a civil action for equitable relief." Gov. Code § 11139 (emphasis added). *See Blumhorst v. Jewish Family Servs. of Los Angeles*, 126 Cal. App. 4th 993, 1001 (2005) ("the Legislature did create a private cause of action for civil rights discrimination by the amendments to section 11139"). The absence of a private right of action to enforce *federal* disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964, *cf.* Dkt. 197 at 15, is irrelevant because the California Legislature has expressly provided for it.

2. Section 11135 And Its Implementing Regulations Prohibit State-Funded Entities From Discriminating In Any Of Their Activities

MTC argues that Section 11135 only bars it from discriminating when allocating State funds, and only if the program at issue is "funded completely" by the State. Dkt. 197 at 16; Dkt. 195 at 13-14. Both arguments fail. Section 11135 and its implementing regulations prohibit discrimination by recipients of state funds in all of their activities, whether or not the particular activity is state funded. In addition, Section 11135 also specifically prohibits discrimination under any "program or activity" that receives any State support. Plaintiffs' challenge to MTC's discriminatory planning and funding practices have the requisite nexus with State funds because MTC is a "recipient" of State funds. If that were not enough, MTC's "program or activity" of planning and funding receives State support.

MTC is a "recipient" of State funds. Section 11135 provides that no person shall be subjected to discrimination under "*any* program or activity that . . . is funded directly by the state, or receives *any* financial assistance from the state." (Emphasis added.) The California Legislature expressly delegated to the Secretary of the Health and Welfare Agency the authority to establish by regulation the "standards for determining *what practices* are discriminatory." Gov. Code § 11139.5 (emphasis added). Pursuant to that authority, the Secretary promulgated implementing regulations that provide that:

"recipient[s]" of state funds from, *inter alia*, "utiliz[ing] criteria or methods of administration that . . . (1) have the purpose or *effect* of subjecting a person to discrimination . . . .") (emphasis added).

> It is a discriminatory practice for a *recipient*, in carrying out *any* program or activity directly, or through . . . other arrangements . . . to utilize criteria or methods of administration that . . . have the purpose or effect of subjecting a person to discrimination on the basis of ethnic group identification, . . . [or] color . . . .

22 Cal. Code Regs. § 98101 (emphasis added). The Secretary defined a "[p]rogram or activity" under Section 11135 as including "*any* project, action or procedure undertaken directly by *recipients of State support*." 22 Cal. Code Regs. § 98010 (emphasis added). Thus, Section 11135 and its implementing regulations impose a duty upon a recipient of State funds not to engage in discriminatory behavior in *any* of its activities.[4] *See Yamaha Corp. of Amer. v. State Bd. of Equalization*, 19 Cal. 4th 1, 3 (1998) ("quasi-legislative regulations adopted by an agency to which the Legislature has confided power to 'make law,' and which, if authorized by the enabling legislation, bind . . . courts as firmly as statutes themselves.").[5]

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[4] The Legislature expressly acknowledged, and implicitly ratified, this regulation in 1999 when it amended Section 11139, stating its understanding that Section 11135 extends to "entities undertaking programs or activities that are funded directly by the state, *and entities that receive financial assistance from the state*." Declaration of Richard Marcantonio in Support of Plaintiffs Combined Reply and Opposition re Motions for Summary Judgment and Summary Adjudication ("Marcantonio Opp. Decl."), Ex. 82, Assem. Floor, Staff Analysis of Assem. Bill 1670 (1999-2000 Reg. Session) at 6 (emphasis added). Plaintiffs hereby request that the Court take judicial notice of this legislative history.

[5] The federal statute on which Section 11135 is based was originally not as broad as Section 11135. Title VI, as enacted in 1964, barred discrimination "under any program or activity receiving Federal financial assistance." After the Supreme Court narrowly construed the "program or activity" language to prohibit only "program-specific" discrimination in *Grove City v. Bell*, 465 U.S. 555, 571 (1984), Congress amended Title VI and related civil rights laws to overrule *Grove City*, making clear that the Title VI prohibition of discrimination under a "program or activity" was as broad as that of Section 11135. *See* 42 U.S.C. § 2000d-4a (providing that "program or activity" means "all the operations of . . . the entity of such State or local government that distributes [federal] assistance"; *Radcliff v. Landau*, 883 F.2d 1481, 1483 (9th Cir. 1989) (Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a, overruled *Grove City* decision).

MTC cites *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and *Comm. for a Better N. Phila. v. Southeastern Penn. Transp. Authority*, 1990 U.S. Dist. LEXIS 10895 (E.D. Pa.), *aff'd*, 935 F.2d 1280 (3d Cir. 1991), but neglects to mention this action by Congress, in response to *Wards Cove,* to restore the more stringent "business necessity" standard for rebutting a prima facie case of disparate impact announced in the seminal case *Griggs v. Duke Power Co.* and other pre-*Wards Cove* cases. *See, e.g., Stender v. Lucky Stores, Inc.*, 1992 WL 295957, *2-3 (N.D. Cal. 1992) (Patel, J.) ("[T]he 1991 Civil Rights Act shifts both the burden of production and the burden of proof to the [defendant] to show that a challenged . . . practice is job related and consistent with business necessity" in line with *Griggs,* and the 1991 Act "places much higher burdens of production and proof on defendant" than did *Wards Cove*." (*2 and n.2)).The California Supreme Court, moreover, has recently affirmed that *Griggs* governs state law disparate impact claims. *See Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 354 n.20 (2000) (citing *Griggs*).

MTC is clearly a "recipient" of state funds, and makes no argument to the contrary. *Compare* Dkt. 175 at 16 n.16 *with* Dkt. 197 at 16. Although MTC attempts to shift the question to whether the underlying funds allocated by MTC are state or federal, the relevant "nexus" is established because MTC itself receives State funds.

MTC's funding and planning process is a "program or activity." Plaintiffs' motion challenges MTC's consistent practice of funding capital rehabilitation but not operating shortfalls. This planning and funding activity – precisely the type of "program or activity" covered by Section 11135's prohibition against discrimination – is supported with State funds.[6] *See also* Gov. Code § 66521(a) ("The Legislature further intends that financial support of the activities of the [MTC] will be made available from federal, state, and local sources normally available for transportation and general planning purposes in the region"). In addition to defining "program or activity" as *any* program or activity undertaken by a recipient of state funding, *see* 22 Cal. Code Regs. § 98101, the regulations also provide that a "program or activity" is "State supported" – and thus covered by Section 11135's prohibition – if it "receives State support, in whole *or in part*." 22 Cal. Code Regs § 98010 (emphasis added). Thus, discrimination is prohibited even if the program or activity is only partially funded by the State. Contrary to MTC's assertion, there is simply no "complete[]" state funding requirement. *Cf.* Dkt. No 197 at 16.

MTC is equally incorrect to argue that Section 11135 reaches only the discriminatory allocation or programming of State transportation funds. Dkt. 197 at 16. The regulations define

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[6] MTC receives funding from several State transportation funding programs that it uses for planning purposes. First, MTC allocates to itself the statutory maximum (3% per County) of Transportation Development Act (PUC §§ 99200 et seq.), or "TDA," funds "for the conduct of the transportation planning and programming process." Pub. Util. Code § 99233.2(a). Marcantonio Opp. Decl., Ex. 43. This amounts to several million dollars in state funding each year.

Second, MTC receives Regional Transportation Improvement Program ("RTIP") funds under PUC § 99311, which are available by statute for "(b) Regional transportation planning by transportation planning agencies designated pursuant to Section 29532 of the Government Code…" These funds are specifically available to cover a portion of the expense of preparing the RTP (§ 99311.5). Marcantonio Opp. Decl., Ex. 44. This is the source of hundreds of thousands of dollars more which MTC receives for its "Planning, programming, and monitoring" activities.

While MTC also receives dedicated *federal* sources of "planning" funding (such as "Metropolitan Planning Program" funds under 49 U.S.C. § 5303 and "Metropolitan Planning Grants" under 23 U.S.C. § 104(f), these federal funds require a minimum 20% match.

"program or activity" to include "the provision of . . . financial aid or other benefits," whenever the financial aid or benefits are "provided *with the aid of* State support." 22 Cal. Code Regs. § 98010 (emphasis added). When MTC funds capital but not operating shortfalls, it programs transportation funding "with the aid of State support" because MTC's budget for engaging in planning and funding activities is partially funded by the State. Marcantonio Opp. Decl., Exs. 43 & 44. The source of the specific underlying funding that MTC allocates is of no consequence.[7] Because MTC receives state funds to undertake its planning and funding activities, it is barred from discriminating when it implements that "program or activity."

B. Plaintiffs Have Established A Prima Facie Case Of Disparate Impact Discrimination.

Plaintiffs have moved for summary adjudication on a discrete legal issue: that the undisputed facts establish a prima facie case of disparate impact discrimination arising out of MTC's consistent practice of failing to fund the operating shortfalls it identifies in the RTP. MTC has not identified any genuine fact dispute material to this narrow issue. Separately, MTC seeks judgment as a matter of law on Plaintiffs' entire disparate impact claim. MTC's motion raises elements of Plaintiffs' disparate impact claim beyond those implicated on Plaintiffs' motion and as to which there are genuine fact disputes, and should be denied. In short, the undisputed evidence establishes that MTC's shortfall practice gives rise to a prima facie case and that Plaintiffs' entire disparate impact claim should proceed to trial.[8]

To establish a prima facie case of disparate impact discrimination, Plaintiffs need only

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[7] *People v. Levinson*, 155 Cal. App. 3d Supp. 13 (1984), on which MTC relies, reinforces the conclusion that MTC's activities, especially its RTP, are covered by Section 11135's prohibitions. The *Levinson* court held that the California courts were not subject to Section 11135 because it "was [intended] to prohibit discriminatory treatment . . . only by those charged with effectuating programs or activities which receive directly or indirectly state support" or "by those implementing state-assisted programs and activities." *Levinson,* 155 Cal. App. 3d Supp. at 18.

[8] MTC's motion must be denied for the independent reason that Plaintiffs' evidence shows a disparate impact arising from another practice – MTC's practice of creating the operating shortfalls, through funding policies that precede the RTP and are incorporated into it. *See* Dkt. 167, Ex. 1, ¶¶ 114-62; Dkt. 175 at 21, n.22.

establish the existence of a facially neutral practice that causes a racially disproportionate adverse effect. *See, e.g., Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997); *Sisemore v. Master Fin. Inc.*, 151 Cal. App. 4th 1386, 1420-21 (2007).

If the Court grants Plaintiffs' motion, then the burden will shift to MTC to explain at trial why its practice of failing to fund operating shortfalls is justified by a "transportation necessity." *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("business necessity"); *see also Larry P. v. Riles,* 793 F.2d 969, 982 (9th Cir. 1986) ("educational necessity").[9] Thus, MTC will have an opportunity to explain – and the burden of proving – why it cannot or should not fund operating shortfalls. Such explanations go to MTC's rebuttal, but do not bear on the question of whether MTC's practice gives rise to a prima facie case of disparate impact discrimination. If MTC is able to persuade the court that its practice is justified by a transportation necessity, Plaintiffs can still prevail by showing the existence of less discriminatory alternatives. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Neither of these showings – transportation necessity (MTC's rebuttal) and less discriminatory alternatives (Plaintiffs' surrebuttal) – is at issue on Plaintiffs' motion for summary adjudication, which focuses narrowly on whether Plaintiffs have established a prima facie case of disparate impact discrimination.

The undisputed facts establish that (1) MTC engages in the *facially neutral practice* of failing to fund the operating shortfalls that it has identified in the RTP process, (2) MTC's practice *causes* harm to minority riders because unfunded operating shortfalls leave an operator no choice but to cut service or potentially increase fares, (3) MTC's practice has a racially *disproportionate* impact because AC Transit, which suffers from persistent operating shortfalls,

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[9] MTC erroneously states that its burden, if plaintiffs establish a prima facie case, is to establish "legitimate, non-discriminatory reasons" for its practice. Dkt. 197 at 17:6-7. MTC confuses the burden-shifting schemes for disparate impact and disparate treatment claims. As the Ninth Circuit has explained, "[o]nce a plaintiff has established a prima facie case, the burden then shifts to the defendant to demonstrate the requirement which caused the disproportionate impact was required by educational necessity." *See Larry P.*, 793 F.2d at 982. The disparate impact burden shifting framework is different, the Ninth Circuit explained, from the analysis applicable to disparate *treatment* claims, in which, after a plaintiff establishes a prima facie case, the burden of production shifts to the defendant "to articulate some legitimate non-discriminatory reason" for the challenged conduct. *Id.* at 982 n.10.

has the highest concentration of minority riders of any Bay Area transit operator, and (4) the impact on minority riders is *adverse* because it denies them transit opportunities and benefits comparable to those enjoyed by the proportionately greater white ridership of other Bay Area transit operators.

1. The undisputed evidence shows that MTC engages in the facially neutral practice of refusing to fund the operating shortfalls it has identified in the RTP.

MTC asserts that "the policy [Plaintiffs] allege does not exist." Dkt. 197 at 17:14-15. Plaintiffs motion challenges MTC's consistent practice of failing to fund the operating shortfalls it identifies in its RTP planning process, while devoting billions of dollars to fund the capital shortfalls that it identifies in that same process. *See* Dkt. 175 at 19-21. To establish the first prong of their prima facie case, Plaintiffs need only point to "the occurrence of certain outwardly neutral practices." *Gamble*, 104 F.3d at 306 (internal quotation marks, citation omitted). MTC interjects a number of extraneous issues but has failed to raise a fact dispute as to the occurrence of this practice. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Factual disputes that are irrelevant or unnecessary will not" preclude summary adjudication.).

The undisputed evidence establishes the following about MTC's RTP process:

(1) *MTC identifies shortfalls in the funds that each transit agency requires for operating and capital rehabilitation purposes*. In each and every one of the last four RTPs, MTC identified an *operating* shortfall for only one major operator, AC Transit. MTC identified *capital rehabilitation* shortfalls for all three operators – AC Transit, BART and Caltrain – in the three most recent RTPs. Dkt. 175 at 11-13 (citing evidence).

(2) *After MTC identifies operating and capital shortfalls, it determines which shortfalls to cover and in what amounts*. *Id.* at 13 (citing evidence). *It assigns money to alleviate the capital shortfalls it identifies in its RTP process, but never operating shortfalls*. MTC admits that it did not take or even consider taking "any steps or actions to cover AC Transit's RTP transit operating shortfalls at any time since the adoption of the 1994 RTP." Dkt. 169, Ex. 47, No. 54 at 5-6. At the same time, MTC has funded a significant portion of the capital rehabilitation shortfalls identified in the RTP process, devoting on the order of $1 billion in each of the last three RTPs to covering the capital rehabilitation shortfalls it identified. *Id.*, Ex. 22 at 1-3; Dkt. 167 at ¶¶ 36-37 & Ex. 1 at ¶ 95.

a. MTC concedes that it does not fund operating shortfalls; questions of whether it could do so are not material to Plaintiffs' prima facie case of disparate impact discrimination.

Significantly, MTC does not dispute that it fails to fund operating shortfalls. Instead, it contends that there is no requirement that it cover operating shortfalls, that it lacks additional operating funds that could be used to do so, and that Plaintiffs have "done nothing" to show that the funds used by MTC to cover capital rehabilitation shortfalls in the RTP could instead be used to cover operating shortfalls. Dkt. 197 at 17:17-18, 18:10-15; Dkt. 195 at 15:2-9. These contentions are not material to Plaintiffs' motion, but raise fact disputes as to the broader issues on which MTC seeks summary adjudication.

MTC leans heavily on its contention that, under federal law, it is not required to cover shortfalls. Dkt. 197 at 8-10 (citing transportation statutes, regulations and agency guidance); 17:17-18. This contention, even if accurate, is beside the point: Plaintiffs seek to enforce the prohibition against discrimination; they do not seek to enforce MTC's compliance with transportation statutes or regulations. That MTC may not be "required" by federal transportation law to fund operating shortfalls does not preclude a finding that its failure to do so is discriminatory. While a school district is not forbidden by law from maintaining a neighborhood school policy, such a policy will be unlawful if it has a discriminatory impact. *See Diaz v. San Jose Unif. Sch. Dist*, 733 F.2d 660, 664 (9th Cir. 1984); *see also Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-76 (1978) (prima facie disparate impact case based on employer's neutral practice of refusing to hire applicants at the jobsite) (reversing and remanding on other grounds).

The first prong of a prima facie case requires Plaintiffs only to identify "the occurrence of certain outwardly neutral practices." *Gamble*, 104 F.3d at 306 (internal quotation marks, citation omitted). MTC has not cited a single case, nor are Plaintiffs aware of any, that requires Plaintiffs, in demonstrating a prima facie case, to show that the challenged practice is contrary to some independent legal requirement. Thus, the existence of any requirement to cover shortfalls is not material to Plaintiffs' summary adjudication motion.[10]

[10] That issue is, however, material to Plaintiffs' intentional discrimination claims, in particular, the question of whether MTC departs from substantive decision-making norms. *See Arlington Heights*, 429 U.S. at 266. There is ample evidence in the record to contradict MTC's assertion and on which a reasonable jury could conclude that transportation planning norms do require MTC to cover shortfalls. *See* Dkt. 167, Ex. 1 at ¶¶ 77-83, Ex. 2 at ¶¶ 14-25, 27-28. MTC's emphasis of this issue merely underscores the conclusion that its motion for summary

Equally wide of the mark is MTC's assertion that it is unable to fund operating shortfalls, in other words, that it is economically impossible to do what Plaintiffs seek. Again, this argument is not material to Plaintiffs' motion, and also supports the conclusion that MTC's broader motion for summary adjudication of Plaintiffs' entire disparate impact claim should be denied.

A defendant's assertion of impossibility constitutes a *defense*.[11] And claims of economic impossibility bear on the existence of a business necessity defense. *See, e.g., United States v. Boldt*, 929 F.2d 35, 41 (1st Cir. 1991) (in Clean Water Act case, defendant's arguments regarding economic feasibility construed by court as effort to invoke "a defense of economic or business necessity"); *United States v. CPS Chem. Co.*, 779 F. Supp. 437, 453 (E.D. Ark. 1991) (in Clean Water Act case, defendant claiming "economic[] impossib[ility]" sought to establish "business necessity" defense).[12]

Moreover, the evidence shows that it is not *in fact* economically impossible for MTC to make additional operating funds available that could be used to mitigate the operating shortfalls it has identified in the RTP. As Plaintiffs' transit expert Thomas Rubin explains, "MTC does have the ability/flexibility/control to cover operating shortfalls." Dkt. 167, Ex. 1 at ¶ 165.[13] Funding

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adjudication of Plaintiffs' intentional discrimination claim should be denied. *See infra* at Part II.C.

[11] *See, e.g., Loomis Cabinet Co. v. Occupational Safety & Health Review Comm'n*, 20 F.3d 938, 943 (9th Cir. 1994) ("We have held that impossibility is a valid defense against OSHA enforcement actions."); *First Data Res., Inc. v. Int'l Gateway Exch., LLC*, 2004 WL 2187566, at *7 (D. Neb. 2004) ("Business necessity, or frustration of purpose, impossibility or extreme impracticability, is a *defense* to breach of contract that will excuse nonperformance.") (emphasis added).

[12] Business necessity is not a valid defense to a Clean Water Act claim. *See, e.g., Boldt*, 929 F.2d at 41. Plaintiffs do not contend that economic impossibility would be an invalid defense to a disparate impact claim, only that such an argument bears on MTC's business necessity defense rather than Plaintiffs' prima facie case. *Cf. Bouman v. Block*, 940 F.2d 1211, 1223 (9th Cir. 1991) (in disparate *treatment* case, court analyzed defendant's argument that it lacked funds as a defense to plaintiff's prima facie case of intentional discrimination)

[13] Mr. Rubin has provided a detailed analysis of the extensive control MTC wields over a wide array of transportation funds, including funds that MTC refuses to include on its list of so-called "discretionary" funds, despite acknowledging that it exerts "control" over various fund sources not on its list. Dkt. 167, Ex. 2 at ¶ 65; *see also id.* at ¶¶ 67-82. Simply stated, MTC could free up additional funds for operating purposes, should it choose to do so. *Id.*, Ex. 1 at ¶¶ 114-153; *see, e.g., id.*, Ex. 1 at ¶ 165 (in 2001 RTP, "there is between one and two billion dollars that MTC could shift to operating purposes over the 25-year of the [2001] RTP."); *id.*, Ex. 1 at ¶

operating shortfalls is also consistent with recognized transportation planning norms.[14] As explained in great detail by Plaintiffs' transit finance expert, the justifications offered by MTC's experts for refusing to provide AC Transit with additional operating funds rest on factually false premises. Dkt. 167, Ex. 2 at ¶¶ 170-230.

But the Court need not and indeed should not resolve at this stage of the litigation these contested questions of whether MTC could or should fund operating shortfalls. Those issues are not material to whether Plaintiffs have established a prima facie case of disparate impact, the only question presented by Plaintiffs' narrow motion. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary [adjudication]." *Anderson*, 477 U.S. at 248. Those issues are material to the question of whether MTC's practice is justified by a "transportation necessity," an issue encompassed by MTC's broader motion for summary adjudication of Plaintiffs' entire disparate impact claim. And the court's proper role on summary judgment is not "to resolve an issue of fact based on conflicting expert testimony." *Scharf v. U.S. AG*, 597 F.2d 1240, 1243 (9th Cir. 1979) (reversing trial court's grant of summary judgment where "parties are entitled to have the trier of fact . . . pass judgment

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169 (in 2005 RTP, "there are, very conservatively, over $2 billion in funds over the 25-year life of the 2005 RTP that MTC could have shifted from capital to operating purposes.").

[14] The evidence also shows that funding AC Transit's operating shortfalls is consistent with the well-recognized transportation planning norm that prioritizes preservation of the existing transportation system. As Mr. Rubin explains, it is well-recognized that "preserving existing transit operations is the highest priority of transit planning and transit funding." Dkt. 167, Ex. 1 at ¶ 56; *see also id.* at ¶¶ 56-73; *id.*, Ex. 2 at ¶¶ 35-44. While shortfalls in operating and capital rehabilitation funds are both necessary to preserve the existing transit system, operating shortfalls more immediately jeopardize the existing system than capital rehabilitation shortfalls. *Id.*, Ex. 1 at ¶¶ 82-83 (capital rehabilitation shortfalls mean "deferred maintenance, not that unsafe transit vehicles are being operated" but "unrelieved operating shortfalls pose serious and immediate threats to the existing system in the form of service cuts, fare increases, and other impacts of the quantity and quality of transit services provided"). Contrary to MTC's assertion, there is nothing "inconsistent" with Plaintiffs' emphasis of the norm of system preservation with its critique of MTC's decision to fund only capital rehabilitation but not operating shortfalls. *Cf.* Dkt. 197 at 5 n.4. As Plaintiffs' expert explains, transportation planning requires a balance: "Where funding is available to address both capital rehabilitation and operating shortfalls, there is simply no justification – either in federal law or basic transportation planning principles – for distinguishing between capital rehabilitation and operating shortfalls, and then covering one but not the other." Dkt. 167, Ex. 1 at ¶ 83.

on the sufficiency of the [expert testimony]"). In other words, whileMTC has failed to raise a material fact dispute that justifies denial of Plaintiffs' narrow summary adjudication motion, this same fact dispute plainly bars entry of MTC's motion for summary adjudication of Plaintiffs' entire disparate impact claim.

b. MTC's Remaining Arguments Lack Merit.

Inexplicably, MTC appears to deny that it funds capital rehabilitation shortfalls. Dkt. 197 at 17. Its own documents, however, undisputedly show that it consistently does so: it assigned $598.3 million to BART and $312.1 million to Caltrain to cover their capital rehabilitation shortfalls in the 1998 RTP, and $472.8 million to BART and $143.8 million to Caltrain for the same purpose in the 2001 RTP. Dkt. 167 at ¶ 37 & Ex. 1 at ¶ 95.

MTC also places emphasis on the fact that operators other than AC Transit also have operating shortfalls in its RTPs. Dkt. 197 at 18. But that fact does not create a fact dispute as to existence of the practice Plaintiffs challenge. Rather, it merely indicates that other operators and their riders are also harmed by that undisputed practice. In other words, the issue of other operators bears, if at all, on Plaintiffs' showing that MTC's practice – which indisputably exists – has an effect that is racially *disproportionate*. As discussed below, by any relevant comparison, MTC's practice has a disproportionate effect on racial minorities. *See infra* at Part II.B.3.

2. The undisputed evidence demonstrates that MTC's failure to fund AC Transit's operating shortfalls *causes* AC Transit service cuts.

The undisputed facts establish that MTC's consistent refusal to fund operating shortfalls forces, and repeatedly has forced, AC Transit to cut service. Dkt. 175 at 21-23. MTC does not expressly address causation in any of its legal arguments relating to Plaintiffs' disparate impact claim, but makes two factual points that potentially bear on causation. First, it emphasizes that AC Transit, not MTC, is the entity that makes final decisions as to service cuts. Dkt. 197 at 4-5; Dkt. 195 at 4-5. Second, it asserts that recessions and not shortfalls in the RTP cause service cuts. Dkt. 197 at 12-13.[15] MTC's effort to shift the focus to AC Transit is misplaced. By refusing to

[15] MTC also misrepresents AC Transit's position on this litigation. Dkt. 195 at 9; Dkt. 179 at 23:10-11. Although MTC acknowledges that AC Transit's Board of Director's is "the

provide AC Transit with the funds it needs to continue operating its existing service, MTC forces AC Transit to cut service and thus acts as a "substantial factor" in causing Plaintiffs harm.

As a threshold matter, it bears emphasis that MTC itself has long acknowledged that unfunded operating shortfalls in the RTP translate into service reductions. *See, e.g.,* Dkt. 169, Ex. 54 at 60 ("Transit Baseline operating shortfalls . . . are left unfunded [in the 1994 RTP] . . . . Consequently, service reductions are assumed to account for significant shortfalls."). MTC's expert also appears to agree that operating shortfalls cause service cuts. Dkt. 190, Ex. 1, at ¶ 5.[16] MTC's own statements establish the causal link between unfunded RTP operating shortfalls and service cuts. Newly introduced testimony by MTC inconsistent with its own prior statements does not create a fact dispute as to causation. *See UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1473 (9th Cir. 1994) ("internal inconsistencies in a party's own testimony fail to create a genuine issue of material fact").[17]

MTC states in its factual discussion that "MTC in no way has asked for or caused AC Transit's service cuts" and then explains that AC Transit chooses what service to cut. Dkt. 197 at 4-5. But MTC's responsibility for the cuts ultimately implemented by AC Transit does not hinge

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legislative body of the district and determines all questions of policy," *id.* at 4, MTC has not introduced any evidence that a letter it received from AC Transit's general manager (Dkt. 205, Ex. E), reflects the views of that Board. In fact, it does not. At the outset of this litigation, AC Transit's Board adopted a position of neutrality. *See* Nemeroff Decl. Ex. A. Att. Res. 08-034 at 1. MTC's counsel submitted a letter to AC Transit "express[ing] our sincerest apologies" for filing declarations from AC Transit employees that included "language that is not in accordance with the Board's neutral policy in this litigation. Again, we sincerely apologize for the misunderstanding." Nemeroff Decl. ¶ 4 & Ex. A. AC Transit's Board unanimously adopted a resolution reaffirming its position of neutrality. *Id.* ¶¶ 4-5 & Ex. A. In accordance with its apology letter, MTC has now filed amended declarations of AC Transit employees Kathleen Kelly and Nancy Skowbo.

[16] Because AC Transit serves a largely low-income and transit-dependent population, it often cannot raise fares to cover shortfalls. Dkt. 167, Ex. 1 at ¶¶ 177-78.

[17] Moreover, any effort by MTC to raise additional causation arguments in its reply brief would be classic "sandbagging" that should not be countenanced. The issue of causation was fully briefed in Plaintiffs' opening brief, and to allow MTC to omit causation arguments from its opposition and instead reserve them for reply on its cross-motion would deprive Plaintiffs of an opportunity to respond. *See Serpa v. SBC Telecomms., Inc.*, 2004 U.S. Dist. LEXIS 18307, at *16 n.4 (N.D. Cal. Sept. 7, 2004) ("Ordinarily, a court does not . . . entertain new arguments if raised for the first time in the movant's reply brief.").

on whether MTC is the entity that formally adopts service cuts. A defendant is liable for the foreseeable harmful effects of its discriminatory funding practices, even where it does not ultimately deliver the services impacted by its funding practices. *See Powell v. Ridge*, 189 F.3d 387, 396 (3d Cir. 1999), *overruled on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Robinson v. Kansas,* 117 F. Supp. 2d 1123, 1141 (D. Kan. 2000); *see also* Dkt. 175 at 21:12-22:11. An unfunded operating shortfall in the RTP is by its nature a quantification of the extent to which an operator lacks the funds, over the horizon of the RTP, to continue to operate its existing baseline of service. Dkt. 167, Ex. 1 at ¶ 178, Ex. 2 at ¶¶ 90, 94. It is entirely foreseeable that AC Transit cannot provide service if MTC does not provide it the money it needs to do so. *Anaya v. Superior Ct.*, 78 Cal. App. 4th 971, 973 (2000) ("the actor is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of the original negligent conduct"). This holds in the civil rights context as well. *Gutierrez-Rodriguez v. Cartagena,* 882 F.2d 553, 561 (1st Cir. 1989) (in rejecting arguments of two police officers who contended they did not "cause" plaintiff's injuries where he was actually shot by a different police officer, court states "[t]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury."). While it may be that the actual service cuts are not implemented until AC Transit adopts its annual budget, at that juncture, the hole in its operating budget is a foregone conclusion, foreseeably predicted by the operating shortfall MTC identified in the RTP, and made necessary by MTC's refusal to provide AC Transit with funds to alleviate that shortfall. *Cf. Harris v. Bd. of Supervisors*, 366 F.3d 754, 762 (9th Cir. 2004) ("it is not speculative to anticipate that reducing the resources available will further impede the County's ability to deliver medical treatment to plaintiffs in their times of need").

The approach of these discriminatory funding cases is entirely consistent with well-established causation principles. MTC "causes" harm to minority transit riders because its conduct is a "substantial factor in bringing about the injury" of service cuts.[18]

MTC's effort to dismiss the RTP as merely a planning document that involves uncertain "*assumptions* and *projections*" is disingenuous at best. *Cf.* Dkt. 197 at 12:23. MTC considers the cost and revenue data underlying the determination of those shortfalls to be "critical," Dkt. 169, Ex. 24 at 173, 178-79 & Ex. 25, and takes care to ensure that it is as precise as possible. It believes it has "a fiduciary responsibility to make [sure] that the public knows what's really going on with these transit districts." *Id.*, Ex. 35 at 346. The information provided "needs to be true," and MTC has "a lot of leverage to make sure that the facts are true and they're shown." *Id.*[19] Once MTC receives projected operating expense data from the transit operators, it subjects the data to a comprehensive review process to ensure that it is accurate and reasonable.[20]

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[18] *Maupin v. Widling,*192 Cal. App. 3d 568, 574 (1987); *see also Mitchell v. Gonzales*, 54 Cal. 3d 1041 (1991) (adopting "substantial factor" causation test for holding defendant liable); *Desrosiers v. Flight Int'l of Fla. Inc.*, 156 F.3d 952, 956 (9th Cir. 1998); *Shawmut Bank, N.A. v. Kress Assocs.*, 33 F.3d 1477, 1495 (9th Cir. 1994); *Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 441 (2004); *Linden Partners v. Wilshire Linden Assoc.*, 62 Cal. App. 4th 508, 531 (1998).

The "substantial factor" test, most frequently applied in tort law, also applies in the civil rights context, *see, e.g., Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1046 (N.D. Cal. 2006) (applying substantial factor test in suit under 42 U.S.C. § 1983), and in cases involving discrimination, *see, e.g., Wysinger v. Auto. Club of S. Cal.*, 157 Cal. App. 4th 413, 422 (2007) (in Fair Employment and Housing Act case, defendant appropriately held liable where, *inter alia*, its "retaliatory conduct was a substantial factor in causing his harm"); *Huffman v. Interstate Brands Cos.*, 121 Cal. App. 4th 679, 683-84 (2004) (question raised in workers' compensation case was "whether the discriminatory conduct (i.e., the demotion) was a substantial factor in the subsequent industrial injury").

[19] See Dkt. 169, Ex. 4 at 193 ("We work, again, with the best available information we have" in regard to the transit capital replacement costs); *id.*, Ex. 12 at 339-40 ("we have gotten progressively better information, for example, on how we estimate operating costs, or, you know, we have a lot more and, I think, better information on the inventory of capital needs among all those plans. . . . The transit operators' short-range transit plans, for example, have, I think, improved over time just by virtue of the fact that, you know, their -- their own attention to different needs has – has improved. So it is a cumulative -- I am sure you can appreciate the more you do any kind of process, the information gets more refined as the operators themselves pay more attention to things of import.").

[20] Thus, for instance, in preparing the data for the 2005 RTP, MTC convened a task force "to really ensure that we were putting more of a focus on collecting this data" and to "ensure that the

Moreover, the evidence demonstrates that MTC relies on RTP shortfall projections to make decisions involving billions of dollars,[21] and that MTC views the *capital rehabilitation* shortfalls that it identifies in the RTP with sufficient concern that it takes aggressive actions to fund all or significant portions of those shortfalls. Dkt. 167, Ex. 1 at ¶¶ 179-82 (identifying MTC documents). Indeed, if the projections contained in the RTP were not of a kind on which MTC could rely to make RTP funding decisions, it would not be executing its long-range planning mandate. *See* 23 U.S.C. § 134; Gov. Code § 65080.[22]

Finally, "economic downturns" do not exculpate MTC. Dkt. 197 at 13:5. While recessions may exacerbate budgetary crises and force further service reductions, the operating shortfalls that MTC refuses to fund would have caused AC Transit to cut service even absent a recession. *See Mitchell,* 54 Cal. 3d at 1049 ("In those . . . situations, where there are concurrent [independent] causes," a defendant cannot escape liability "on the ground that identical harm

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best possible data was given." Dkt. 169, Ex. 24 at 184. Moreover, MTC "communicate[s] with transit operators . . . and in some cases, ma[k]e[s] adjustments to the numbers to improve the long-range forecasts and assumptions." *Id.*, Ex. 13, Interrogatory 41 at 10.

[21] For instance, MTC used the transit shortfall projections as a central input into its decision-making about how to assign billions of dollars in "uncommitted" RTP funding. It used it in making at least three decisions: (a) how to assign "uncommitted" funds as between transit capital shortfalls and local streets and roads shortfalls (Dkt. 169, Ex. 31 at 524-36; *id.*, Ex. 34 at 8; *see* Dkt. 167, Ex. 1 at ¶¶ 76-77); (b) how to divide the transit portion of that funding among transit operators; and (c) how much of this approximately $9 billion would be assigned to expansion purposes, as opposed to being used to sustain the existing transportation system. Dkt. 169, Ex. 24 at 206-07; *id.*, Ex. 34 at 4-5, 8.

MTC also used the RTP shortfall projections as a basis for making representations about the "Vision Element" of its 2005 RTP. *See* Dkt. 169, Ex. 27 at 275-76. The "Vision Element" refers to new local, regional, state and federal funds that may become available over the near to mid-term of the Transportation 2030 Plan through voter approval or legislative authorization." *Id.*, Ex. 33 at 80 n.2. For instance, MTC made the following assertion to the California Legislature: "While Bay Area transit has expanded dramatically over the last 30 years, including new BART, bus and light-rail service, no corresponding operating funds have materialized. During the recent recession, Bay Area transit agencies have been forced to raise fares and cut service substantially. MTCs long-range plan projects a transit operating shortfall totaling $1.6 billion over 25 years that will need to be addressed with similar fare and service changes absent a new source of operating funds." *Id.*, Ex. 58 at 9. *See* Dkt. 167, Ex. 1 at ¶¶ 76-77.

[22] MPOs must "demonstrate[] the consistency of proposed transportation investments with already available and projected sources of revenue," 23 C.F.R. § 450.322 (b) (11); *see also* 23 U.S.C. § 134(g)(2)(B), based on "[r]evenue estimates [that are] as comprehensive as possible" (Dkt. 169, Ex. 8 at 4), and on "sound cost estimating practices." *Id.* at 5.

would have occurred without it. The proper rule for such situations is that the defendant's conduct is a cause of the event because it is a material element and a substantial factor in bringing it about.") (alteration in original).[23]

3. The evidence demonstrates that the adverse impact of MTC's funding practice falls *disproportionately* on minorities.

Controlling Ninth Circuit precedent in *Keith v. Volpe,* 858 F.2d 467 (9th Cir. 1988), and *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), provide the framework for analyzing whether the impact in this case is racially disproportionate.[24] That framework unquestionably demonstrates disproportionality because AC Transit has an overwhelmingly minority ridership, the highest concentration of minorities on any Bay Area transit operator. Dkt. 175 at 17-18, 25. MTC relies heavily on the aggregate numbers of minorities who ride BART and Caltrain and demands statistical showings that are inapplicable to this case. Its arguments are flawed for many reasons, flowing fundamentally from two misconceptions.

First, the issue in a disparate impact case is not the absolute number of minorities harmed, but whether minorities are *disproportionately* harmed. *See, e.g., Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 354 n.20 (2000). As MTC's own statistical expert concedes, proof of disparate impact involves comparisons of rates or percentages, and absolute numbers are utilized only to derive rates or percentages. Dkt. 169, Ex. 45, at 37-42.

Second, MTC argues for a statistical showing that is simply inapplicable to this case. As explained in Plaintiffs opening brief, there are two conceptually distinct types of disparate impact

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[23] *See also Thomsen v. Rexall Drug & Chem. Co.*, 235 Cal. App. 2d 775, 783 (1965) (causation established "where several causes concur to bring about an event and either one of them operating alone would have been sufficient to cause the result."); *John B. Gunn Law Corp. v. Maynard*, 189 Cal. App. 3d 1565, 1571-72 (1987); *Hart v. Browne* 103 Cal. App. 3d 947, 961 (1980); *Fraijo v. Hartland Hosp.*, 99 Cal. App. 3d 331, 347 (1979). Courts have further held that if a defendant's actions are a substantial factor in causing the injury, then the defendant will be held legally liable, regardless of the extent to which the actions actually contributed to the final injury. *See, e.g.*, *Espinosa v. Little Co. of Mary Hosp.*, 31 Cal. App. 4th 1304, 1317-18 (1995).

[24] While the Ninth Circuit ultimately held in *Garcia* that plaintiffs did not establish a prima facie case, because they had failed to show an adverse impact, it did find that the defendant's English-only policy had a *disproportionate* impact. 998 F.2d at 1490*; see id.* at 1486 ("crux of the dispute" is whether policy is "adverse").

cases, the one at issue in this case, and also in *Garcia* and *Keith,* in which Plaintiffs contend that the challenged practice has an adverse impact on minorities because the practice harms a population that, for reasons unrelated to the defendant's conduct, is racially imbalanced, and the other, not at issue here, which contends that the defendant engages in a practice, usually a selection device, that disproportionately excludes minorities and thus causes the populations at issue to be racially segregated. Dkt. 175 at 17-18, 25 (citing cases). The second theory is more familiar in employment cases where, for example, the plaintiff contends that an employer's selection device excludes protected groups. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. at 424, 428-29 (1971). In the selection device type case, the statistical showing of racial disparity is demanding because its purpose is to show that the defendant's conduct caused protected groups to be excluded. *See Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002).

Much of MTC's legal analysis is entirely inapposite because it fails to appreciate this distinction. *See, e.g.*, Dkt. 197 at 18-19. The Ninth Circuit in *Garcia* and *Keith*, and other courts in conceptually indistinguishable funding challenges, make clear that disproportionality is established by looking to the percentage of minorities in the population of the adversely affected entity. Plaintiffs have easily satisfied the applicable standard.

a. MTC cannot dilute the disproportionality of its harmful funding practices on minorities by pointing to the aggregate numbers of minorities on BART or Caltrain.

Seeking to obscure the effect of its practices on the high concentration of minorities who ride AC Transit, MTC places heavy reliance on the fact that more minorities ride BART and Caltrain and that AC Transit's share of minorities when the riders of all three operators are combined is somewhat less than BART's. Dkt. 195 at 7; Dkt. 197 at 14. The second statement is simply a different way of stating the first, and both points are irrelevant. Resorting to aggregate numbers allows MTC to dilute the effect of its practice on the highly concentrated minority population on AC Transit by virtue of the fact that BART and Caltrain, with their significantly smaller proportion of minority riders, carry a larger number of riders overall. *See* Dkt. 166, Ex. 2

at 32-35. There is no basis for this approach.[25]

First, MTC is plainly wrong to assert that there is "no basis in law" for comparing the relative percentages of minorities on different transit operators. Dkt. 197 at 21:21-22; Dkt. 195 at 18. The Ninth Circuit's analysis in *Keith* and *Garcia* make clear that disproportionality is established in this case because AC Transit's ridership is overwhelmingly minority. *See* Dkt. 175 at 17-18, 25; *see infra* at Part 3.b(1). But to the extent broader comparisons are warranted, the caselaw is consistent that in a disparate impact funding case such as this, the disproportionality analysis looks to the relative percentage of minorities in the allegedly underfunded entity or entities, not, as MTC seeks to do, aggregate numbers of minorities. In *Powell*, the Third Circuit held that plaintiffs stated a disparate impact claim on the basis of the allegation that "school districts with higher proportions of non-white students receive less Commonwealth treasury revenues than districts with higher proportions of white students." 189 F.3d at 394.[26] Focusing on the racial make up of each transit operator makes sense "[b]ecause the actions challenged involve distributions to [transit operators] rather than to individuals." *Meek v. Martinez,* 724 F. Supp. 888, 899 ¶96 (S.D. Fla. 1989). It is irrelevant that the minorities who ride BART and Caltrain outnumber those who ride AC Transit. The question is relative percentages on each operator.

Second, reference to the transit operator that minorities disproportionately use does not convert this case into a challenge about "discrimination[] against transit systems" or a claim that status as an AC Transit rider is protected. *Cf.* Dkt. 197 at 21:18-19, 21:26; Dkt. 195 at 18:24-19:2. The crux of a disparate impact claim is that "the challenged policy appears benign because

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[25] Indeed, MTC has not used this approach itself prior to the filing of this lawsuit. Dkt. 166 Ex. 2 at 32 (Since 2001, "MTC itself [has] treat[ed] *proportional* concentration of minorities as the basis for defining 'Communities of Concern' in its RTP Equity Analysis.")

[26] Similarly, in *Robinson v. Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000), *aff'd,* 295 F.2d 1183 (10th Cir. 2002), another school funding case, the court held that plaintiffs could establish disparate impact by showing "that minority students are disproportionately enrolled in districts which receive less funding." *Id.* at 1140. The court in *Meek,* also a disparate impact funding case, used the same analysis – "comparing the funding received by the four highest and lowest percentage minority districts." 724 F. Supp. at 899 ¶ 96; *see also id.* at 906 ¶¶ 51-52.

it applies on its face to a group of individuals who are not members of a protected class" "[b]ut the implementation of that policy has a disproportionate adverse effect upon members of a class that *is* protected." *Sisemore*, 151 Cal. App. 4th at 1421. Thus, the court in *Sisemore* reversed an order sustaining a demurrer where plaintiffs challenged on disparate impact grounds a policy that discriminated against licensed home day care providers, ruling that policies which affected home day care operators "disproportionately affected women and families with children because those two protected classes comprise a much higher percentage of day care home operators in Santa Clara County than the percentages of those groups found generally in the County." *Id.* at 1423. Similarly, here, Plaintiffs do not contend that AC Transit riders are a protected class. But Plaintiffs do contend that MTC's refusal to fund operating shortfalls harms AC Transit riders, and that actions that harm AC Transit riders disproportionately affect minorities because minorities comprise a much higher percentage of riders on AC Transit than the percentage of minorities on public transit in general (78% v. 61%), or on well-funded transit operators such as BART and Caltrain, in particular (78% v. 53% and 50%, respectively). *See infra* Part II.B.3.b(2)(a).[27] MTC seeks to dismiss as legally insignificant the fact that AC Transit "happens to have predominantly minority riders." Dkt. 197 at 22:1-2; Dkt. 195 at 19:4. But that is precisely the point in this type of case.

Third, MTC complains that Plaintiffs "ignor[e] the non-white riders of BART and Caltrain" and "the white riders of AC Transit." Dkt. 197 at 20; Dkt. 195 at 17. This very

[27] MTC's reliance on *Carter v. CB Richard Ellis, Inc.*, 122 Cal. App. 4th 1313 (2004) (employee failed to establish prima facie case of disparate impact discrimination on the basis of reorganization plan that demoted administrative managers), is misplaced. As the *Sisemore* court explained, the plaintiff in *Carter* "made the erroneous assertion that administrative managers were a protected group." *Sisemore*, 151 Cal. App. 4th at 1422. For the reasons explained by the Court in *Sisemore*, *Carter* is distinguishable because neither the plaintiffs in *Sisemore* nor Plaintiffs in this case contend that home day care operators or AC Transit riders are a protected class. MTC also cites *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997), which holds that in disparate impact *age* discrimination claims, the alleged impact must affect individuals over 40, and not a subset of the protected class, such as individuals over 55. *Criley,* 119 F.3d at 105. As a result, a disparate impact age discrimination plaintiff cannot redefine the protected group to be a "sub-group" of the statutorily protected class. *Id.* Plaintiffs in this case are not redefining the protected group to be a "sub-group" of minorities who ride AC Transit.

argument is rejected by courts as routinely as it is made by defendants. In *Garcia,* the Ninth Circuit found that it was "beyond dispute" that an employer's English-only workplace policy had effects that "will be suffered disproportionately by those of Hispanic origin." 998 F.2d at 1486. It was of "no consequence" that not all Hispanic employees spoke Spanish or that some non-Hispanic workers spoke Spanish. *Id.* There is simply no requirement that the practice challenged in a disparate impact case "fall exclusively upon" a protected group. *De La Cruz v. Tormey*, 582 F.2d 45, 57 (9th Cir. 1978). "Challenges which rely upon disparate impact inevitably will involve consequences which are not restricted in their operation to one group or another. The essence of this sort of legal attack is imbalance and disproportionality." *Id.*[28] Indeed, in *Powell*, the Third Circuit rejected the very argument MTC makes here: "that plaintiffs' comparisons of [transit operators] are invalid because there are some white [riders on] the allegedly disadvantaged minority [transit operators] and some non-white [riders on] the allegedly advantaged white [transit operators]." *Id.* at 396. And in *Robinson*, another school funding case, the court explained that the defendant who emphasized non-minorities in the under-funded district "fail[ed] to recognize the nature of a disparate impact claim." 117 F. Supp. 2d at 1139.[29]

Fourth, and relatedly, MTC seeks to exculpate itself by pointing to the fact that minorities ride BART and Caltrain and thus benefit from MTC's funding practices. The Supreme Court has rejected this argument in the context of disparate impact claims:

> [The Civil Rights Act] does not permit the victim of a facially discriminatory policy to be told that he [or she] has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory.

Connecticut v. Teal, 457 U.S. 440, 455-56 (1982). "Congress never intended to give a

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[28] *De La Cruz* raised an equal protection claim. The court, as part of its analysis, examined whether plaintiffs had pleaded a "discriminatory effect," an element of an intentional discrimination claim, and relied on disparate impact cases to conclude that they had. *See, e.g., De La Cruz*, 592 F.2d at 51-53 (citing *Dothard v. Rawlinson*, 433 U.S. 321 (1977) & *Lau v. Nichols,* 414 U.S. 563, 568 (1974)); *Griggs*, 401 U.S. 424.

[29] *See also Keyes v. Sch. Dist. No. 1 Denver, CO*, 413 U.S. 189, 200 (1973) ("We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system.").

[defendant] license to discriminate against some [plaintiffs] on the basis of race . . . merely because he favorably treats other members of the [plaintiffs'] group." *Id.* at 455. For the same reason, Ms. Darensburg's or Ms. Hain's occasional use of BART does not defeat their claims. *Cf.* Dkt. 197 at 22; Dkt. 195 at 19.[30] Whether Plaintiffs receive equitable treatment when riding other operators simply cannot "undo" the harm they suffer from AC Transit service cuts.[31]

Finally, MTC's cases are inapt because they involve what MTC concedes to be the "typical disparate impact case," Dkt. 197 at 19; Dkt. 195 at 16, which involves a selection device that directly excludes protected individuals and thus causes segregation in the populations at issue.[32] As noted above, Plaintiffs rely on a different theory of disparate impact, the same kind at issue in *Garcia* and *Keith*. MTC argues for a statistical showing that is inapplicable to cases like this one, in which the plaintiff challenges a defendant's conduct as having an adverse impact on a group that for reasons unrelated to the defendant's conduct is disproportionately composed of

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[30] In any event, Ms. Darensburg and Ms. Hain ride BART infrequently, as it is too expensive for them to ride on a regular basis. Declaration of Syliva Darensburg in Support of Plaintiffs' Combined Reply Memorandum and Opposition re Motions for Summary Judgment and Summary Adjudication ("Darensburg Decl.") at ¶¶ 25-26; Declaration of Vivian Hain in Support of Plaintiffs' Combined Reply Memorandum and Opposition re Motions for Summary Judgment and Summary Adjudication ("Hain Decl.") at ¶ 26

[31] MTC's argument relating to Plaintiffs' occasional BART usage purports to rest on *Garcia*, which simply does not address this issue, and its assertion that in a proper statistical analysis of disparate impact, "no member of the protected class can be a member of the comparison group." Dkt. 197 at 22. While that general notion may be true in selection device type cases, where in many cases it would be illogical for a plaintiff both to be shut out by a hiring test and then also hired nonetheless, *see generally Connecticut v. Teal,* 457 U.S. 440 (1982) (in disparate impact challenge to written promotional exam that disproportionately excluded blacks, the Court *rejected* employer's "bottom line" defense that blacks promoted at higher rate than whites because plaintiffs had right to challenge discriminatory component of multi-component hiring process), it is completely inapplicable to this type of disparate impact case.

[32] *See Katz v. Regents of the Univ. of Cal.*, 229 F.3d 831, 836 (9th Cir. 2000) (statistics regarding adversely affected employees "failed to demonstrate causation"); *Criley,* 119 F.3d 102 (challenge to hiring plan that disproportionately excluded pilots over 55); *Frank v. County of Los Angeles,* 149 Cal. App. 4th 805, 820 (2007) ("plaintiffs presented no evidence that minorities were deterred from applying for LASD positions rather than County police"); *Carter*, 122 Cal. App. 4th at 1323-24 (explaining that purpose of statistical showing is "to show that the practice in question has *caused* the exclusion of applicants for jobs or promotions because of their membership in a protected group") (emphasis added) (internal quotation marks, citation omitted).

minorities. *See Garcia,* 998 F.2d at 1486; *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 937 (2d Cir. 1988); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights,* 558 F.2d 1283, 1290 (7th Cir. 1977). Unlike a selection-device type of case, a plaintiff in a *Garcia-Keith* type case like this one does not contend—and is therefore not required to show—that the defendant's challenged practice is causing the racial disparity. In *Garcia* for example, the Ninth Circuit found it "beyond dispute" that the English-only policy disproportionately affected those of Hispanic origin because the "vast majority" of workers who spoke another language and for whom English was not a first language were Hispanic. 998 F.2d at 1486. Plaintiffs were not attempting to argue that the employer's English-only policy *caused* Hispanics disproportionately to speak another language or not to speak English as a first language. Nor did the Court require them to make any such showing to establish disproportionality. In short, the purpose of the numerical showing in a selection device case is to demonstrate *causation* (i.e., that the practice is causing the racial imbalance); the purpose in a *Garcia-Keith* type case is merely to establish *disproportionality*.

b. The undisputed facts about the percentages of minority riders on Bay Area Transit operators demonstrate that the challenged practice *disproportionately* harms minority transit riders.

The undisputed evidence establishes that minority riders are disproportionately harmed by actions that harm AC Transit service. This is apparent when the analysis, as is appropriate, focuses only on AC Transit, but also when AC Transit's ridership is compared to a broader universe of operators.

(1) AC Transit's population establishes disproportionality.

The disproportionality of the impact of MTC's practice is obvious because of AC Transit's population. MTC's statistician concedes that minorities make up 78% of AC Transit riders and that it serves the highest concentration of minority riders than any other Bay Area transit operator. Dkt. 169, Ex. 45 at 10; Dkt. 189, Ex. A at 9-10. The analysis adopted by the Ninth Circuit in *Garcia* and *Keith* establishes disproportionality because the overwhelming majority of the affected population – here, the riders of the only transit operator to have persistent operating shortfalls – are members of a protected group. *See* Dkt. 175 at 17-18, 25. MTC makes

no effort to explain why *Garcia* and *Keith* are inapplicable.

MTC's effort to dilute the racially disproportionate impact of its actions by drawing other transit operators into the analysis has no legal basis. Indeed, the Ninth Circuit in *Keith* and the court in *Comm. Concerning Cmty. Improvement v. City of Modesto*, 2007 WL 1456142 (E.D. Cal. May 15, 2007) ("*CCCI*"), both rejected defendants' efforts to defeat plaintiffs' disproportionality showing by expanding the pool of supposedly affected individuals.[33] Here, it is appropriate to focus exclusively on AC Transit riders because they are "the persons who would benefit" if MTC funded operating shortfalls, *Keith* at 484, and the more "limited population for disparate impact proof," *CCCI* at *19, adversely affected by the conduct challenged. AC Transit, uniquely among Bay Area transit operators, has suffered a persistent operating shortfall across each of the last four RTPs. Dkt. 169, Ex. 22. That being so, AC Transit, uniquely among Bay Area transit operators, is affected by MTC's consistent refusal to fund operating shortfalls. And of its ridership, 78% are minorities, far more than the two-thirds found to establish disproportionality of effect in *Keith*. *Id*. As Plaintiffs' statistical expert explains: "Clearly, adverse policies or funding decisions affecting AC Transit service would disproportionately affect minority riders because AC Transit

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[33] In *Keith*, the plaintiffs challenged the disparate impact on minorities of a city's refusal to approve a low and moderate income housing project for residents displaced by freeway construction. 858 F.2d 467. The Ninth Circuit looked only to the racial make-up of the population that was adversely affected by the challenged decision (the displacees) and found a "racially discriminatory effect" because two-thirds of them were racial minorities. *Id*. at 484. Notably, the Ninth Circuit rejected the City's effort to define the adversely affected population more broadly, and instead concluded that it was appropriate to focus on "current Hawthorne displaces" because they were "the persons who would benefit from the state-assisted housing" that was made unavailable by the challenged action. *Id*. at 483-84. The analysis set forth by the Ninth Circuit in *Keith* makes clear that it is appropriate to rely exclusively on the racial make-up of the population adversely affected by the challenged decision or practice in establishing disproportionality.

In *CCCI*, plaintiffs brought a disparate impact challenge under Section 11135, contending that Latino neighborhoods received fewer and poorer public services than white neighborhoods. Relying on *Keith*, the court concluded that the plaintiffs could establish disparate impact discrimination where the neighborhoods adversely affected by the city's facially neutral zoning practice had predominantly Latino populations. *See CCCI*, 2007 WL 1456142, at *19. The court expressly noted that "*Keith v. Volpe* permitted the use of a more limited population for disparate impact proof." *Id*. (The court ultimately rejected the disparate impact claim under Section 11135 but on a ground unrelated to whether plaintiffs had established a prima facie case. *Id*.)

riders are approximately 2.1 to 3.5 times as likely to be minority than non-minority." Dkt. 165, Ex. 1 at 2.[34]

It bears emphasis that AC Transit serves the highest concentration of minority riders of all Bay Area transit operators. This fact alone establishes disproportionality. In *Meek,* 724 F. Supp. at 906, plaintiffs brought a civil rights challenge to Florida's formula for distributing federal funds for nutrition and other services for the elderly. The court held that the challenged funding policies had a disparate impact because the adversely affected district "has the highest concentration of minorities of any [planning and service area] in the state." *Id.* at 906, ¶¶ 51-52.

(2) Comparison of the riderships of AC Transit, BART and Caltrain establishes disproportionality.

Even if reference to some broader population were appropriate, MTC's practice of refusing to cover AC Transit's operating shortfalls clearly has a disproportionate effect on minorities. This is so because AC Transit has a significantly higher proportion of minority riders than BART or Caltrain. In addition, it is appropriate to focus on these three operators.

(a) AC Transit riders are significantly more minority than BART or Caltrain riders.

While AC Transit serves a population that is 78% minority, BART and Caltrain serve minority riderships of 53% and 50%, respectively. Dkt 189, Ex. A, at 10; Dkt 169, Ex. 45 at 10. In other words, the percentage of minorities on AC Transit is approximately 50% greater than the percentage of minorities on BART and Caltrain. Said another way, the percentage of white riders

[34] MTC attacks Plaintiffs' statistical expert, Prof. Berk, on the ground that he discussed only the demographics of various transit operators and did not have information about specific MTC policies and practices. *See, e.g.,* Dkt. 197 at 13. Plaintiffs submitted testimony from a transit finance expert to opine about MTC policies and practices and to explain how those policies and practices force AC Transit to cut service. *See generally* Dkt. 167 Plaintiffs also submitted testimony from Prof. Berk, a statistical expert, to analyze whether – if, as Mr. Rubin's declaration establishes, MTC's policies or practices cause harm to AC Transit riders – minorities are disproportionately harmed. *See generally* Dkt. 165. While MTC apparently faults Prof. Berk for not opining on matters beyond his expertise (such as MTC's policies and practices), Prof. Berk's limitation of his testimony to matters within the scope of his expertise underscores the admissibility of his expert testimony, (*See* Plaintiffs' Opposition to Defendant's Motion for Order to Exclude Expert Testimony, section III.B, filed herewith) contrasting starkly with the testimony of MTC's statistician, Mr. Boedeker, who admittedly has no expertise in transit matters. Dkt. 169, Ex. 45 at 60.

on BART and Caltrain is *more than double* that of AC Transit (46% on BART and 49% on Caltrain, but only 22% on AC Transit).

MTC emphasizes that BART and Caltrain both serve riderships that are made up of a majority of minorities. Dkt. 197 at 21. But this observation ignores the baseline of the Bay Area's population. AC Transit's ridership is substantially more minority than Bay Area transit riders across all operators (78% v. 61%). Compare Dkt. 169, Ex. 45 at 10 with Marcantonio Opp. Decl., Ex. 81. By contrast, BART (46%) and Caltrain (49%) serve riderships that are more white than Bay Area transit riders in general (39%). Dkt. 169, Ex. 45 at 10. While minorities make up a bare majority of the riders on BART and Caltrain (53% and 50%, respectively), *id.*, this is far below the two-thirds threshold found by the Ninth Circuit in *Keith* to establish disproportionality.[35] Thus, actions that harm BART and Caltrain riders would not give rise to a disparate impact claim as do actions that harm the disproportionately minority riders of AC Transit.

(b) AC Transit, BART, and Caltrain form an appropriate universe of analysis.

MTC, like many defendants in disparate impact cases, seeks to rely on a larger sample size and introduce other Bay Area transit operators to allow it to dilute the effects of its practices. But this is hardly a situation where an excessively small sample size "detract[s] from the value of (statistical) evidence." *Teamsters v. United States,* 431 U.S. 324, 339 n.20 (1977); *see also Knutson v. Boeing Co.*, 655 F.2d 999, 1001 (9th Cir. 1981) ("evidence of disparate impact unpersuasive" where sample size consisted only of 20). AC Transit, BART, and Caltrain together carry 176 million riders annually, more than 35% of all Bay Area transit riders**.** Dkt. 169, Ex. 20. The rationale for requiring a broader universe of analysis is simply inapplicable.

Further, to the extent a comparative analysis is called for, it is entirely appropriate to focus

[35] It is also far less than MTC's own threshold for "Communities of Concern," defined as 70% or more minorities. Dkt. 166, Ex. 2 at 32-33; Part II.B.3.b. In *Powell*, a challenge to Pennsylvania's formula for funding school districts, the court noted that "high proportion" minority school districts are described as those with 75% or more minority enrollment. 189 F.3d at 396. Under both of these criteria, AC Transit's ridership qualifies as "high proportion" minority and a "Community of Concern," while the riderships of BART and Caltrain do not.

on AC Transit, BART, and Caltrain. They are the largest single-mode (i.e., bus-only and rail-only) operators in the region.[36] Dkt. 167, Ex. 2 at ¶ 100 n.27. Moreover, their geographic service areas overlap substantially. *Id.* The first two agencies are further intertwined, both in funding and origin. A major source of operating funds for both agencies is the half-cent sales tax authorized by AB 1107. *See* Pub. Util. Code §§ 29140-29144.

(3) Comparison of the riderships of the seven largest Bay Area transit operators establishes disproportionality.

Even if a universe broader than AC Transit, BART, and Caltrain were appropriate, the undisputed facts still show that MTC's practice of refusing to fund operating shortfalls disproportionately affects minority riders. Ninety five percent of Bay Area transit trips are taken on seven operators. Dkt. 167, Ex. 2 at ¶ 99.[37] An analysis of these seven operators shows that MTC's practice of failing to fund the operating shortfalls that it identifies in the RTP disproportionately harms minority riders. This is so because MTC's practice necessarily harms the riders of those operators with operating shortfalls, and the transit operators with high concentrations of minority riders suffer by far from the largest operating shortfalls. Dkt. 167, Ex. 2 at ¶¶ 100-101 & Exs. F&G. MTC's practice also disproportionately disadvantages minorities because MTC funds a far greater percentage of total shortfall needs for the lower minority operators than the high minority operators.

The seven largest operators, from lowest to highest minority ridership are: Golden Gate (37% minority), Caltrain (50%), BART (53%), MUNI (58%), VTA (70%), Samtrans (70%), and AC Transit (78%). Dkt. 169, Ex. 45 at 10. These operators naturally divide into two groups,

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[36] It is particularly appropriate to focus on the region's main single-mode operators in the context of the effect of the specific practice at issue in this motion. The subject of this motion is MTC's funding of capital but not operating shortfalls. As MTC's own expert acknowledges, rail is inherently more capital intensive than bus. Dkt. 169, Ex. 44 at 16, ¶ 4. As a result, any preference for capital funding inherently prioritizes the needs of rail operators over bus operators. An analysis that includes multi-modal operators, *i.e.*, operators that have both rail and bus components and thus internally heterogeneous operating and capital needs, blurs the effect of MTC's refusal to fund operating shortfalls.

[37] MTC's statistical expert also found that an analysis of the top 7 largest operators was appropriate. Dkt. 189, Ex. B at 16.

those with minority riderships of 60% or less and those with minority riderships of 70% or more. This division is meaningful for two reasons. The overall population of Bay Area transit riders is 61% minority. Marcantonio Opp. Decl., Ex. 82 at [9]. In addition, MTC itself defines a population that is 70% or more minority as a "Community of Concern" for Title VI purposes. Dkt. 166, Ex. 2 at 32-33. Dividing the seven major operators along these lines, Golden Gate, Caltrain, BART, and MUNI all fall in the lower-minority concentration group, while VTA, Samtrans, and AC Transit make up the high-minority group. Both per rider and as a percentage of operating budget, the high-minority transit operators suffer from far larger operating shortfalls than the lower-minority transit operators.[38]

AC Transit had a higher operating shortfall as a percent of its operating budget (7.91%) than any of the lower-minority operators, which had operating shortfalls of 4.57% (Golden Gate), 3.78% (SF MUNI), 1.05% (Caltrain), and 0% (BART). Dkt. 167, Ex. 2 at ¶ 101(a). Indeed, the average operating shortfall for the three high-minority operators (including AC Transit) was 5.92% of their respective operating budgets, almost *three times* the average operating shortfall for the four lower-minority operators (2.0%). *Id.*, Ex. 2 at Ex. F.[39]

The figures are similarly stark on a per rider basis. AC Transit had a higher operating shortfall per rider ($0.60) than any of the lower-minority operators, which had operating shortfalls per rider of $0.13 (Caltrain and SF MUNI), $0.09 (Golden Gate), and $0.00 (BART). Dkt. 167, Ex. 2 at ¶ 101(b). Indeed, AC Transit had a per rider operating shortfall more than 4.5 times larger than the highest per rider operating shortfall of all the lower-minority operators ($0.60 as compared to $0.13). *Id.*, Ex. 2 at Ex. G. The average operating shortfall per rider for the high-

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[38] Because operators vary in size, it makes sense in comparing the relative magnitude and impact of an operating shortfall not to look at the operating shortfall in absolute numbers but as a percentage of operating budget and also on a per rider basis. Dkt. 167, Ex. 2 at ¶101.

[39] MTC observes that Caltrain had an operating shortfall in the 2005 RTP. Dkt. 195 at 15:7-8. Caltrain suffered an operating shortfall in only one of the last four RTPs, and it was measured against a baseline of *expanded* new "Baby Bullet" service. *See* Dkt. 175 at 12. This anomaly occurs because of MTC's definition of the "baseline" against which shortfalls are measured. *See* Dkt. 167, Ex. 1 at ¶ 94. It does not change the fact that Caltrain did not have a shortfall in the operating funds needed to maintain its *existing* level of service.

minority operators was $0.56, more than *five times* the average operating shortfall per rider for the lower-minority operators ($0.10). *Id*.

Finally, while MTC refuses to fund operating shortfalls, it channels billions of dollars in the RTP process to fund capital rehabilitation shortfalls. Both operating and capital rehabilitation funds are needed to preserve the existing baseline of service. Dkt. 167, Ex. 2 at ¶ 102. After identifying in its RTP process the shortfalls in each operator's budget for funds needed to operate and maintain the existing baseline of service, MTC consistently provides funds to alleviate capital but not rehabilitation shortfalls. *Id.,* Ex. 1 at ¶¶ 92-97. In the 2005 RTP, MTC funded only 8.07% of the total shortfall needs of the high minority operators, but 27.4%, more than *three times*, the total shortfalls needs of the lower minority operators. *Id.,* Ex. 2 at ¶ 102 & Ex. H. Although MTC funded a portion of AC Transit's total shortfall (the capital rehabilitation component), MTC covered only 14.02% of AC Transit's total shortfall, but 43.61%, again, approximately *three-times*, the total shortfall needs of BART. *Id.* Thus, MTC funds shortfalls at three times the rate for lower minority operators that it does for high minority operators.

Following the analysis in *Powell* and *Meek* and comparing the funding needed by and received by the high minority and lower minority operators, *Powell*, 189 F.3d at 394; *Meek*, 724 F. Supp. at 899 ¶96, the undisputed evidence demonstrates that high-minority operators, and in turn their disproportionately minority riders, are disadvantaged by MTC's shortfall funding practice. MTC's practice of refusing to fund operating shortfalls hurts riders whose transit operators suffer from the largest operating shortfalls, because those shortfalls mean cuts in existing service levels. It is undisputed that the high-minority operators suffer substantially greater operating shortfalls than the lower-minority operators, both as a percentage of total operating budget (three times higher) and on a per rider basis (five times higher). In addition, MTC's practice of funding capital but not operating shortfalls also disproportionately disadvantages minority riders: It funds total shortfalls at a rate three times greater for the lower minority operators than the higher minority operators.

c. The undisputed evidence demonstrates that the impact of MTC's refusal to fund operating shortfalls is *adverse*.

Equally meritless is MTC's contention that Plaintiffs' have not shown the impact on them to be adverse. Dkt. 197 at 22-25; Dkt. 195 at 19-24. As set forth in Plaintiffs' opening brief, Plaintiffs are denied the transit opportunities afforded to the relatively white ridership of other transit operators as a result of the service cuts and fare raises cause by MTC's funding practice. *Powell*, 189 F.3d at 395 (funding disparities "limit[] the[] educational opportunities" of minority students); *De La Cruz*, 582 F.2d at 53 (denial of equal "educational opportunities" based on lack of childcare facilities); *see* Dkt. 175 at 24. Service cuts harm Plaintiffs by increasing their travel and wait times, stranding them in unsafe neighborhoods, impairing their ability to get to and from work and other critical destinations, and forcing them to purchase cars and thus incur unwanted costs.[40] *See infra* Parts II.D.1.a., II.E.2.a.. Relying on Second Circuit authority that has not been followed in the Ninth Circuit, MTC contends that Plaintiffs are required to, but cannot establish "an appropriate statistical measure" of impact. Dkt. 195 at 20. The Ninth Circuit has never required a quantitative measure of the harm of adverse impact. In any event, the evidence establishes numerically meaningful measures of the adverse impact of MTC's shortfall practice on Plaintiffs and the Class.

MTC cites no cases in which the Ninth Circuit required a statistical demonstration of the impact. In *Keith*, for example, the Ninth Circuit did not require plaintiffs to quantify the harm that resulted from the defendant's failure to approve the low and moderate income housing project. Similarly, in *Larry P.*, plaintiffs successfully brought a disparate impact challenge to the use of "IQ tests" to place students in classes for the "educable mentally retarded" ("E.M.R."). 793 F.2d at 972. The Ninth Circuit affirmed the district court's finding that improper placement in E.M.R. classes had "a definite adverse effect, in that E.M.R. classes are dead-end classes which de-emphasize academic skills and stigmatize children improperly placed in them." *Id*. at 983. Again, the Court required no statistical quantification of the harm.[41]

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[40] *See, e.g.,* Darensburg Decl. at ¶¶ 9, 14, 17-20; Hain Decl. at ¶¶ 13, 16-17, 20, 22-25; Casias Decl. at ¶¶ 5, 8, 12-13; Hernandez Decl. at ¶¶ 13-15, 21; Chavez Decl. at ¶¶ 9, 13, 15-16; Martinez Decl. ¶¶ 9, 12-13, 16-17, 21-22, 27-32, 37-38; Robinson Decl. at ¶¶ 9-13; Jones-White Decl. at ¶¶ 7-13, 15.

[41] One of MTC's own cases (Dkt. 197 at 22) makes clear no quantification of harms is necessary. In *Coalition of Concerned Citizens v. Damian*, 608 F. Supp. 110 (S.D. Ohio 1984), a

In any event, even if this Court were to expand the disparate impact showing beyond what the Ninth Circuit requires and adopt the standard of the Second Circuit, the evidence establishes the requisite "meaningful measurement," *New York City Env. Justice Alliance v. Giuliani*, 214 F.3d 65, 72 (2d Cir. 2000), both of MTC's conduct and also its harm on minorities. In fact, the evidence before this Court establishes three "meaningful measurements" that illustrate the impact of MTC's funding practices: operating shortfalls, the percentage of total shortfall (operating plus capital rehabilitation) that MTC funds in the RTP, and service level reductions. These metrics quantify precisely how MTC's refusal to fund operating shortfalls, juxtaposed against its funding of capital rehabilitation shortfalls, disproportionately causes minority riders to suffer service cuts.

Operating shortfalls: An operating shortfall, by definition, measures the extent to which an operator is unable to deliver its existing baseline level of service. Dkt. 167 at ¶ 22; *see generally id.,* at ¶¶ 18-24. As a result, "the existence and size of a present or forecasted operating shortfall is both an excellent indicator of whether an operator will be able to continue to provide its existing level of service, and a useful measure of the degree to which it will be forced to cut existing service." *Id.*, Ex. 2 at ¶¶ 94; *see also id.*, Ex. 2 at ¶¶ 90-93, 101(a).[42] Although both operating and capital rehabilitation funds are necessary to preserve the existing system, operating shortfalls are a better predictor of immediate service impacts. "[U]nrelieved capital rehabilitation shortfalls are unlikely to have an immediate significant impact on the existing system, whereas unrelieved operating shortfalls pose serious and immediate threats to the existing system in the form of service cuts, fare increases, and other impacts on the quantity and quality of transit

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disparate impact challenge to a highway construction project, the court found a prima facie case where unquantified "disruptions and negative impacts of highway construction and after the highway is operating will fall primarily upon neighborhoods that are mostly comprised of minorities." *Id.* at 127 (affected communities were 50%-90% minority). In other words, where, as here, the challenged conduct disproportionately affects minority communities, even without a quantification of the impact, plaintiffs establish a prima facie case.

[42] As discussed above, MTC has long acknowledged that unfunded operating shortfalls in the RTP translate into service reductions. *See supra* Part II.B.2; Dkt. 175 at 15, 21-23. Any effort by MTC to introduce self-contradicting testimony (particularly on reply) cannot create a genuine fact dispute. *See UA Local 343*, 48 F.3d at 1473.

services provided." *Id.* at ¶ 24; *id.*, Ex. 1 at ¶ 83 & Ex. 2 at ¶¶ 92-94.

The evidence also establishes that high-minority transit operators, especially AC Transit, suffer from operating shortfalls. As discussed above, AC Transit is the only operator to have suffered persistent operating shortfalls in each of the last four RTPs. Dkt. 169, Ex. 22. BART had *no* operating shortfall in any of these RTPs and Caltrain suffered a shortfall in only one. *See* Dkt. 175 at 11-12.[43] In addition, of the seven major operators that account for 95% of all Bay Area trips, high-minority operators suffer substantially greater operating shortfalls than lower-minority operators, both as a percentage of total operating budget (three times higher) and on a per rider basis (five times higher). *See supra* Part II.B.3.b(3). These metrics are an appropriate way to quantify and compare operating shortfalls across operators. Dkt. 167, Ex. 2 at ¶101.

Percentage of total shortfall funded by MTC in the RTP: After identifying in the initial stages of its RTP process the *total* shortfall in funds each operator will encounter to preserve and maintain the existing system, *i.e.*, both operating and capital rehabilitation, MTC then assigns funds to alleviate the capital, but not the operating, component of the total shortfalls. *See* Dkt. 167 at ¶¶ 25-41; *id.*, Ex. 1 at ¶¶ 92-97. Because both operating and capital rehabilitation funds are needed to preserve the existing system, "the degree to which MTC covers operating and capital rehabilitation shortfalls in the RTP process measures the amount of assistance MTC provides to operators to enable them to continue to operate and maintain the existing system." *Id.*, Ex. 2 at ¶ 94. "This analysis directly tracks MTC's RTP process, in which it assesses the costs of maintaining and operating the existing transportation system over the 25-year horizon of the RTP and then assigns revenues to address those needs." *Id.* at ¶ 102.

MTC disproportionately funds the total shortfalls of lower-minority operators, starving high-minority operators of the funds they need to maintain their existing baseline of service. In the 1998 RTP, MTC covered only 45% of AC Transit's total shortfall, while covering 75% of

[43] In fact, MTC defined "existing" baseline service levels in such a manner that it measured operating shortfalls for the lower-minority operators against expanding service levels, while measuring those same shortfalls against decreasing service levels for AC Transit. Dkt. 167, Ex. 2, ¶ 102, n.29.

BART's and 75% of Caltrain's. In the 2001 RTP, MTC covered only 87% of AC Transit's total shortfall, as compared to 100% of BART's and 100% of Caltrain's. *See* Appendix 4; Dkt. 167 at ¶ 27; *id.*, Ex. 1 at ¶ 95. And in the 2005 RTP, MTC covered only 14% of AC Transit's true total shortfall but 44% of BART's. *See* Appendix 4; Dkt. 167 at ¶ 39. In addition, of the seven major operators, MTC funded only 8% of the total shortfall of the high-minority operators, but 27%, more than three times, the total shortfall of the lower-minority operators. *Id.*, Ex. 2 at ¶ 102 & Ex. H.

Service cuts: "[T]he most meaningful measure of the amount of service that a transit agency provides to transit riders is 'Vehicle Revenue Miles' ('VRMi')." Dkt. 167, Ex. 1 at ¶ 102. VRMi measures "[t]he miles that vehicles actually travel while in revenue [i.e., passenger] service." *Id.*[44] The evidence demonstrates that AC Transit riders have experienced service level cuts over the same period in which riders of other transit operators, especially BART and Caltrain, have enjoyed substantial expansion in service levels. Over the period that MTC prepared and adopted its last four RTPs, AC Transit riders suffered service level declines of 10% while BART riders enjoyed a nearly 50% increase in service levels and Caltrain riders enjoyed an 80% increase. Dkt. 167 at ¶¶ 11-12; *id.*, Ex. 1 at ¶¶ 103, 106; *see* Dkt. 175 at 6-7. Even looking just to the period since MTC began to prepare its most recent RTP (2002-03 to the present), AC Transit bus riders experienced service level declines of 10% while BART and Caltrain riders benefited from growth of 4% and 27%. Dkt. 167 [Rubin Decl.], Ex. 2 at ¶ 152. Using the 10-year period selected by MTC's expert, AC Transit riders suffered cuts of 3%, while the Bay Area total of all operators (without AC Transit) grew by 27%, BART's rail service grew by 37% and Caltrain's rail service grew by 62%. *Id.* at ¶ 155.[45]

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[44] Although service can also be measured in vehicle revenue hours, VRMi is a "more meaningful measure" of service provided to transit riders because "[p]eople ride public transit to get one from place to another, not to find ways to spend time, and so the metric that captures the distance traveled more closely reflects the purpose for which public transit exist (transit users board buses and trains to ride X miles, not to ride for Y minutes)." Dkt. 167, Ex. 1. MTC has offered no evidence that VRMi is not a meaningful measure of the amount of service available to transit riders; to the contrary, MTC routinely uses that metric itself. Dkt. 169, Ex. 20.

[45] Although MTC's statistician purported to compare AC Transit service (both in terms of revenue vehicle miles and revenue vehicle hours), his analysis was highly flawed because, for

These metrics meet the Second Circuit standard articulated in *New York Urban League v. New York*, 71 F.3d 1031, 1038 (2d Cir. 1995) ("appropriate statistical measure[s]") and *New York City Env. Justice Alliance,* 214 F.3d 65, 72 ("meaningful" "measurement"). In *New York Urban League*, plaintiffs contended that the relatively minority ridership of the subway and bus system shouldered a "disproportionately high share of the cost of operating the transportation system they use," compared to the white riders on the commuter lines. 71 F.3d at 1035. The district court preliminarily enjoined a proposed fare increase after finding that it would increase the "farebox recovery ratio" by a greater percentage on the subway and bus lines than on the commuter lines. *Id.* at 1037. The Second Circuit reversed on the ground that the district court had failed to make any "factual findings supporting . . . selection [of farebox recovery ratio] as an appropriate statistical measure of the subsidization of transportation systems." *Id.* at 1038.

In this case by contrast, the evidence demonstrates that operating shortfalls are a "reliable indicator" of whether a transit operator will need to cut its existing baseline of service. *Id.*; Dkt. 167, Ex. 2 at ¶ 94. Because AC Transit, the operator with the highest concentration of minorities, is also the only operator to have suffered operating shortfalls in each of the last four RTPs, Dkt. 169, Ex. 22, and operating shortfalls disproportionately afflict high-minority transit operators, MTC's refusal to fund this type of shortfall in the RTP disproportionately affects minorities. Further, the percentage of total shortfalls that MTC funds in the RTP "is directly calculated to quantify the amount of assistance MTC provides to operators to enable them to continue to provide existing service." Dkt. 167, Ex. 2 at ¶ 8(c).[46] Unlike *New York Urban League*, where the plaintiffs provided no evidence that their "farebox recovery" metric accounted for "[t]he different

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example, he aggregated data for different transit modes, completely ignoring the varying carrying capacity of each mode. *See* Dkt. 167, Ex. 2 at ¶¶ 141-42. MTC has offered Mr. Boedeker as a statistical expert only and not an expert on transportation matters. Dkt. 169, Ex. 45 at 60.

[46] Recognizing that rail operators have proportionately higher capital costs than bus operators, Plaintiffs have not sought to skew the analysis by comparing dollar to dollar the amounts assigned by MTC in funding shortfalls. Instead, Plaintiffs use of a percentage figure captures the extent to which MTC provides each operator with the funds it needs to operate and maintain its existing system. Because this percentage figure is based on each operator's needs, there is no distortion in the analysis based on the higher absolute costs of preserving a rail system.

costs associated with the two systems" under comparison, the percentage of total shortfall funded by MTC in the RTP is an "appropriate statistical measure of the subsidization of transportation systems." *New York Urban League,* 71 F.3d at 1038. This metric demonstrates that MTC disproportionately starves the transit operators used by high minority operators.

In *New York City Env. Justice Alliance*, the plaintiffs challenged the City's proposed sale or destruction of community gardens, which were disproportionately located in minority neighborhoods. 214 F.3d 65. The Second Circuit found the plaintiffs were not likely to succeed on their claim because, in their attempt to compare the relative loss in access to "open space" of white and minority communities, they arbitrarily excluded Central Park and other regional parks which were "located adjacent to minority communities" from their definition of "open space." *Id.* at 71.

In this case, Plaintiffs have established as a threshold matter that minorities are disproportionately harmed by MTC's shortfall practice because operating shortfalls disproportionately afflict their transit operators. But unlike the plaintiffs in *New York City Env. Justice Alliance,* they have gone beyond this threshold showing and also identified a meaningful measurement of the harm that flows from MTC's practice – reductions in service levels, as quantified by Vehicle Revenue Miles. This metric does not arbitrarily exclude information about service levels that would distort the degree of service reductions. By comparing the service levels of the high-minority operators (including AC Transit) with that of lower-minority operators (including BART and Caltrain), Plaintiffs have established a meaningful measurement of the differential impact experienced by minority transit riders.

MTC's *only* criticism of Plaintiffs' service level data is that they represent "an aggregate measure of revenue miles, not the effects on AC Transit's minority riders." Dkt. 195 at 23. In other words, MTC contends that Plaintiffs must prove that cuts occurred along the lines that AC Transit minority riders use. This argument is legally incorrect and factually misplaced.[47]

[47] First, MTC cites no caselaw to support such an atomized analysis, which is merely a reiteration of MTC's meritless effort to disaggregate riders from the transit operator they disproportionately use. But the caselaw is clear that in a disparate impact funding cases such as this, the under-funded entity is the correct unit of analysis, *see Powell,*189 F.3d at 394; *Robinson*, 117 F. Supp. 2d at 1140; *Meek,* 724 F. Supp. at 899 ¶96, 906 (¶¶ 51-52), and there is simply no

d. MTC's remaining arguments do not negate Plaintiffs' prima facie case or warrant judgment as a matter of law in MTC's favor on any of Plaintiffs' claims.

MTC makes two additional arguments regarding Plaintiffs' disparate impact claim, neither of which warrant denial of Plaintiffs' narrow summary adjudication motion on the prima facie case of disparate impact, or granting MTC's broad motion on any of Plaintiffs' claims.

(1) MTC's Analysis of Discretionary Funds.

MTC contends that its statistician, Mr. Boedeker, "demonstrated that there is no correlation between MTC's allocation of discretionary funds and race." Dkt. 197 at 25:8-9; *see also* Dkt. 195 at 24. MTC's "statistical" analysis of "discretionary funds" is immaterial to Plaintiffs' summary adjudication motion, because it goes not to Plaintiffs' prima facie case, but to MTC's rebuttal. On the other hand, this contention does not support summary judgment in MTC's favor because both its factual predicate and its conclusion are incorrect, and at the very least, disputed.

The relevance of Mr. Boedeker's conclusion to this case depends on the premise that MTC cannot cover operating shortfalls because it does not have "discretion" over funds that would enable it to do so. Even if that premise were not contradicted factually by MTC's own statements – as it is – it is legally irrelevant to Plaintiffs' motion because it addresses MTC's rebuttal burden of "business necessity," not Plaintiffs' prima facie case. The thrust of the argument, in other words, is that MTC does not have "discretion" over funds that it could use to cover AC Transit's operating shortfall, and that it is therefore impossible for MTC to cover it. As

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requirement that plaintiffs provide a more detailed breakout of the impact within the under-funded entity. The Second Circuit caselaw on which MTC relies reinforces this conclusion. The court in *New York Env. Justice Alliance* explained that the plaintiffs should have (but did not) provide a measurement that "compared" the impact on "minority communities" with the impact on "non-minority communities." 214 F.3d at 71. The court faulted plaintiffs' measurement, not because it provided information about overall access to "open space" by each of the entire neighborhoods at issue, but that it misleadingly excluded certain parks from the definition of open space. In other words, the court did *not* require a breakdown about who, within particular minority neighborhoods, went to which parks. Under *New York Env. Justice Alliance*, all that is required is that the metric meaningfully measure the harm to the *overall* minority entity, in that case neighborhoods, here, transit operators.

Second, Plaintiffs have demonstrated the effects of service cuts on minority riders. *See infra* Part II.D.1.a.

already noted earlier, this defense is immaterial to Plaintiffs' motion. *See* Part II.B.1.a., *supra*.

Moreover, the factual predicate of Mr. Boedeker's analysis – that MTC lacks control over sufficient funds to cover AC Transit's operating shortfall – is simply incorrect. Mr. Boedeker, who has no qualifications in transportation finance,[48] includes in his analysis only the funds that MTC included in four annual "Discretionary Funding Reports" (Dkt. 172-5 at 14-16) for the period from FY 2002-03 to FY 2005-06. Dkt. 189, Ex. A at 14, ¶ 19. But the issue with respect to MTC's ability to cover shortfalls is its *control* over funds, and as Plaintiffs' transit finance expert explains, "MTC controls many funds not included in these reports." Dkt. 167, Ex. 2 at ¶ 61; *see also id.* at ¶¶ 67-82; *id.*, Ex. 1 at ¶¶ 115-53, 163-69.[49] When asked how MTC defines "discretionary" (which is not a term of art in this context, Dkt. 167, Ex. 2, ¶64, its Deputy Executive Director testified that "[i]t depends because discretionary is used depending on the fund source in different ways." Marcantonio Opp. Decl., Ex. 22 at 29:24-30:5. In fact, MTC itself has specifically acknowledged its "control" over funding sources that it excludes from its "Discretionary Fund Reports." *Id.*, Ex. 2 at ¶¶ 65-66.[50]

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[48] MTC expressly does *not* offer Mr. Boedeker as a "transportation finance expert" Dkt. 169, Ex. 45 at 60. He is not qualified to opine on basic questions such as the degree of MTC's control over funding sources and made no independent assessment of which funds should be included on the "discretionary" list. *Id.* at 15.

Plaintiffs reserve the right to move to exclude Mr. Boedeker's testimony at trial given his self-acknowledged lack of expertise in transportation finance. But there is no need to reach the question of his qualifications at this juncture because Mr. Boedeker's "discretionary funds" analysis is not material to Plaintiffs' summary adjudication motion and raises fact disputes as to MTC's motions.

[49] Mr. Rubin has identified a number of other flaws in Mr. Boedeker's analysis. For instance, it looks only at a year-by-year "snapshot" of fund allocations. Because capital investments are, in transportation finance jargon, "lumpy," *i.e.*, not spread out evenly, such short-term snapshots provide a distorted analysis. Dkt. 167, Ex. 2 at ¶ 83. MTC's other expert agrees that transportation funding requires a long-term analysis. Dkt. 190, Ex. A at 14-15, ¶ 1. In particular, Mr. Boedeker's analysis of "discretionary" funds does not measure the extent to which AC Transit (or any other high-minority operator) has sufficient funding to continue delivering its existing levels of service, much less does it compare that with the extent that lower-minority operators do. *See* Dkt. 167, Ex. 2 at ¶¶ 60-132, esp. ¶¶ 103-132. That being so, his conclusion is incapable of raising a disputed issue of fact material to Plaintiffs' prima facie showing with respect to the disparate impact of MTC's practice of failing to fund operating shortfalls needed to preserve existing service levels.

[50] Thus, internally, MTC distinguishes clearly between "discretionary funds" and "funds

Nor does Mr. Boedeker's conclusion of "no correlation" between "discretionary funds" and race follow as a matter of statistics. *Cf.* Dkt. 195 at 24. For the reasons explained by Plaintiffs' statistical expert "whether there is a causal relationship between race of ridership and funding is neither addressed nor answered by Boedeker's analysis." Dkt. 165, Ex. 2 at 4. Prof. Berk identifies various "incorrect assumptions" in Mr. Boedeker's analysis and concludes that "it is very doubtful" that the analyses "convey any useful information." *Id.* at 5. In short, at a bare minimum, MTC's "discretionary funds analysis" gives rise to genuine disputes of material fact over what funds MTC controls, the proper time-horizon for analyzing allocations of funds, and the statistical utility of the analysis even setting aside the flawed transportation assumptions on which they rest. Summary adjudication of any discrimination claim arising out of MTC's allocation of "discretionary funds" is therefore inappropriate. *See Scharf v. U.S. AG*, 597 F.2d 1240, 1243 (9th Cir. 1979) (reversing trial court's grant of summary judgment where "parties are entitled to have the trier of fact . . . pass judgment on the sufficiency of the [expert testimony]"). These fact disputes have no bearing on Plaintiffs' motion, on the other hand, because they only relate to MTC's rebuttal defense of economic impossibility.

(2) MTC's Abstention-Deference Defense.

MTC raises an amorphous abstention-deference defense. Dkt. 197 at 25; Dkt. 195 at 24-25. Plaintiffs do not invite this Court to "substitute" its judgment for MTC's, merely to examine whether MTC's practices are discriminatory – a role courts have historically assumed where, as here, important rights are at stake, and even where complex questions of public policy and public finance are involved. *See, e.g., Brown v. Bd. of Educ.,* 347 U.S. 483 (1954); *Serrano v. Priest*, 18 Cal. 3d 728, 768 (1976) (invalidating state scheme for school financing and declining to defer to defendant's invocation of the need for "local control of fiscal and educational matters"); *see also Aguilar v. Felton*, 473 U.S. 402 (1985) (finding New York City's use of federal funds for certain educational purposes unconstitutional);[51] *Hills v. Gautreaux*, 425 U.S. 284 (1976) (approving of

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under MTC's control." Marcantonio Opp. Decl., Ex. 36 at 2.

[51] On remand, the district court entered a permanent injunction against the Board of Education governing its use of public funds. *See Agostini v. Felton,* 521 U.S. 203, 212 (1997).

remedial order requiring local and federal housing authorities to take corrective action to remedy discrimination in public housing); *Cobell v. Norton,* 240 F.3d 1081 (D.C. Cir. 2001) (finding federal government's fiduciary duties to manage Indian trust accounts judicially enforceable and remanding case so federal government could manage Indian trust accounts under federal court supervision).

MTC's expertise in transportation issues does not shield its discriminatory conduct from judicial scrutiny. *Arlington Heights*, 429 U.S. at 265-66 ("racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."); *see, e.g., Thomas S. v. Flaherty,* 902 F.2d 250, 252 (4th Cir. 1990) (rejecting state agency's argument that district court should have accepted conclusions of its mental health treating professionals or hospital accreditation bodies regarding acceptable treatment standards). But courts are familiar with the job of balancing institutional interests and individual rights. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319 (1976); *Johnson v. Gardner,* 986 F.2d 1521 (9th Cir. 1993) (en banc) (rejecting prison's "security" "justification" for challenged policy).[52]

MTC's transportation justifications for its funding practices are not before the Court on Plaintiffs' motion for summary adjudication, which focuses only their prima facie case. Because there are numerous genuine fact disputes surrounding its assertions of "transportation necessity," those disputes must be reserved for trial. *See supra* Part II.B.1.a.

Over a decade later, the Supreme Court vacated the injunction after changing the substantive law, not because of any error in issuing the injunction. *Id.*

[52] MTC's cases do not support a grant of summary judgment based on deference to its administrative expertise. *See e.g. Dandridge v. Williams*, 397 U.S. 471 (1970) and *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1 (1973), stand for the unexceptional proposition that, where (unlike this case) no suspect classification is at issue, the equal protection clause demands only rational basis review. In the absence of a constitutional violation, courts are naturally loath to intervene. *Gay v. Waiters' & Dairy Lunchmen's Union*, 694 F.2d 531, 550 (9th Cir. 1982), merely found that the plaintiffs' evidence failed to establish a prima facie case of disparate treatment. And *Committee for a Better N. Phila. v. Southeastern Penn.,* 1990 WL 121177 (E.D. Pa. 1990), applied the deferential and now-much maligned "business justification" standard set forth in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989), that prompted an act of Congress to supersede. *See supra*, Part II.A.2., n.5.

C. AMPLE EVIDENCE DEMONSTRATES THAT AT THE VERY LEAST GENUINE ISSUES OF MATERIAL FACT EXIST AS TO MTC'S DISCRIMINATORY INTENT.

The Prescribed "Sensitive Inquiry" Into The Totality Of The Direct And Indirect Evidence Of Discriminatory Intent Is Ill-Suited To Disposition by Summary Judgment.

For purposes of "[d]etermining whether invidious discriminatory purpose was a motivating factor," the U.S. Supreme Court has prescribed "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Because "'the ultimate question [regarding discriminatory purpose] is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by a factfinder, upon a full record,'" a plaintiff "need produce very little evidence in order to overcome" a defendant's motion for summary judgment in an intentional discrimination case. *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1124 (9th Cir. 2000) (citation omitted) (employment discrimination). As MTC agrees, the inquiry looks to the "totality of the relevant evidence," Dkt. 195 at 12 (quoting *Arlington Heights*, 429 U.S. at 266), and the "cumulative impact" of that evidence must be weighed as a whole. *Diaz,* 733 F.2d at 674 ("in making its determination in respect to the board's intent, the district court erred in failing to give weight to the cumulative impact of the evidence"). Accordingly, where, as here, a plaintiff has come forward with a range of indirect evidence of discriminatory intent, the need for trial is especially great, as the "weight [of that evidence] depends upon all of the circumstances involved in the case." *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 555 (9th Cir. 1982).

The *Arlington Heights* Court catalogued illustrative "subjects of proper inquiry in determining whether racially discriminatory intent existed." 429 U.S. at 268. It began by noting that discriminatory *effect* is relevant proof of intent, *id.* at 265 (disproportionate impact, while "not the sole touchstone of an invidious racial discrimination," "is not irrelevant") (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)), and "may provide an important starting point." *Id.* at 266. The relevance of evidence of discriminatory effect is particularly heightened where that effect is the *foreseeable* outcome of the challenged practice or decision. *Dayton Bd of Educ.*

v. Brinkman, 443 U.S. 526, 536 n.9 (1979) ("proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose"). Indeed, where "the adverse consequences are *clearly identified and repeatedly articulated to the decisionmaking body*, the inevitability of the adverse effects provides *a strong inference* of illegitimate intent." *Diaz v. San Jose Unif. Sch. Dist.*, 733 F.2d 660, 663 n.1 (9th Cir. 1984) (en banc) (citing *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 462 n.11, 463 n.12 (1979) (emphasis added)).

The *Arlington Heights* Court addressed five other illustrative indicia of discriminatory intent. Three relate to the history and chronology of the challenged decision or practice: the historical background of the decision ("particularly if it reveals a series of official actions taken for invidious purposes," *Arlington Heights*, 429 U.S. at 267); the specific sequence of events leading up to the challenged decision (which "also may shed some light on the decisionmaker's purposes," *id.*); and the legislative or administrative history (which "may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports," *id.* at 268). The Court also identified "departures" from norms of two kinds, procedural and substantive: "departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role," while "[s]ubstantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.* at 267.

The *Arlington Heights* Court did not "purport[] to be exhaustive" in its catalogue. Subsequent decisions have identified other "subjects of proper inquiry in determining whether racially discriminatory intent existed," *id.* at 268, augmenting its factors to include evidence of dissembling and cover-up, and of broken promises. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), an age discrimination case, the Court held that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* The Court explained that "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the [defendant] is dissembling *to cover up a discriminatory*

purpose." *Id*. (emphasis added).[53]

In *Diaz*, the 9th Circuit, sitting en banc in a school segregation case, found segregative intent where the defendant was "continuously aware that it had an affirmative duty to desegregate under state law" *(id*. at 665) yet "continued to justify actions that maintained segregation . . . ." *Id*. at 667. Also probative of the defendant's forbidden intent was evidence that it "repeatedly promised the public and state officials that it would desegregate its schools," and "consistently refused to implement suggestions for desegregation." *Id*. at 674.

Plaintiffs' Evidence Of Discriminatory Intent Is More Than Sufficient To Overcome MTC's Summary Judgment Motion.

Plaintiffs came forward with extensive evidence of intent in the declarations of Prof. Sanchez (Dkt. 166) and Mr. Rubin (Dkt. 167) – evidence that MTC simply ignores. *See* Dkt. 195 at 11-13. We summarize this and related evidence in the *Arlington Heights* categories.

Actual And Foreseeable Disparate Impact.

Prof. Sanchez and Mr. Rubin demonstrate the "important starting point" of the inquiry, the discriminatory *effect* of MTC's actions (*Arlington Heights*, 429 U.S. at 266), as well as MTC's continuing execution of "actions having foreseeable and anticipated disparate impact." *Columbus Bd. of Educ*., 443 U.S. at 464. MTC knew early on that AC Transit carried a disproportionately minority ridership,[54] that BART and Caltrain carried a disproportionately white ridership,[55] and

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[53] As a matter of "general principle[s] of evidence law," the Court reasoned, "a party's dishonesty about a material fact" permits the trier of fact to infer a discriminatory purpose. *Reeves* at 147 (citing *Wright v. West*, 505 U.S. 277, 296 (1992)); s*ee also Keith,* 858 F.2d at 484 (asserted reason for denying housing project was "pretextual"); *U.S. E.E.O.C. v. Newport Mesa Unif. Sch. Dist*., 893 F. Supp. 927, 932 (C.D. Cal. 1995) (policy may not "be used as pretext to cover-up an illicit motive").

[54] MTC has long known that AC Transit carried a disproportionately high share of minority riders. Marcantonio Opp. Dec., Ex. 2. at 104-06 (MTC's current director was aware since at least 1993); *id*., Exs. 66 & 69 (at that time, only 32% of AC Transit's riders were white, compared to 63% of BART riders); *id*., Exs. 65 & 67 (five years later, AC Transit 24% white, BART 45% white); Dkt. 166, Ex. 1 at 96-97 (from operator surveys, "MTC was aware at least as early as the mid-1990s that AC Transit carried a significantly greater proportion of minorities than BART did"); Dkt. 169, Ex. 13 at 561-62 (MTC was not surprised in 2006 to learn that nearly 80% of AC Transit riders are minorities, compared to only 50% and 53% of BART and Caltrain riders).

[55] See previous footnote. *See also* Marcantonio Opp. Decl. Ex. 68 at ii (BART's "improved accessibility is greater for higher-income white households," reflecting "BART's original transportation objective, to relieve congestion on the suburban-to-downtown transportation corridors – commute routes serving primarily higher-income white households); *id.,* Ex. 45 at 9,

that MTC's priority of expansion over preservation had caused repeated cuts to AC Transit service,[56] with grave resulting harm to its minority riders.[57] As described more fully below, minority bus riders and their representatives had "clearly identified and repeatedly articulated to" MTC the ongoing "adverse consequences," *Diaz,* 733 F.2d at 663 n.1, they suffered as a result of MTC's funding and planning actions. Part II.C.2., *supra*. MTC continued to prioritize rail expansion and to fail to preserve existing bus operations in the face of this knowledge, knowing that greater harm would foreseeably, if not inevitably, follow unless it changed course. These facts support "a strong inference of illegitimate intent." *Diaz,* 733 F.2d at 663 n.1.

Historical Background and Chronology.

The historical background of MTC's ongoing practices by which it has prioritized rail preservation – and indeed expansion – over the preservation of bus service, while knowing of the adverse impacts on minority bus riders, provides further evidence of MTC's discriminatory motivation, "reveal[ing] a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. For example, MTC's responsibility for inadequate and discriminatory

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33 (1978 study by MTC demonstrated that the rail service currently operated by Caltrain was designed to serve higher income commuters, and did not meet the needs of transit dependent riders, including racial minorities. Study found an absence of fare discounts for low-income persons (at 9) and that "[t]he two predominantly minority and low-income station areas in San Francisco (23rd St and Paul Ave.) are skipped by most trains"); *see id.* at 16 (defining "transit dependent" as minority, elderly, handicapped, and low-income people).

[56] Dkt. 175 at 3-7, 15, 21-24 (citing evidence re repeated cuts to AC Transit service). MTC was aware of these cuts, and of AC Transit's long decline in service levels. Dkt. 169, Ex. 23 at MTCP123429 (MTC's SRTP Guidelines require operators to report to it "[w]here reductions in service levels are required in order to achieve a balanced operating budget, describ[ing] the reductions and assess their impact on the affected service areas and communities."). Finally, MTC has been aware that the declining levels of AC Transit service have come as service levels for BART and Caltrain riders were increasing dramatically. *See., e.g.*, Dkt. 169, Ex. 20.

[57] Since at least 2001, for instance, MTC knew that a significant proportion of AC Transit's routes (67 routes out of 152) were "Lifeline" routes that MTC considered critical to meeting the needs of minority communities in the Bay Area. Marcantonio Opp. Decl., Ex. 4, Ex. 1 ("Lifeline Report") at 1, 5; *see id.*, Ex. 25 at 66-67; *see also id.*, 26 at Stip. No.15, and that 53 of those 67 "Lifeline" routes – nearly 80% – had significant gaps in service. Lifeline Report at App. D; *see id.* at 15 (Lifeline routes serve destinations that "include employment sites, medical facilities, homeless shelters, career and job training centers, daycare centers, schools, civic destinations (such as libraries and town halls), public housing sites, and establishments that accept food stamps.").

By 2006, AC Transit's service levels had fallen by 9.6% over 1993 levels. Dkt. 167, Ex. 1 at ¶¶ 100-103. And they declined by nearly 10% just in the four years since MTC began the process of adopting its 2005 RTP. Dkt. 167, Ex. 2 at ¶134.

funding levels for AC Transit operations has a long history, going back to the 1970s, when MTC brokered state legislation relating to a source of operating revenues for BART, AC Transit and MUNI. MTC's solution was a three-county sales tax that today generates several hundred million dollars each year, of which MTC reserved 75% for BART. In exchange, AC Transit would receive state Transportation Development Act (TDA) funds. Almost immediately, with the passage of Proposition 13, the balance of those funding sources was no longer adequate to meet AC Transit's operating needs, yet MTC has consistently declined to take steps to right the funding imbalance.[58]

More recent history discloses that, in the preparation of the shortfall projections leading up to the adoption of the 2005 RTP, MTC knowingly incorporated figures in its RTP that substantially understated AC Transit's true projected operating shortfall. Before the "cut-off" date in the data collection phase of preparing the financial element of the 2005 RTP, MTC knew that AC Transit planned to cut service by 14% beginning in December 2003, and knew that AC Transit's 25-year projections made those service cuts a permanent feature built into its long-range budget. Dkt. 167, Ex. 2, ¶¶ 95-98; *see* Dkt. 169, Ex. 24, at 187-90; Marcantonio Opp. Decl., Ex. 1 at 422-27. Despite that knowledge, when MTC projected AC Transit's operating shortfall, as of 2003, it failed to reflect that service in its 2005 RTP baseline. *Id.*; Dkt. 169, Ex. 22. The result was to understate AC Transit's operating shortfall by more than $500 million over 25 years. Dkt. 167, Ex. 2, ¶¶ 95-98.[59]

The historical background also includes MTC's creation of a discriminatory two-tiered

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[58] MTC secured dedicated operating funding for BART, while knowing that it did not serve minorities well. Marcantonio Opp. Decl., Ex. 38 at 2 ("The calculations jointly developed [in 1979] *assumed AC Transit and SF Muni would have access to TDA and FTA Section 9* – the other significant regional revenues... Since then these revenues have declined compared to AC Transit and SF Muni budgets causing them to curtail services and raise fares."); *see id.*, Ex. 37 at 45, 65-68. In its compilations of "discretionary funds," MTC routinely includes AC Transit's 12.5% share of AB 1107 sales tax funds while excluding BART's 75% share. Dkt. 167, Ex. 2, ¶¶ 78-82. At the same time, MTC includes AC Transit's TDA funds (*id.*), and states that "MTC's operating assistance policies favor . . . AC Transit over BART." Marcantonio Opp. Decl., Ex. 60.

[59] More recently, MTC unilaterally cut AC Transit's projection of its 25-year operating shortfall from $2.9 billion down to $870 million – contrary to its own policy of relying on operator cost projections in preparing this data. Marcantonio Opp. Decl., Ex. 1 at 427-28.

system, Resolution 3434, for addressing the needs of primarily white commuters with cars and Lifeline for minority and transit-dependent bus riders. *See infra*, Part II.B.2.c., immediately following.

Departures From Substantive Norms.

Like all MPOs, MTC is subject to the substantive norm that it emphasize the "preservation of the existing transportation system," 49 USC 5303(b)(1)(G), and that it do so "before any additional system expansion is . . . considered." Dkt. 169, Ex. 8. MTC itself acknowledges this norm,[60] yet departs from it in two fundamental, and related, ways. First, it fails to preserve existing bus service by failing to cover the operating shortfalls in the funding needed to run that service. Dkt. 175 at 7-15. And second, given the choice between filling "gaps" in the region's rail system through its transit *expansion* program, and filling "gaps" in *existing* "Lifeline" bus service, MTC has consistently prioritized rail expansion. Both illustrate an underlying two-tiered approach by which MTC creates and maintains a two-tiered, separate-and-unequal transit system.

In 2001 MTC adopted the "Regional Transit Expansion Program" embodied in its Resolution No. 3434. Marcantonio Opp. Decl., Ex. 14 & 15. By its very definition, Res. 3434 emphasizes expansion over system preservation. *Id.*, Ex. 14 at 584. The successor to Res. 1876, a transit expansion program that focused *exclusively* on rail, Res. 3434 continues to focus *overwhelmingly* on rail expansion; it includes over $13 billion in projects, of which only 2.5% of the funds are earmarked for bus projects (Dkt. 167, Ex. 2, ¶ 46), while some $8.3 billion are earmarked for BART and Caltrain expansion alone. (*Id.*, ¶ 56.)

The express purpose of Res. 3434 was to "close[ ] some key gaps in the transit network" for commuters with access to private autos. Marcantonio Opp. Decl., Ex. 15 at MTCP 115268; *see* 14 at 596-99). It was purportedly a co-equal priority of MTC's to fill gaps affecting another group – gaps in "Lifeline" transit service for minority and low-income communities.[61] In 2001,

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[60] It has stated, for instance, that it "places a policy of maintaining and sustaining the existing system before expanding the system," Marcantonio Opp. Decl., Ex. 5 at 1-5, and that "[o]nly after these needs [maintenance and preservation of the existing system, including transit and local streets and roads] have been adequately met will any flexible funds be considered for additional expansion." *Id.*, Ex. 58.

[61] Recognizing that many of the concerns in the 2001 RTP focused on the inability of people

MTC's Lifeline Transportation Network Report ("LTNR") found that some 1.5 million additional hours of transit service would be needed yearly to close the identified "gaps in the existing transit network for low-income communities," *id.*, Ex. 4 (LTNR) at 6, 26, and MTC estimated the cost of that added service at between $1.5 to $2.1 billion dollars over 25 years. *Id.*, Ex. 8 at MTCP027068, MTCP027055; *see id.*, Ex. 3 at 70. MTC promised to treat gaps in the Lifeline Transportation Network "on equal footing" and as an "equal priority" with the gaps addressed by Res. 3434.[62] Going even further, MTC stated that Res. 3434 and Lifeline were "equally important, and both will be included in the [2001] RTP."[63]

Far from treating these two initiatives as equal priorities in the 2001 RTP, however, MTC established one system in Res. 3434, for predominantly white commuters with cars (*see id.*, Ex. 14 at 641-44), and the other, in Lifeline, for predominantly minority and transit-dependent riders. The differential treatment accorded to transit-dependent minorities under MTC's two-tiered system extended both to the contrasting financial commitment to the two programs and to the level of commitment to the programs' implementation.[64] In its 2001 RTP, MTC committed

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in minority communities to access essential destinations, MTC staff defined a Lifeline Transportation Network as part of the 2001 RTP. Marcantonio Opp. Decl., Ex. 6 at 4-1 ("Many of the equity concerns raised in the 2001 RTP focus on the inability of people in low-income and minority communities to conveniently get to specific activities which are essential for daily life . . . . In response, staff began working to define a Lifeline Transit Network as part of the 2001 RTP.").

[62] Marcantonio Opp. Decl., Ex. 71 at 35; *id.*, Ex. 72; Ex 21.

[63] Marcantonio Opp. Decl., Exs. 20 & 75.

[64] As for financial commitment:

- Res. 3434 has "a distinct financial plan attached to it," Marcantonio Opp. Decl., Ex. 14 at 584, calculated to better position the Bay Area to compete for discretionary funding for the selected projects (*id.* at 620-21); for the unmet Lifeline transit needs it identified, on the other hand, MTC relied on funding from an uncertain future funding source that was not expected to become available until 2008, seven years after the gaps had been identified. *Id.*, Ex. 3 at 51-53.
- Even when MTC provided "interim" funding for Lifeline, much of it came from sources that could be used only for capital purposes, *id.*, Ex. 84 at 6, despite MTC's acknowledgement that Lifeline required operating funds. *Id.*, Ex. 23 at 38.
- As previously noted, MTC immediately committed over $10 billion to Res. 3434, with its emphasis on rail expansion. For Lifeline, MTC provided no funding for the first four

approximately $9.7 billion to Res. 3434 expansion projects, *id.*, Ex. 16, Att. B, while dedicating only $30 million to a Lifeline-related program with no assurances that even this small amount of funding would be used to close the gaps identified in the Lifeline Report. *See id.*, Ex. 27, Ex. 3 at 14-15. Again, in its 2005 RTP, MTC assigned $10.8 billion to Res. 3434 projects, *id.*, Ex. 16, Attach. B, but only $216 million to the Lifeline Program, Dkt.169, Ex. 33, a tiny fraction of the identified need.[65]

MTC's failure to prioritize the preservation of existing transit services before expanding is a departure from a widely-accepted and fundamental transportation planning norm "usually considered important by" transportation decision-makers that "strongly favor[s] a decision

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years, merely conducting a study; it then determined that further study was needed, and began a long process of "Community Based Transportation Plans" that it does not expect to be completed before 2012. *Id.*, Ex. 3 at 96. Then, in the 2005 RTP, MTC provided only $216 million out of a 25-year estimated need of some $2 billion. Dkt. 169, Ex. 33; Marcantonio Opp. Decl., Ex. 8. That estimate, moreover, was based on 2001 costs to close 2001 gaps that had since, with additional major service cuts, only grown larger.

As for MTC's two-tiered implementation commitment:

- MTC took a hands-on role in creating a "strategic master plan," *id.*, Ex. 14 at 584, with a "comprehensive funding strategy" (*id.* at 670), selecting projects on the basis of criteria it developed and forging a set of "coordinated regional priorities" (*id.* at 617 & *id.*, Ex. 18; on the other hand, MTC "basically turned the Lifeline Program over to the [local] Congestion Management Agencies to administer," *id.*, Ex. 3 at 19), with no assurances that they would allocate the available funds to fill identified Lifeline gaps. *Id.*, Ex. 61 at MTCP243794-243801). MTC's own department head, whom MTC designated as the person most knowledgeable about Lifeline, has not even read the 2001 Lifeline study or its recommendations. *Id.*, Ex. 3 at 36-37)
- Costs and projects in Res. 3434 are periodically updated, and progress is carefully monitored (*e.g.*, *id.*, Ex. 14 at 665 & *id.*, Ex. 18); by contrast, MTC has neither monitored the filling of the Lifeline Network gaps nor updated its 2001 study to account for significant service cuts since then – despite express promises that the "Lifeline analysis [w]ould be updated in subsequent RTP updates." *Id.*, Ex. 25 at 108-10, 113; *id.*, Ex. 4 at 26).

[65] MTC misled minority bus riders in explaining its failure to provide funding to close these Lifeline gaps: "what was identified in the Lifeline Transportation Plan was a need for additional operating funds, and additional operating funds was just what we could not get a handle on because the discretionary funding that we had available in RTP was all capital." Marcantonio Opp. Decl., Ex. 23 at 38. It was true that Lifeline gaps could only be closed with funding sources that could *operate* service. It was false, however, to say that MTC lacked RTP funds that could have been made available for transit operations. Dkt. 167, Ex. 1, ¶¶ 133-44, 165-69.

contrary to the one reached." *Arlington Heights*, 429 U.S. at 267. That norm is one that is imposed on MTC by federal law and that MTC itself purports to embrace. Dkt. 167, Ex. 1, ¶¶ 20, 56-73. It is strong evidence of a discriminatory purpose that MTC undertakes the challenged conduct even though it runs directly contrary to so fundamental a precept of transportation decision-making.

Departures from Procedural Protections.

The Affirmative Duty to Treat Minority Riders Equally: In the course of maintaining its discriminatory policies and practices, and in an attempt to insulate them from repeated criticism by minority bus riders, their elected officials and others, MTC has departed from, and indeed undermined, the important norms that directly relate to its affirmative duty under Title VI and Executive Order 12898, both to treat minority riders equally by engaging minority communities in its decision-making process and to monitor its actions for potential discriminatory impacts. *See Diaz*, 773 F.2d at 665 ("The Board was also continuously aware that it had an affirmative duty to desegregate under state law."); *id*. at 667 n.7 ("Inaction in the face of an affirmative duty may support a higher probability of discriminatory intent than does inaction when no such duty exists."). Four norms of MPO conduct are accepted, nationally and by MTC, as necessary in meeting these affirmative obligations: providing minority participants with the information and analysis they need to meaningfully participate in the decision-making process; continuity of participation; transparency; and integrity. Dkt. 166, Ex. 1 at 5, 11-13, 65. MTC itself acknowledges these norms,[66] but as Prof. Sanchez notes, "MTC has a history of repeated and severe failures to meet the expectations of providing information and analysis in a continuous and transparent manner, and with the integrity required to ensure meaningful participation of EJ Communities in the planning and decision-making process." Dkt. 166, Ex. 1 at 7. Several incidents illustrate an on-going pattern of covering up its discrimination against minority bus riders and its extensive departure from the very norms intended to ensure that it identify and

[66] A number of these norms, for example, are embodied in the first two Environmental Justice Principles proposed by MTC's minority advisory committee – the two Principles that MTC adopted. Marcantonio Opp. Decl., Ex. 53 at MTCP 257574.

rectify discriminatory impacts.

Minority communities dependent on AC Transit bus service expressed deep concern in 2001 that the contemplated Res. 3434 expansion of BART service would come, as it had in the past, at the expense of cuts to their bus service.[67] MTC responded that "[w]e intend to ensure that rail expansion does not come at the expense of critical bus service to minority and low-income communities." Marcantonio Opp. Decl., Ex. 53. In fact, MTC's policy to protect "critical bus service" from cuts due to rail expansion was limited to two operators – MUNI and VTA. Contrary to repeated statements made by MTC, this policy offered no protection to AC Transit riders. *Id.*, Ex. 14 at 744-45; *see id.*, Ex. 21.

Minority riders and their representatives have repeatedly asked for funding data by race – in 1998, again in 2001, and again in 2004 – so that they could participate meaningfully in MTC's formulation of RTP policy. Dkt. 166, Ex. 1, at 10-11 ("[T]he MPO is expected to provide community participants – and EJ communities, in particular – with the information and analysis that they reasonably require in order to articulate the actions that best respond to their needs, preferences and desires."). MTC repeatedly refused to provide that data, despite its obligations to foster meaningful participation by minorities and to affirmatively monitor its actions for potentially discriminatory impacts. *Id.* at 8-10, 17-19 (describing MPO obligations under Title VI and Executive Order 12898). MTC not only withheld that requested funding data for years, but took the extraordinary step of devising an RTP "Equity Analysis" that by its very design would show that equity was improving "based on expanded rail service, even if bus service does not expand, or is cut." Dkt. 166, Ex. 1 at 6, 46-47 & Ex. 2 at 13. MTC already knew what the result of its "Equity Analysis" would be, even before it first ran the computer model in 1998, because the design of the model rested "tautologically on the assumption that 'if the RTP invests in urban transit, that increases accessibility for low income and minority riders.'" Dkt. 166, Ex. 1 at 93;

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[67] For instance, 42 African American ministers in Richmond wrote to ask that MTC "fund AC Transit fairly so that bus service can be improved" for the minority bus riders in their congregations; they expressed their view that those riders "deserve[d] the same level of funding that you will be providing to build your new rail extension program." Marcantonio Opp. Decl., Ex. 73.

Marcantonio Opp. Decl., Ex. 11 at 447-48. Thus, its purpose in running the 1998 "Equity Analysis" was not to learn something MTC did not already know (*id.*, Ex. 11 at 509-10) but to reach the "pre-determined conclusion" that there were no racial inequities in its funding. Dkt. 166, Ex. 1 at 15; *id.* at 25-28, 91; *see* Marcantonio Opp. Decl., Ex. 41 (internal 1998 memo states that proposed Equity Analysis would "make a prima facie case . . . that, far from intentionally discriminating against low-income and minority groups, MTC has made substantial efforts to see that their transportation needs are addressed.") Over the course of six years and three RTP cycles, MTC provided the same deceptive analysis to minority bus riders, never disclosing that it was rigged to yield the same result each time.[68] Dkt. 166, Ex. 1 at 67.

MTC also obstructed its minority advisory committee[69] when that committee urged MTC, over a period of more than two years (Dkt. 166, Ex. 1 at 49-56), to adopt a simple set of four Environmental Justice Principles. These Principles would have finally required MTC both to provide the financial data minority bus riders had long been requesting by racial status of riders (EJ Principle No. 2) *and* to correct any distributional inequities in funding that were disclosed in that data (EJ Principle No. 3).[70] After numerous procedural irregularities and lengthy delays,[71]

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[68] Dkt. 166, Ex. 1 at 48-49; Marcantonio Opp. Decl., Ex. 11 at 446, 509-10, 513-14, 609; *id.*, Ex.3 at 1-4; *id.*, Ex. 49; Dkt. 169, Ex. 39 at ES-5.

[69] This committee, known as the "Minority Citizens Advisory Committee," or MCAC, was originally formed in settlement of a formal protest over the exclusion of minority participation that the Mexican American Legal Defense and Education Fund (MALDEF) had brought against MTC in 1974. MTC agreed to establish the committee "to assist and consult with respect to effective methods and procedures of obtaining the maximum input from minority citizens to the regional transportation planning process," Marcantonio Opp. Decl., Ex. 50 at 3), and to "[a]dvise[ ] MTC to ensure that the views and needs of minority communities are adequately reflected in MTC policies." *Id.*, Ex. 42 at 28.

[70] MCAC's EJ Principles Nos. 2 and 3 read as follows:

"Principle #2 – Collect accurate and current data essential to understanding the presence and extent of inequities in transportation funding based on race and income.

"Principle #3 – MTC should change its investment decisions as necessary to mitigate identified inequities. These changes would apply both to the financing of already existing projects as well as to the financing of proposed or future projects."

Marcantonio Opp. Decl., Ex. 53 at MTCP257574.

[71] Among other things, (a) MTC staff, rather than being guided by the recommendations of its advisory committee, attempted to rewrite them in a manner that would have deleted any mention of "equity," Marcantonio Opp. Decl., Ex. 52 at MTCP 257539; (b) at the first hearing

finding that the process embroiled it in "controversy" and "divisiveness," Marcantonio Opp. Decl., Ex. 28 at 132-33 (controversy), *id.* at 94-96 (divisive), MTC ultimately failed to adopt the latter Principle. Dkt. 166, Ex. 1 at 63, 99-104.[72]

In 2006, after eight years of requests and a year after the filing of this lawsuit, MTC finally provided some of the transit funding data by race – the analysis that minority bus riders had been requesting since 1998.[73] Dkt. 166, Ex. 1, 56-64; Marcantonio Opp. Decl., Ex. 11 at 486-89; *id.*, Ex. 28 at 89-90; *id.*, Ex. 8. In draft form, that analysis showed plainly that, during the 8-year period on which MTC reported, AC Transit received less than its share of funding while BART and Caltrain received substantially more:

Operator	*% minority ridership*	**Share of riders**	**Share of total funding**
AC Transit	*78%*	**15%**	**11%**
BART	*53%*	**21%**	**33%**
Caltrain	*50%*	**2%**	**6%**

Id., Ex. 32, table 7b; Dkt. 169, Ex. 45 at 10.[74] In other words, relative to its share of riders, BART received 57% more funding and Caltrain three times as much, while AC Transit received 27% less.[75] *Id.*, Ex. 34 at 3. A joint subcommittee comprised in equal parts of representatives of MCAC and MTC's premier stakeholder group, the Partnership Board,[76] agreed that this data

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before MTC's Legislation Committee, the staff report analyzed staff's alternative, not the advisory committee's proposal, *id.*, Ex. 53 at MTCP 257574; *id.*, Ex. 54 at MTCP 257575; (c) when MCAC insisted on language that conveyed its belief that inequities existed in MTC's funding practices, MTC's executive director personally intervened to negotiate a version more to his liking, *id.*, Ex. 55 at MTCP 257607; and (d) after concluding the negotiation, he brought in the Partnership Board, a powerful stakeholder committee with a charge unrelated to racial equity, which criticized and lobbied against adoption of the Principles. *Id.*, Ex. 56 at MTCP 257609.

[72] Another Commission decision forms a sharp contrast: despite the outspoken opposition of minority bus riders it took MTC only a third as much time to broker the "consensus" (Ex. 52) that resulted in its [unanimous] adoption of its complex transit expansion program (Res. 3434) involving more than $10 billion in expenditures, most for new rail. Marcantonio Opp. Decl., Ex. 60.

[73] It did so only as part of an overt strategy to avoid adopting an Environmental Justice Principle promulgated by its minority advisory committee that would have committed it to "change its investment decisions as necessary to mitigate identified inequities." Ex. 28.

demonstrated inequities that would require corrective action by MTC under MCAC's proposed EJ Principle No. 3. *Id.*, Ex. 28 at 86-88; *id.*, Ex. 30 at 4. And the minority advisory committee unanimously

> adopted a motion stating the committee's strong opinion that inequities exist, whether intentional or not, in the distribution of transportation funding based on race and income, and recommending that the commission adopt proposed EJ Principles #3 and #4.

Id., Ex. 33.[77] Yet when MTC published the "final" version of its funding report, id., Ex. 30; *see also id.*, Ex. 28 at 103-4), in connection with a hearing on the EJ Principles of the Commission's Legislation Committee, it took a "particularly troubling action": it censored these findings, and provided, instead, only numbers that purported to show each operator's share of a subjectively

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[74] MTC provided funding data on five operators (AC Transit, BART, Caltrain, VTA and MUNI), and reported shares of ridership and funding for each of the five as a percentage of the total for the five. (For racial demographic data, MTC relied on the on-board ridership surveys prepared by the five operators, which showed that AC Transit, BART and Caltrain carried 79%, 57% and 40% minorities, respectively.) *See* Marcantonio Opp. Decl., Ex. 32.

[75] Despite the fact that well over 70% of AC Transit's ridership is comprised of minorities, meeting MTC's long-standing criterion as a "Community of Concern," MTC refused requests that it classify transit riderships in this manner in order to compare them for disparate racial impacts MTC's RTP "Equity Analyses" in 2001 and 2004 had been based on a comparison of the rest of the region with what MTC called "Communities of Concern," defined as neighborhoods that met percentage thresholds of minority and/or low-income residents. Dkt. 166, Ex. 1 at 37-41. MTC's minority threshold for defining a Community of Concern is 70% or more minority residents. *Id.* at 37-38; 44 n.19; Marcantonio Opp. Decl., Ex. 5 at 3-4 to 3-5; Dkt. 169, Ex. 39 at 3-3 to 3-4. Instead of applying that longstanding category to minority transit riderships, MTC created the position that it takes in this litigation, namely, that it is the absolute number of minority riders that is of consequence for Title VI purposes. That represents a marked shift in the position MTC has taken in its past "equity analyses," in which it has defined "Communities of Concern" based on *percentages* of minorities, rather than absolute numbers of minorities. Dkt. 166, Ex. 2 at 32-35.

[76] The Partnership Board is "a confederation of the top staff of various transportation agencies in the region (MTC, public transit operators, county congestion management agencies, city and county public works departments, ports, Caltrans, U.S. Department of Transportation) as well as environmental protection agencies." Dkt. 166, Ex. 2, at 5 (citing MTC Website at http://mtc.ca.gov/about_mtc/partner.htm).

[77] Five members of the California Legislature and two County Supervisors wrote MTC in early 2007 to express their view that "MTC's report shows that AC Transit received a disproportionately smaller share, relative to the size of its ridership, than BART and Caltrain," and requesting "a list of actions MTC plans to take that would lead to an equitable per passenger subsidy for all transit passengers, regardless of ethnicity or income." Marcantonio Opp. Decl., Ex. 70.

and inconsistently defined subset of "MTC discretionary" funds.[78] Dkt. 166, Ex. 1 at 66, 101-02; Marcantonio Opp. Decl., Ex. 30. MTC finally abandoned the effort to adopt EJ Principles with the ironical rationale that there was no "consensus." *Id.*, Ex. 28 at 107-08, 62-67.[79]

Departures from Title VI norms are especially probative of MTC's discriminatory intent, as they represent its undermining of the very norms that require it to monitor its activities to ensure that its funding decisions are not discriminatory and that minority constituents have a full and equal opportunity to participate in MTC's decision-making processes. Dkt. 166, Ex. 1 at 10 ("EJ communities are . . . protected doubly, both by the usual norms and requirements of public participation, and by the requirements of Title VI of the Civil Rights Act and [Executive Order] 12898 . . . .").

False Promises and Explanations: MTC's discriminatory intent is also evidenced by a pattern of broken promises and false statements it has made to minority bus riders. *See Diaz, supra*, 733 F.2d at 674 ("The District repeatedly promised the public and state officials that it would desegregate its schools in compliance with state law."). Some examples include the following: (1) MTC first rationalized its failure to fund Lifeline in the 2001 RTP on the basis that what was needed were "additional operating funds" that were not available, Marcantonio Opp. Decl., Ex. 23 at 38, but then later provided *capital* funds with the claim that it was "funding the Lifeline program."[80] *Id.*, Ex. 19. (2) Minority bus riders repeatedly requested an analysis linking bus and rail funding levels to the race of riders. MTC rationalized its failure to provide that information in 2001 with the claim that "key missing data crucial to any equity discussion around transit" rendered this analysis impossible. *Id.*, Ex. 5 at MTCP043549. All the while, however, it

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[78] Inconsistently, in its previous RTP "Equity Analyses," MTC had not limited its computer modeling to projects built with "discretionary funds," but had included "the full RTP investment, which would dictate how much transit service is provided over the 25 years," Marcantonio Opp. Decl., Ex. 11 at 496. It did so because "[i]t is the whole $]110 billion that defines the transit system that is serving the communities of concern." *Id.*

[79] Mr. Corless went so far as to state that "probably the closest that we have come to, you know, generating something that most people agree on, even if maybe not everybody agreed on the outcomes of the findings" was the RTP Equity Analysis, Marcantonio Opp. Decl., Ex. 28 at 73-74. He was referring to the very "Equity Analysis" that minority riders had consistently rejected since 1998.

concealed the fact that it had available to it operator-generated demographic data from a number of major operators, including AC Transit and BART.[81] Marcantonio Opp. Decl., Ex. 65-67, 69. (3) When MTC censored data on "total funding" in the final 2006 funding equity analysis it prepared for its minority advisory committee, providing only "discretionary funding" data, it contradicted its longstanding practice in its RTP "Equity Analyses" of relying on *total* RTP funding.

MTC also made other false promises and representations.[82]

This large and varied body of evidence has significant cumulative impacts that cannot be weighed on summary judgment, and corresponds to many of the kinds of proof that courts have found constitute circumstantial evidence of discriminatory motivation under *Arlington Height*'s "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. It is certainly more than the "very little evidence" sufficient to defeat MTC's motion for summary judgment of Plaintiffs' intentional discrimination claims. *Chuang*, 225 F.3d at 1124.

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[80] This statement – that RTP "discretionary" funds may be used for capital purposes only – is one that MTC has repeated frequently over the years: It has given it as the basis for its failure to provide funds that would benefit AC Transit riders by closing both RTP operating shortfalls, (Marcantonio Opp. Decl., Ex. 64 at 4, MTCP 016488) ("virtually all of [the RTP discretionary funding] is classified as 'capital' money … and as such cannot be applied to operating purposes")] and Lifeline gaps. Yet it is false. Dkt. 167, Ex. 1, ¶¶ 133-44, 165-69.

[81] In fact, MTC relied on the demographic data in the on-board surveys conducted by five major transit operators in preparing the 2006 funding equity analysis for its minority advisory committee. Marcantonio Opp. Decl., Ex. 3. Only after this lawsuit was filed, in 2006-07, did MTC conduct its demographic survey of Bay Area transit operators.

[82] Among other things, (1) while stating that it takes its minority advisory committee seriously, (Marcantonio Opp. Decl., Ex. 28 at 57-58; *see also id*. Ex. 11 at 473; Dkt. 166, Ex. 1 at 39-40, 100,) MTC obstructs, undermines and rejects that committee's guidance whenever it conflicts with MTC's overriding priorities of rail expansion at the expense of the preservation of existing levels of bus service. Dkt. 166, Ex. 1 at 100-04 It has, in fact, explicitly failed to recognize consensus positions espoused by that committee, while at the same time asserting that a consensus existed when that committee was strongly opposed. (2) After repeated promises that Lifeline and Res. 3434 were "equally important, and both will be included in the [2001] RTP," MTC included in the 2001 RTP billions of dollars for the latter and not a penny for the former. (3) After promising to obtain the demographic data on transit ridership by race (Marcantonio Opp. Decl., Ex. 5 at 7-2), it failed to do so for five years, until after the filing of this lawsuit.

D. INDIVIDUAL PLAINTIFFS AND THE CLASS HAVE STANDING.

1. PLAINTIFFS NEED ONLY RAISE A GENUINE ISSUE OF MATERIAL FACT REGARDING STANDING TO DEFEAT SUMMARY JUDGMENT.

MTC has renewed its challenge to Plaintiffs' standing. Standing requires that (1) the plaintiff suffered or faces an injury in fact; (2) the injury is fairly traceable to the conduct challenged in the action; and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Harris v. Bd. of Supervisors, Los Angeles County*, 366 F.3d 754, 760 (9th Cir. 2004); *see also* Order Granting in Part Motion to Dismiss (Dkt. 33) at 4; Order Denying Motion to Dismiss (Dkt. 62) at 5.

As discussed below, Plaintiffs are not required to prove their standing in order to survive a motion for summary judgment. "[A]t the summary judgment stage the plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002). Just as with any other factual element of plaintiffs' claims, statements made in affidavits supporting standing are taken to be true. *Lujan*, 504 U.S. at 561. Moreover, the Supreme Court has repeatedly recognized that when one plaintiff is found to have standing, Article III's case-or-controversy requirement is satisfied, and a court need not consider whether any of the other plaintiffs have standing.[83] Because a class has been certified in this case, as long

[83] *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006) (considering standing of only one plaintiff in multi-plaintiff suit because presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (not addressing standing of union or Congress members where individual plaintiffs had standing); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (no need to reach standing of various plaintiffs where one plaintiff had standing); *Arlington Heights.*, 429 U.S. at 264 n.9 (presence of one plaintiff with standing in suit obviates any need to consider standing of other plaintiffs); *see also Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003) (not considering whether organization had standing because individual plaintiffs had standing); *Bates v. UPS*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001); *Doe v. County of Montgomery*, 41 F.3d 1156, 1161 n.4 (7th Cir. 1994); *Humane Society of the United States v. Hodel*, 840 F.2d 45, 60 n.27 (D.C. Cir. 1988); *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1073 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996).

as one identifiable member of the Class has standing, the entire Class has standing even if all the current named Plaintiffs lack it. *Bates v. UPS*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001).

a. Plaintiffs and the Class Suffer an Ongoing Injury in Fact.

A plaintiff must have suffered or be threatened with an injury that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560. For injunctive relief, a plaintiff must show a realistic threat of repetition of the violation. *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). The threatened future injury need not be certain, nor even probable; plaintiff need only have a reasonable expectation that the challenged conduct could recur. *Truth v. Kent School Dist.*, 524 F.3d 957, at 965 (9th Cir. 2008); *Harris*, 366 F.3d at 760 (credible threat of injury suffices as injury in fact for standing purposes); *see also Cent. Delta*, 306 F.3d at 950. Only one type of injury is required to avoid dismissal for lack of standing, *see Lujan*, 504 U.S. at 560; here, however, Plaintiffs and the Class have suffered three separate types of injury in fact: stigmatic injury, injury to quality of life, and economic injury.

i. Plaintiffs and the Class Suffer Ongoing Stigmatic Injury.

Stigmatic injury may satisfy the "injury in fact" prong of the standing test, even in the absence of a facially discriminatory classification. Dkt. 62 at 5-7 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) and *Keyes v. School Dist. No. 1 Denver, CO*, 413 U.S. 189, 201 (1973)). A facially-neutral policy may give rise to a stigmatic injury when it is administered in a way that results in the same evils that a facially-discriminatory policy would create, because racial discrimination causes harm regardless of whether it is documented as racial discrimination by its perpetrators. *See Keyes*, 413 U.S. at 198-202.

This Court previously ruled that "an explicit two-tiered approach" to transit funding, favoring projects that serve primarily white riders and disfavoring projects that serve primarily minority riders, supported a claim of stigmatic injury. Dkt. 62 at 7. The evidence demonstrates that MTC administers its facially-neutral planning and funding policies using such a two-tiered approach. MTC has implemented a two-tiered approach to funding shortfalls identified in the RTPs by covering capital rehabilitation shortfalls but refusing to cover operating shortfalls, the

negative effects of which fall disproportionately on minority riders. *See* Dkt. 175; Part II.B.2, *supra*. As one example, MTC has committed billions of dollars to fully fund rail "gaps" through its Res. 3434 transit expansion program to benefit disproportionately white riderships, while failing to fund more than a tiny fraction of its "co-equal" Lifeline program to close "gaps" to meet the transportation needs of low-income minority communities. *See* Part II.C.2.c, *supra*.

These practices send the message to Plaintiffs and Class Members that they are less important than BART and Caltrain riders. *See* Dkt. 169, Ex. 1 [MTCP 153449] (42 African American ministers tell MTC that minority bus riders "deserve the same level of funding that you will be providing to build your new rail extension program"). Like MTC, Plaintiffs and Class Members recognize the difference between the overwhelmingly minority ridership of AC Transit and the much greater proportion of white riders on BART and Caltrain, and they recognize that the comparatively whiter riders of BART and Caltrain receive superior service to AC Transit riders. This contrast sends the message to them that they are worth less than their white counterparts, leading them to conclude that they are unequal participants in the community whose needs MTC ignores while it addresses the needs of white passengers.[84] The presence of white riders on AC Transit and minority riders on BART and Caltrain does not eliminate the stigma of unequal group treatment. *See Keyes*, 413 U.S. at 200 ("We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system."). The statements of Plaintiffs and Class Members show that they feel the sting of an injury to their dignity by virtue of MTC's two-tiered approach to planning and funding.[85]

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[84] Hain Decl. at ¶ 30; Darensburg Decl. at ¶¶ 32-33; Casias Decl. at ¶ 22; Hernandez Decl. at ¶¶ 18-20, 25; Robinson Decl. at ¶ 14. This experience of unequal treatment is exacerbated by MTC's refusal to heed efforts by minority advocates for redress. Plaintiff Darensburg has spoken at an MTC committee meeting, but she feels that MTC ignored her and other non-white riders and has not addressed the needs of minority communities. Darensburg Decl. at ¶ 34. *See* Part II.C, *supra*.

[85] MTC's arguments to defeat Plaintiffs' claim of stigmatic injury miss the point. MTC argues that no two-tiered approach exists because (a) BART and Caltrain carry more minority riders, in absolute terms, than AC Transit; (b) Plaintiffs have not proven MTC failed to provide AC Transit with operating funds to which it was entitled; and (c) RTP shortfalls do not cause service cuts. Each of these arguments is beside the point; in particular, each of the latter two goes

Such a two-tiered approach is evidence that MTC administers a facially-neutral program in such a "plainly skewed way against a disfavored group as to inflict stigmatic injury sufficient to confer standing." Dkt. 62 at 7. Plaintiffs' evidence raises a material dispute of fact as to the existence of a two-tiered approach, making summary judgment inappropriate.

ii. Plaintiffs and the Class Suffer Ongoing Injuries to Their Quality of Life by Virtue of MTC's Discriminatory Practices.

The evidence also shows that the quality of life of Plaintiffs and the Class is injured by MTC's practice of refusing to cover operating shortfalls. That practice causes AC Transit to reduce service which, in turn, injures Plaintiffs as they experience reduced mobility, increased inconvenience, and increased safety risks as a result of lessened access to bus service. As this Court previously recognized, "concrete" quality-of-life injuries satisfy the injury-in-fact prong of the *Lujan* standing test. Dkt. 33 at 7 (citing *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 73-74, n.18 (1978)). Nor does MTC disagree. Dkt. 179 at 18.

The record establishes the reduced quality of life Plaintiffs and the Class suffer due to lessened mobility occasioned by reductions in AC Transit service. Reductions in AC Transit's service have caused them to experience longer travel times to and from jobs, school, medical care, community activities, and family visits.[86] Service cuts have increased the amount of time they must wait for buses.[87] Service cuts have entirely eliminated their ability to use certain lines

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to issues of causation and MTC's defense of transportation necessity (on which MTC bears the burden of proof), not the presence of stigmatic injury. Each is addressed elsewhere in this brief.

MTC's final argument – that there can be no stigmatic injury from its racially discriminatory acts because MTC helps the transit dependent through the LTN program and the Community Based Transportation Plan ("CBTP") program – also cannot defeat Plaintiffs' standing because there are material disputes as to the role and effectiveness of the LTN and CBTP programs. Although MTC argues that these programs show its concern for minority communities, Plaintiffs show in Part II.C.2.c., *supra*, that they are worse than ineffective palliatives, in fact playing an active role in excluding minorities from a meaningful opportunity to participate in and benefit from the transportation decision-making process.

[86] *See, e.g.,* Darensburg Decl. at ¶¶ 17-20; Hain Decl. at ¶¶ 16-17, 22-24; Casias Decl. at ¶ 13; Hernandez Decl. at ¶¶ 13, 15; Chavez Decl. at ¶ 9; Martinez Decl. at ¶¶ 9, 13, 21-22; Robinson Decl. at ¶¶ 9-10; Jones-White Decl. at ¶¶ 6, 9; *see also* Pls. MSA (Dkt. 175) at 3-4.

[87] *See, e.g.,* Darensburg Decl. at ¶¶ 14, 19; Hain Decl. at ¶ 17; Casias Decl. at ¶¶ 8, 13; Jones-White Decl. at ¶¶ 9, 13; Robinson Decl. at ¶¶ 9-10; Martinez Decl. at ¶¶ 9, 13, 22, 26, 28-

at certain times or on certain days.[88] Perhaps worst of all, their personal safety has been placed at greater risk as a result of service cuts, which force them to walk long distances in unsafe neighborhoods to reach destinations and to wait for buses at unsafe stops.[89]

MTC does not argue that these injuries have not occurred. Dkt. 179 at 9-12 (statement of facts). In fact, it does not seriously argue that these injuries are insufficiently concrete to pass muster under the *Lujan* standing test.[90] The injuries alleged here are similar to those found sufficient in *Neighborhood Action Coalition v. City of Canton, Ohio*, 882 F.2d 1012 (6th Cir. 1997) (deterioration of neighborhood, little police response to calls, and presence of unsavory individuals around plaintiffs' homes sufficient to supported their standing).[91] As this Court

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29; Chavez Decl. at ¶¶ 9, 13, 15; Hernandez Decl. at ¶¶ 14-15; *see also* Pls. MSA (Dkt. 175) at 3-4.

[88] *See, e.g.,* Darensburg Decl. at ¶¶ 9, 17-18; Hain Decl. at ¶¶ 16, 20-21; Martinez Decl. at ¶¶ 21, 26-27, 29-30; Hernandez Decl. at ¶ 21; Robinson Decl. at ¶¶ 9-11; Jones-White Decl. at ¶¶ 8-11.

[89] *See, e.g.,* Darensburg Decl. at ¶ 20; Hain Decl. at ¶¶ 16, 25; Casias Decl. at ¶¶ 8, 13; Jones-White Decl. at ¶¶ 7, 9, 13; Martinez Decl. at ¶¶ 31; Chavez Decl. at ¶ 16; *see also* Dkt. 175 at 3-4. Indeed, Class Member Jose Casias and ATU 192 member Rebecca Jones-White often drive their cars to late work shifts, despite the fact that gas is difficult to afford, because they feel unsafe waiting for the bus for the length of time required by infrequent evening and night service. Casias Decl. at ¶¶ 5, 8, 13; Jones-White Decl. at ¶ 13.

[90] The closest MTC comes to making this argument is to imply, in its "Factual Background" section, that Plaintiffs' complaints – though factually uncontested – are simply not worthy of attention. For example, it repeatedly refers to the fact that Plaintiff Hain used AC Transit and was injured by lack of transit access to certain locations "even though she had a car." Dkt. 179 at 9. It simply dismisses her safety complaints, noting that "Hain's only claim is that there are longer walks to and waits for buses in the evening and early morning hours." *Id.* at 10.

Similarly, as to Plaintiff Darensburg, MTC dismisses her complaint that changes to the 58X route made her trip to downtown Oakland for job searches and legal appointments take twice as long by following its recitation of her concern with the phrase "even though other AC Transit alternatives are available." Dkt. 179 at 11. It also dismisses her statement that she was affected by the elimination of the 40L route, arguing that it was "the slowest of three options available to her." *Id.* at 12. MTC follows its description of Plaintiff Darensburg's safety concerns due to an increase in the length of her walk from the bus in an unsafe neighborhood with the irrelevant statement that "[s]he also notes however that the 57 was 'a pretty clean bus.'" *Id.* at 12-13. While this juxtaposition shows MTC's lack of concern for her personal safety, its equation of physical danger with uncleanliness does not diminish the injury it causes her.

[91] Indeed, far less concrete injuries have been frequently approved by courts. In *Duke Power*, for example, the Supreme Court held that "aesthetic" consequences of thermal pollution

previously noted, "[l]engthy delays and lack of safety in transit to necessary destinations such as jobs, schools, grocery stores and medical appointments, injure urban residents at least as concretely as aesthetic and environmental harm to lakes injures suburban and rural dwellers." Dkt. 33 at 7. The injury prong of the standing test is satisfied by the injuries outlined above.

Athough MTC does not specifically address quality of life injuries (focusing instead on fare increases, discussed in Part II.D.1.A.iii immediately below), it vaguely references its argument that MTC is not to blame for service reductions. *See* Dkt. 179 at 18-19. As discussed in Parts II.D.1.b, *infra*, and II.B.2, *supra,* MTC's actions do, in fact, cause AC Transit to cut service. MTC's callous suggestion that the difficulties these cuts cause bus riders are not worth complaining about is insufficient to defeat their standing. The record contains evidence of exactly the kind of quality of life injuries that this Court previously noted were sufficient to support standing. Thus, genuine issues of material fact exist sufficient to defeat MTC's summary judgment motion.

iii. Plaintiffs and the Class Suffer Ongoing Economic Harm by Virtue of MTC's Discriminatory Practices.

Finally, the record shows that Plaintiffs suffer economic harm when they pay higher fares or are forced to use or buy cars that they can ill afford. As the Court noted, economic injury can be sufficient to establish injury-in-fact for standing purposes. Dkt. 33 at 6, Dkt. 62 at 8; *see also Sierra Club v. Morton*, 405 U.S. 727, 73 (1972).

Plaintiffs and Class Members have suffered two kinds of economic harm from MTC's discriminatory failures to fund AC Transit's operating shortfalls. First, many have been injured directly by having to pay higher fares when AC Transit turns to its riders to shore up shortfalls in its operating budget.[92] Some Class Members will have to cut back on spending on food and other

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of lakes near the power plant at issue laid the basis for standing. 438 U.S. at 73-74, n.18.

[92] Plaintiff Darensburg and other Class Members must make room in extremely limited budgets by cutting other expenses each time AC Transit has raised fares. *See, e.g.,* Darensburg Decl. at ¶¶ 10, 17-18, 21, 27; Hain Decl. at ¶¶ 10, 13-14; Casias Decl. at ¶ 12; Chavez Decl. at ¶ 14; Martinez Decl. at ¶¶ 34-36; Hernandez Decl. at ¶ 17; *see also* Dkt. 175 at 3-4. Whether or not the increase in Ms. Darensburg's fare payments has kept place with inflation (Dkt. 179 at 18:25) is immaterial; if the increase makes the fares more difficult for her to afford, she has been injured. Comparison to inflation would only help determine how *much* she has been injured.

necessities if AC Transit raises fares again.[93] Second, other Plaintiffs and Class Members have been forced to rely on cars, against their wishes, due to inadequate AC Transit service, causing economic harm due to spending money on the purchase, operation, and upkeep of a car that would not be necessary but for the lack of access on AC Transit to locations they must reach.[94]

MTC does not directly address these injuries, instead rehashing its argument that it does not force AC Transit to cut service and raise fares. In fact, MTC's planning and funding practices do force AC Transit to cut service or raise fares, as set forth in Part II.B.2., *supra*. Because Plaintiffs have shown that MTC causes the service cuts and fare increases that harm them economically, they have shown that that there are genuine issues of material fact sufficient to defeat MTC's summary judgment motion.

iv. Both The Injuries Plaintiffs Suffer And The MTC Conduct That Plaintiffs Challenge Are Likely to Recur.

[93] *See, e.g.,* Darensburg Decl. at ¶ 28; Hain Decl. at ¶ 27; Casias Decl. ¶ 15 ("If bus fares went up again, I and my family would have to cut food costs to continue to afford taking AC Transit."). The harm that gives rise to an injury in fact for purposes of standing need not be a past harm – a credible threat of harm such as that faced by Ms. Darensburg, Ms. Hain, and Mr. Casias should AC Transit raise fares again suffices. *Harris v. Bd. of Supervisors, Los Angeles County*, 366 F.3d 754, 761 (9th Cir. 2004). AC Transit has current plans to raise fares, so the threat to Mr. Casias is more than credible – it is likely. Marcantonio Opp. Decl., Ex. 83 (AC Transit News re: fare re: May 21: Fare Changes, http://www2.actransit.org/news/articledetail.wu?articleid=5d83198c).

[94] For example, ATU 192 members Margo Robinson and Rebecca Jones-White both were forced to purchase cars due to the difficulty of reaching necessary locations on AC Transit following service cuts. Robinson Decl. at ¶¶ 11-13; Jones-White Decl. at ¶¶ 12-13, 15. Jose Casias prefers to avoid driving due to the great expense of operating his car. Casias Decl. at ¶¶ 5, 8, 13, 18. Nevertheless, he is forced to use his car when he works a late shift, because infrequent nighttime AC Transit service makes it impossible for him to attend his full shift and forces him to compromise his personal safety by waiting for the bus for long stretches in an unsafe area. *Id.* at ¶¶ 8, 13. Plaintiff Hain is similarly forced to use her car, which she would prefer to avoid because it costs more money than the bus to reach destinations that AC Transit does not reach due to reductions in service. Hain Decl. at ¶ 13. Thus, Plaintiff Hain is not exempt from economic harm as a result of AC Transit's starved operating budget because she has access to a free bus pass, as MTC argues. *See* Dkt. 179 at 18.

Plaintiffs' economic injuries also do not depend on the elimination of AC Transit's free student bus pass program. Indeed, Plaintiffs strongly disagree that MTC provided "preferential treatment" in providing $1,000,000 for a pilot program that forced MTC to cut other service, *see* Dkt. 179 at 19, and MTC's argument that Plaintiffs are not independently "entitled" to such a pass misses the mark. *See* Part II.B.1.a., *supra*. Plaintiffs' economic injuries are sufficient to support standing without reliance on the free student bus pass program.

A plaintiff who seeks injunctive relief satisfies the injury-in-fact requirement if he or she is realistically threatened by a repetition of the alleged violation. *Lyons*, 461 U.S. at 111. The threatened future injury need not be certain, nor even probable; the plaintiff need only have a reasonable expectation that the challenged conduct could recur. *Truth*, 524 F.3d at 965; *see also* Dkt. No. 33 at 13. Only where the harm is unlikely ever to recur again does the plaintiff lack standing. *Lyons*, 461 U.S. at 111 (police unlikely to subject particular individual to allegedly unconstitutional choke-hold again in the future).

Here, Plaintiffs' injuries are ongoing. There is no evidence to suggest that MTC has changed its challenged practices or dismantled its two-tiered approach to funding transit service. Far from it being unlikely Plaintiffs will experience the injuries described above again, it is virtually certain that they will.[95] MTC's unsupported assertions that Plaintiffs have failed to show a likelihood of future injury are not enough to meet its burden. *See* Dkt. 179 at 18. The ongoing nature of Plaintiffs' injuries distinguish them from the single, non-continuous kind of injury in *Lyons*, where the plaintiff had no reason to believe he would again suffer the allegedly unconstitutional police behavior. *Lyons*, 461 U.S. at 111. Because Plaintiffs here, by contrast, continue to need to ride AC Transit to reach destinations and need to be able to afford the fares, the odds of continuing harm are high. *See* Parts II.D.1.a.ii, iii, *supra*. At the very least, genuine issues of material fact preclude summary judgment.

b. Plaintiffs' Ongoing Injuries Are Fairly Traceable to MTC's Actions.

With respect to stigmatic injury, Plaintiffs have satisfied the requirements of causation "because the discrimination directly causes the stigma and its cessation by itself eliminates the stigma." Dkt. No. 33 at 5:12-13; Dkt. No. 62 at 7:25-28. The Court, therefore, need not consider causation issues further in light of the fact that only one type of injury is required to avoid dismissal for lack of standing. *See Lujan*, 504 U.S. at 560.

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[95] In fact, AC Transit has current plans to increase fares again this year. Marcantonio Opp. Decl., Ex. 83 (AC Transit news re: fare hikes, http://www2.actransit.org/news/articledetail.wu?articleid=5d83198c).

As to quality of life and economic harms, to establish the requisite causal link for standing, plaintiffs' injuries must be "fairly traceable" to defendant's challenged conduct. *Lujan*, 504 U.S. at 560. While the injury should not be "the result of the independent action of some third party not before the court," the defendant's conduct need not be "the very last step in the chain of causation." Dkt. 33 at 8 (citing *Bennett v. Spear*, 520 U.S. 154, 168 (2000)) (internal citations and quotations omitted). Rather, defendant's action must be a "substantial factor motivating" the third party's conduct. *Id.* (citing *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301 (D.C. Cir. 2002)). Under this legal standard, Plaintiffs' evidence amply demonstrates that MTC has caused their quality of life and economic injuries.

MTC "causes" harm to minority transit riders because its conduct is a "substantial factor motivating" AC Transit's decision to cut service and raise fares. *See Tozzi*, 271 F.3d at 308. That AC Transit is the entity that ultimately adopts service cuts or fare increases does not shield MTC from responsibility.[96] MTC's consistent refusal to fund AC Transit's operating shortfalls forces, and repeatedly has forced, AC Transit to cut service and raise fares. Dkt. 175 at 21-23; Part II.B.2, *supra*.[97] Service cuts have caused injury to the quality of life of Plaintiffs and Class Members, while fare hikes have created economic hardships for them.[98] Plaintiffs have shown that MTC's conduct is a substantial factor motivating AC Transit's service cuts and fare increases

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[96] A defendant is liable for the foreseeable harmful effects of its discriminatory funding practices, even where it does not ultimately deliver the services impacted by its funding practices. *See Powell v. Ridge*, 189 F.3d 387, 396 (3d Cir. 1999), *overruled on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *see also* Part II.B.2, at12.

[97] "[U]nrelieved operating shortfalls pose serious and immediate threats to the existing system in the form of service cuts, fare increases, and other impacts on the quantity and quality of transit services provided." Dkt. 167 at ¶ 24; *id.*, Ex. 1 at ¶ 83 & Ex. 2 at ¶¶ 92-94.

MTC raises specific examples (e.g., allocation of preventive maintenance funds, Richmond Bus line, and funds allocated to transit-dependent riders, *see* Dkt. 179, at 20-21) in an effort to contest causation. Given ample evidence that MTC's failure to fund operating shortfalls causes AC Transit to cut service and raise fares, these arguments are irrelevant to the Court's standing inquiry.

[98] To the extent that MTC suggests that Plaintiffs must prove that cuts occurred along lines that AC Transit minority riders use, as discussed in Part II.B.2.c, this argument is legally incorrect. The correct unit of analysis in a disparate impact funding case is the under-funded entity, not a breakdown of the individuals within that entity. *See* n.47, *supra*.

such that there are genuine issues of material fact for trial.

c. Plaintiffs Ongoing Injuries are Redressable.

With respect to stigmatic injury, Plaintiffs have satisfied the requirements of redressability "because the discrimination directly causes the stigma and its cessation by itself eliminates the stigma." Dkt. 33 at 5; Dkt. 62 at 7. The Court, therefore, need not address redressability issues further in light of the fact that only one type of injury is required to avoid dismissal for lack of standing. *See Lujan*, 504 U.S. at 560.

As to quality of life and economic harm, to demonstrate redressability for the purposes of standing, plaintiffs need only show "that a favorable decision is *likely* to redress [their] injur[ies], not that a favorable decision will *inevitably* redress [their] injur[ies]." *Graham v. Fed. Emerg. Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir. 1998) (emphasis added). "Plaintiffs lack standing primarily. . . when redressability depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict." *Id.* (citations and quotations omitted). Here, a favorable decision will provide redress to Plaintiffs and the Class by providing AC Transit with the means to increase service and reduce fares to their benefit.

Plaintiffs seek declaratory relief and injunctive relief that would redress quality of life and economic injuries.[99] MTC argues that Plaintiffs' injuries are not redressable because "AC Transit has the final say on how it spends funds received from MTC." Dkt. 179 at 22. Because shortfalls force AC Transit to cut service, there is a "substantial probability" that the amount and quality of service that AC Transit provides would increase were it to receive additional funds from MTC. *See* Part II.B., *supra*. With additional funding, AC Transit would not only be able to maintain

[99] Plaintiffs seek to "permanently enjoin MTC from making any funding decision that has an unjustified disproportionately adverse impact on AC Transit riders of color, including decisions that cause (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, (b) an inequitable subsidy per passenger trip for AC Transit passengers as compared to Caltrain or BART passengers, and/or (c) an inequitable quantity and quality of service for AC Transit passengers as compared to Caltrain or BART passengers; and to permanently enjoin Defendant MTC from supporting the funding of or funding any improvement or expansion in service that detracts from the equitable funding of services that benefit AC Transit riders." (Dkt. 137 at Prayer for Relief ¶¶ 5-6.)

service levels over time, but could also implement the service improvements that its Board has formally committed to in its "Strategic Vision Plan" or "Green Book." *See* Nemeroff Decl., Ex. B, at 2 ("AC Transit is committed to working with our regional funding agency partners to implement the plan, and improve the quality of life for East Bay residents."); Marcantonio Opp. Decl. Ex. 84 at 50.[100] Plaintiffs and class members would benefit from the service improvements described in the Green Book.[101]

MTC's unsupported and entirely speculative argument is that AC Transit would decline to spend *any* portion of additional funds from MTC on service improvements or fare reductions to the benefit of Plaintiffs and the Class, who comprise fully 78% of AC Transit's ridership. Dkt. 179 at 22. Elsewhere in its briefing, however, MTC notes that AC Transit as a public entity is subject to the antidiscrimination guarantee of Title VI and that it has acted in the past to limit harm to its minority ridership from service cuts. Dkt. 197 at 4. "Nothing in [the Supreme Court's] prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief." *Carolina Env. Study Group*, 438 U.S. at 78. To the contrary, a court must refrain from pre-judging the actions of a third party so as to summarily conclude that redress is unattainable. *See Tyler v. Cuomo*, 236 F.3d 1124, 1133 (9th Cir. 2000). Here, there is a substantial probability that increased funding to AC Transit would result in better service and lower fares—which would benefit Plaintiffs and the Class. *See Graham*, 149 F.3d at 1003

[100] The Strategic Vision Plan proposes a "two-phase implementation plan of both capital and service improvements" over a ten-year period "[t]o address local concerns, achieve significant ridership increases, and enhance mobility in the service area." Nemeroff Decl., Ex. B at 1. It includes planned service improvements for the entire AC Transit network, including areas where the individual Plaintiffs live, and strategies for making fares more affordable. *See generally* Nemeroff Decl., Ex. B. The Green Book remains current AC Transit Board Policy; it has not been materially revised, and is available to the public on AC Transit's website. *See AC Transit Website* at http://www2.actransit.org/planning_focus/details.wu?item_id=42 [last visited 5/22/08].

[101] *See* Darensburg Decl. at ¶¶ 29-31; Hain Decl. at ¶¶ 28-29; Casias Decl. at ¶¶ 16-20; Chavez Decl. at ¶¶ 20-21; Martinez Decl. at ¶ 43; Hernandez Decl. at ¶ 22. Even if named Plaintiffs would not benefit directly from planned service improvements, the Class is now certified, and identifiable members of the Class most definitely would. *Bates*, 511 F.3d at 988 (finding that even though named plaintiff's claim became non-redressable, because an identifiable class member "has standing to seek injunctive relief, the entire federal class has standing.")

("Plaintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision.").[102]

E. THE COURT NEED NOT REACH ASSOCIATIONAL STANDING, BUT EVEN IF IT DOES SO, THE ASSOCIATIONAL PLAINTIFFS HAVE STANDING.

As discussed above, the individual plaintiffs have established their standing to bring this suit. Because only one plaintiff need have standing, the Court need not decide whether ATU 192 or CBE also has standing. *See supra* at n.83. Both, however, do.

1. THE ASSOCIATIONAL PLAINTIFFS HAVE STANDING.

Even if the Court addresses the issue of associational standing, both ATU 192 and CBE have standing to bring this suit. An association has standing when: (1) its members would

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[102] MTC claims that AC Transit's Board Policy 550—and not the Strategic Vision Plan—guides AC Transit's service plans. Dkt. 179 at 23. Even if MTC were correct that Board Policy 550 is the guiding policy for service changes, the "service restoration package" cited by MTC in reference to this lists, in conjunction with AC Transit GM-Memo No. 04-283a, service and frequency improvements to the bus system that would still benefit plaintiffs. Dkt. 205, Ex. B, Ex. E. For example, increases in service and service frequency on the Telegraph/International/E. 14th Lines, among others, (Dkt. 205, Ex. B; *cf.* Nemeroff Decl., Ex. B at 4-9), would also provide benefits to individual plaintiffs and the plaintiff class, including Ms. Darensburg, Ms. Hain and Mr. Casias. Darensburg Decl. at ¶ 29; Hain Decl. at ¶ 28; Casias Decl. at ¶ 20. In addition, MTC's claim that AC Transit staff is "grateful for MTC's efforts" is irrelevant and does not reflect the views of AC Transit's Board, which has adopted a position of neutrality towards this litigation. Dkt. 205 & Nemeroff Decl. ¶4 & Ex. A; *cf.* Dkt. 179 at 23 (citing Skowbo Decl., ¶ 8 Ex. E).

MTC also contends that the Court cannot redress Plaintiffs' injuries because "Plaintiffs have failed to specify which funds that MTC allocates fund the service that Plaintiffs use." Dkt. 179 at 22. MTC suggests that because cuts were made "to the least productive service" and "in areas in which the Plaintiffs do not reside," Plaintiffs were by implication not harmed and their injuries will not be redressed. *Id.* First, MTC would have the Court apply too stringent a standard on redressability. Redressability does not require this precise of a showing. Moreover, the assumption that Plaintiffs were not affected by cuts in areas where they do not reside is simply ill-informed. For example, Ms. Hain was unable to get her daughters to school on time in the "hills" because of cuts to bus service, and an AC Transit memo acknowledges that cuts to service in the "hills" caused hardships to transit dependent individuals. Hain Decl. ¶¶ 20-23; Dkt. 205, Ex. B at 4 ("While these services were never well used, they did serve some transit dependent passengers and their elimination created hardships for some people.").

With respect to MTC's claim that operating funds are indefinite, in *Powell v. Ridge*, a Title VI challenge to a discriminatory school funding formula, defendant legislators sought to contest redressability by claiming that half the money to the school district was from local sources not controlled by defendants. 189 F.3d at 403. The Court rejected this argument, finding that a court order would provide redress to plaintiffs by equalizing the system of funding, "even if other sources of the school district's income were simultaneously reduced." *Id.*

otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the suit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). MTC does not dispute, as the Court already found in ruling on MTC's first motion to dismiss, that the third prong is satisfied because the plaintiffs seek prospective and equitable relief, not damages. *See* Dkt. 33 at 12; *see also Presidio Golf Club v. Nat'l Park Serv.*, 115 F.3d 1153, 1159 (9th Cir. 1998) (participation of individual members not required where suit does not seek individualized damages). Rather, MTC argues that ATU 192 and CBE fail to satisfy the first and second *Hunt* prongs. As we explain below, MTC's arguments are meritless.

a. MEMBERS OF ATU 192 AND CBE WOULD HAVE STANDING.

The first prong of *Hunt* is satisfied so long as an organization has at least one member who would have standing to bring the suit. *Nat'l Lime Assoc. v. Env. Prot. Agency*, 233 F.3d 625, 636 (D.C. Cir. 2000). ATU 192 and CBE satisfy this prong because each organization has members of color who use AC Transit for their transportation needs and who have suffered the very same injuries as the individual plaintiffs.

Two minority members of ATU 192 have submitted declarations stating that, over a period of many years, they have used AC Transit and experienced serious hardships as a result of service cuts. *See* Robinson Decl. ¶¶ 2-3, 5, 9-13; Jones-White Decl. ¶¶ 2-4, 7-13, 15.[103] Similarly, three minority CBE members have submitted declarations describing the negative impact that MTC's two-tiered transportation system has had on their lives. For example, Concepciòn Chavez is an 80-year old Latina who is AC Transit dependent. Chavez Decl. ¶¶ 3, 7. BART was not designed to address her needs or take her where she needs to go. Chavez Decl. ¶¶

[103] For example, Margo Robinson was forced to buy a car in 2003, when reductions in bus services rendered her unable reliably to use AC Transit for work commuting and other purposes. Robinson Decl. ¶¶ 9, 11. Rebecca Jones-White was also forced to purchase a car because AC Transit's services did not allow her to commute safely and reliably. Jones-White Decl. ¶¶ 9-12. Owning and maintaining their vehicles has imposed significant and unwanted financial hardships on both of these ATU 192 members. Robinson Decl. ¶¶ 11-13; Jones-White Decl. ¶ 13, 15. In addition, MTC's unequal and discriminatory funding practices inflict stigmatic harm on ATU 192 members who use AC Transit, just as those practices stigmatize the individual plaintiffs. *See* Robinson Decl. ¶ 14.

7-8, 10-12, 18. Ms. Chavez' day revolves around taking the bus to grocery stores, medical care, church and social events. Chavez Decl. ¶¶ 7, 9-12. Decreased bus reliability and increased crowding mean she has to spend much of her day traveling, and she risks being injured while getting on and off the bus. Chavez Decl. ¶¶ 9, 13, 17, 21.[104]

The harms suffered by ATU 192 and CBE members as a result of MTC's discriminatory conduct constitute injuries in fact for the same reasons discussed previously regarding the injuries suffered by the individual plaintiffs. And for the reasons also discussed previously with regard to the individual plaintiffs, MTC has caused these injuries to the organizations' members, and the relief sought in this case would redress those injuries. Therefore, both ATU 192 and CBE satisfy the first element of associational standing. *See*, *e.g.*, *Nat'l Lime Assoc.*, 233 F.3d at 636 (first

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[104] In addition, CBE member Octavio Hernandez is a Latino man who relies entirely upon public transit. Hernandez Decl. ¶¶ 3, 6. He uses or has used AC Transit for work, school, groceries and recreation. Hernandez Decl. ¶ 7. For years he has had to take multiple AC Transit buses to reach his destinations, or has had to walk miles to BART at times that he could not afford to take both modes of traffic. Hernandez Decl. ¶¶ 8-12. The unreliability of AC Transit service has resulted in his getting warnings from his employer. Hernandez Decl. ¶ 13. The fare increases have sometimes prevented him from getting to work. Hernandez Decl. ¶ 17. AC Transit route cuts and realignments have meant longer waits for him, more walking in unsafe areas, and in the context of work, more limited exposure for his students by way of field trips. Hernandez Decl. ¶¶ 15, 17-18, 20-21. Mr. Hernandez also feels that local pollution from cars and trucks negatively affects his health. Hernandez Decl. ¶¶ 23-24. He is upset by being stigmatized by the two-tiered system. Hernandez Decl. ¶ 25.

Further, Virginia Martinez is a Latina and mother of four children. Martinez Decl. ¶¶ 2-3. She, her husband, and their children have been primarily transit dependent since 1996, but recently were loaned a van by a family member who witnessed them struggling for many years. Martinez Decl. ¶ 6. Before borrowing the van, Ms. Martinez and her family relied on AC Transit for groceries, medical care, social events, and church, among other places. Martinez Decl. ¶¶ 6-8, 10-12, 17. Due to AC Transit fare increases, Mrs. Martinez could no longer afford bus passes, so her children started to walk very long distances to school. Martinez Decl. ¶¶ 21-22, 36. Due to service cuts, Mrs. Martinez often has to wait long periods of time for the bus and sometimes walks long distances because it is faster. Martinez Decl. ¶¶ 9, 12-13, 15, 26, 28-29. She even received a warning from her employer because of the infrequent schedule. Martinez Decl. ¶ 16. Ms. Martinez has passed up potential job opportunities because they were not adequately accessible via AC Transit due to service frequency and speed. Martinez Decl. ¶¶ 31-32. She fears for her children's safety in light of previous threats to her family and murders on the route from the bus to her home. Martinez Decl. ¶¶ 38-42. There are no benches and no shelter. Martinez Decl. ¶ 43. Ms. Martinez believes that she suffers health impacts from car and engine exhaust on San Pablo Avenue. Martinez Decl. ¶ 44. All three CBE members have suffered under MTC's discriminatory practices and would have standing to sue in their own right.

Hunt prong satisfied where one member of trade association faced costs that would be avoided if association and other plaintiffs succeeded in challenge to environmental rule); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1484 (9th Cir. 1993) (union satisfied first *Hunt* prong where some of its members could claim injury from application of English-only policy).

b. THE INTERESTS AT STAKE IN THIS CASE ARE GERMANE TO THE ORGANIZATIONS' PURPOSES.

MTC contends, wrongly, that issues of discrimination and inequity in transportation funding are not germane to the purposes of ATU 192 and CBE. MTC's arguments grossly misconstrue the germaneness standard and are contrary to fact.

It is well-settled that the germaneness test for associational standing is "undemanding." *Presidio Golf Club*, 155 F.3d at 1159; *see also Bldg. & Constr. Trades Council of Buffalo, New York v. Downtown Dev., Inc.*, 448 F.3d 138, 148-49 (2d Cir. 2006); *Nat'l Lime Assoc.*, 233 F.3d at 636; *Hodel*, 840 F.2d at 58-59. An organization need not show that the interests sought to be protected in the suit are central to or at the core of the organization's mission; "mere pertinence" between the litigation and an organizational purpose is sufficient. *Hodel*, 840 F.2d at 58; *see also Bldg. & Constr. Trades Council*, 448 F.3d at 148; *Nat'l Lime Assoc.*, 233 F.3d at 636.

MTC attempts to turn this standard on its head and require the Court to engage in an improperly demanding and intrusive inquiry, contrary to the Ninth Circuit's binding decision in *Presidio Golf Club* and every other published decision on the subject. The Court should reject MTC's efforts, especially as it need not reach the issue of associational standing at all.

MTC posits, for example, that promoting racial equality in public transit services is unrelated to ATU 192's purposes because the Union has not conducted an ethnographic survey of its members, who in some cases may be white people living in areas not served by AC Transit. This startling assertion ignores the fact that most ATU 192 members are estimated to be minorities; that members who might benefit from a discriminatory scheme may have a principled and legitimate interest in promoting equality; and that, as a matter of law, an organization is free to advocate on behalf of a subset of its members, even if members' interests conflict (and here no

evidence of conflict exists). *Hodel*, 840 F.2d at 60 n.25; *see* Declaration of ATU 192 President Yvonne Williams ("Williams Decl.") ¶ 3.

While ATU 192 need not establish a close nexus between the litigation and organizational purpose, the Union's interest in equitable and non-discriminatory transit services is very much aligned with its purpose to engage in a broad range of activities to further the "interests and welfare of [its] membership." *See* Williams Decl. ¶ 4, Ex. A at 30. ATU 192 has brought litigation in the past to vindicate members' interests that the Union deems important. For example, ATU 192 brought an environmental claim against AC Transit under the California Environmental Quality Act (CEQA); and it brought suit on behalf of just one member who faced loss of medical benefits. *Id.* at 35. It is not surprising that ATU 192 would also choose to vindicate its members' right to have non-discriminatory and equitable access to transportation benefits. ATU 192 is, after all, an organization representing individuals employed in the transportation industry. As such, its familiarity with, and concern for, transit issues naturally drew its attention to the discriminatory practices at issue here. Williams Decl. ¶¶ 2, 5.

MTC attempts to attack ATU 192's motives by speculating that the Union's interests are adverse to the interests of AC Transit riders. But no credible evidence exists to support MTC's assertions, which are entirely based on the erroneous and offensive assumption that ATU 192 cannot care about *both* its members' employment conditions and the welfare of riders, including member riders. To the contrary, ATU 192's interest in eradicating discriminatory funding practices is consistent with the interests of the riding public – a public on whose behalf ATU 192 has frequently advocated.[105] MTC's attempt to conjecture about ATU 192's motives in bringing

[105] ATU 192 has, for example, often opposed proposed service cuts on the basis that such cuts would disenfranchise low-income minority riders, including ATU 192 members. Williams Decl. ¶ 4, Ex. A at 39-41, 72-74, 86-87, 91-94. The Union has also opposed efforts to increase fares over the years and recently spoke at a public hearing against AC Transit's latest attempt to substantially increase fares. *Id.* at ¶¶ 4, 5, Ex. A at 72-74. ATU 192 has pushed for improved sanitation and safety measures on buses – such as the installation of safety cameras – which would benefit both drivers and riders. *Id.* at ¶ 4, Ex. A at 53-61. The Union advocates for riders for a variety of reasons, including because its members interact with riders every day and care about the quality of services provided to them. *Id.* at ¶ 5. Moreover, while the Union is legitimately concerned about potential layoffs that could result from service cuts, this concern is compatible with its interest in promoting better and affordable services for riders. *Id.* at ¶ 4, Ex.

suit is wholly irrelevant to the "undemanding" germaneness test, under which the organization need only show that it has one interest related to the litigation. "[S]tanding is not measured by divining the mix of a party's motivations for bringing suit, and would not be defeated by showing that, absent interests unrelated to the subject matter of the action, it would not have been filed." *Bldg. & Constr. Trades Council*, 448 F.3d at 149 n.6.[106]

The discriminatory allocation of transportation funding is also germane to CBE's purpose. Equity in transportation funding as well as increased quality and quantity of public transportation in low-income communities of color is germane to CBE's purpose to "achieve environmental health and justice by building grassroots power in and with communities of color and working-class communities."[107]

CBE's clear mission is further articulated on its website and in its materials:

> "[CBE] organize[s] in working class communities of color because those communities suffer the most from environmental pollution and toxics. CBE works in urban communities in Northern and Southern California among low-income African Americans, Latinos and other nationalities who are bombarded by pollution from freeways, power plants, oil refineries, seaports, airports, and chemical manufacturers. As a result, the people – who have no choice but to live in these areas -- suffer from very high rates of asthma and respiratory illnesses,

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A at 39; 115. Expanding services is good for riders *and* good for AC Transit employees, who are needed to drive and maintain the vehicles used to provide those services.

[106] Indeed, labor organizations frequently bring suits that seek to further interests that are separate from bread-and-butter collective bargaining issues. *See Int'l Union, UAW v. Brock*, 477 U.S. 274, 290 (1986) (union had standing to bring suit under Trade Act); *Bldg. & Constr. Trades Council*, 448 F.3d at 148-150 (labor organization had standing to bring environmental action); *Garcia*, 998 F.2d at 1484 (local union had standing to bring Title VII discrimination suit); *California Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, 1174 (9th Cir. 1990) (suit challenging regulation prohibiting provision of legal services to certain legal residents was germane to union's purpose, where union's constitution included objectives of advancing "economic, social, and political interests" of members). Under this well-established precedent, this litigation is clearly germane to ATU 192's broad interest in protecting the interests and welfare of its members.

[107] *See* http://www.cbecal.org/about/mission.html. The environmental justice movement, of which CBE is a part, is "the confluence of three of America's greatest challenges: the struggle against racism and poverty; the effort to preserve and improve the environment; and the compelling need to shift social institutions from class division and environmental depletion to social unity and global sustainability." Report to the U.S. EPA and the Office of the President Submitted by Delegates of the 1991 National People of Color Environmental Leadership Summit Healthy Communities, page 1, at http://www.cbecal.org/pdf/healthy-communities.pdf. CBE's work addresses each of these issues discretely and jointly through its organizing, research, policy, and litigation. For example, CBE works on general plans, redevelopment plans, green industry and statewide policy as well as mobile and stationary source pollution issues.

> heart problems, cancer, low birthrate, and miscarriages. These problems are made worse by higher than average rates of poverty, inadequate housing, poor schools, and inadequate health care and social services. Children are the most vulnerable victims of these problems." <http://www.cbecal.org/about/index.html>

Through this lawsuit in particular, CBE seeks to ensure mobility in such minority communities; increase access to schools, health care, and social services; and increase funding for AC Transit that would allow it to improve service quality. These goals are all germane to CBE's mission and purpose described above. Closely tied to its purpose, CBE, through this lawsuit, seeks empowerment for members living in environmental justice communities ("building grassroots power"), which comes in part from obtaining equity in the treatment of minority transit riders.[108] In sum, while the Court need not reach the issue because the individual plaintiffs have standing, both ATU 192 and CBE satisfy the requirements of associational standing.

2. CBE CAN CHALLENGE ALL MATTERS OTHER THAN THOSE PERTAINING TO THE "DEVELOPMENT, PREPARATION OR ADOPTION" OF THE 2005 RTP.

MTC seeks partial summary judgment on the separate ground that "CBE is barred from pursuing any part of its claims raised to the extent they are related to the 2005 [RTP]" because the waiver provisions of the settlement of an environmental lawsuit prohibit CBE from bringing "any future claims related to MTC's 2005 RTP." Dkt. 177 at 3. In fact, the waiver provisions are narrowly drawn and do not preclude CBE from challenging the adequacy or implementation of the 2005 RTP nor "any matters outside the scope of" the settlement agreement.

The agreement executed in March 2004 between CBE, MTC and other parties to an air quality case settling an environmental lawsuit concerning the 2001 San Francisco Bay Area

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[108] MTC contends that funding BART and Caltrain is more consonant with CBE's general objectives "than taking money from rail service for the benefit of AC Transit." Dkt. 177 at 20. This position misunderstands CBE's purpose and goals. First, due to MTC's inequitable and discriminatory funding practices, CBE's AC Transit rider members experience tremendous personal stress and are forced to borrow and operate cars instead of using public transit. Martinez Decl. ¶¶ 6, 12, 17, 38, 41-42, 45. This has the effect, among other things, of increasing pollution. Second, MTC's provision of transit funding in a way that discriminates against communities of color and CBE members does not further CBE's goals of empowerment and environmental health, or access. Third, equitable funding to AC Transit could result in local buses that are less polluting; lower polluting buses directly comport with CBE's goals.

Ozone Attainment Plan[109] states that CBE waives "any and all claims . . . arising under any provision of law to challenge judicially MTC's development, preparation and/or adoption of the 2005 RTP or its EIR." Dkt. 191, Ex.AA, at 10-11 (section D.2). Unlike another waiver provision in the agreement, this provision did not waive challenges to the "adequacy" or "implementation" of the then-unapproved and unimplemented RTP. *See id.* at 10 (section D.1.). The following subparagraph of the agreement, moreover, specifies that: "CBE . . . do[es] not waive any rights to contest in a court of law any matters outside the scope of this Agreement. The waiver of rights agreed to by CBE . . . shall extend only to claims specified in this section." *Id.* at 11 (section D.3). Using the contractual interpretation principles invoked by MTC, Dkt. 177 at 22-23, the agreement therefore waives only CBE's right to challenge the "development, preparation and/or adoption" of the 2005 RTP, but not challenges to any other aspects of the 2005 RTP, such as challenges to the adequacy or implementation of the 2005 RTP. Nor does the waiver bar CBE from challenging the continuing effects of earlier RTPs.

Notwithstanding the broad reach of its partial summary judgment motion seeking to bar any claims by CBE to the extent they "are related" to the 2005 RTP, MTC's supporting memorandum apparently concedes that the terms of the waiver provision are actually far narrower. The pertinent heading of its memorandum argues only that "CBE is barred from bringing those parts of its claims based upon MTC's preparation, development, and adoption of the 2005 RTP." Dkt. 177 at 22. Here, CBE's claims essentially challenge the discriminatory *implementation* of the 2005 RTP as well as the continuing effects of prior RTPs. MTC's contention that CBE is prohibited from bringing any claims related in any way to the 2005 RTP is

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[109] MTC confuses two unrelated settlements, one to which MTC was not a party. In its supporting memorandum, Dkt. 177 at 6-8, and 23, MTC describes *Bayview Hunters Point Cmty. Advocates v. MTC*, 366 F.3d 692 (9th Cir. 2004), in which CBE sued MTC, AC Transit and MUNI for failing to implement a transportation control measure ("TCM2") – requiring a 15% transit ridership increase within ten years. After CBE prevailed in District Court, AC Transit and MUNI entered into settlement with CBE. MTC was not a party to the settlements. *CBE v. BAAQMD* is a separate case challenging the Bay Area Air Quality Management District and MTC's 1-Hour Ozone Attainment Plan. *See* Dkt. 178-4 at 2.

inaccurate, and thus its broad request for summary judgment on this ground should be denied.

3. THE APPLICABLE STATUTE OF LIMITATIONS DOES NOT BAR CBE'S CLAIMS IN THIS LAWSUIT.

MTC incorrectly argues that the statute of limitations restricts CBE's claims. *See* Dkt. 177 at 21-22. CBE and the other Plaintiffs seek declaratory and injunctive relief based on challenges to MTC's ongoing discriminatory policies as manifested in MTC's actions. The continuing violation doctrine preserves incidents that occur outside of the limitations period when those incidents are part of a larger discriminatory practice. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *see also Williams v. Owens-Illinois, Inc.,* 665 F.2d 918, 924 (9th Cir. 1982) ("[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period."). Only one incident needs to have occurred within the statutory period to trigger the doctrine. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002).[110]

Moreover, this Court previously rejected MTC's statute of limitations argument at the motion to dismiss stage. Dkt. 62 at 12 ("Plaintiffs, however, are alleging present and ongoing discrimination; the background and historical information alleged in the complaint can be relevant to the ongoing discrimination") (citing *Arlington Heights,* 429 U.S. at 266-67, and *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004)). The factual record, discussed above at Parts II.B.1 and C.2, strongly supports Plaintiffs' allegations of "present and ongoing discrimination" such that summary judgment is inappropriate.[111]

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[110] Nor is *Ledbetter v. Goodyear Tire & Rubber Co.*, ---- U.S. ----, 127 S. Ct. 2162 (2007), to the contrary. In *Ledbetter*, the Court held that pay-setting decisions before the administrative charge-filing period under Title VII were time barred because each pay-setting decision in that case was a discrete act. *Id.* at 2175. *Ledbetter* distinguished an earlier case, *Bazemore v. Friday*, 478 U.S. 385 (1986) in which the pay-setting decisions derived from a continuing pay structure in which African-American employees were paid less than whites adopted before the charge period that was "intentionally retain[ed]" to the present. *Ledbetter,* 127 S. Ct. at 2174. This case, like *Bazemore*, concerns claims of intentional discrimination and a record showing that MTC's long-standing, systemic unequal treatment of minority riders begun many years ago extends on an ongoing basis II.B.1 and C.2. above.

[111] For example, in 2003, MTC tightened its restriction in Res. 3580, requiring operators to show that the shortfall would result in a significant service reduction beyond service adjustments already planned as part of FY 2003-04 budget process; MTC passed Res. 3688 limiting preventive maintenance flexibility to only two out of every twelve years for any transit operator. In MTC's 2003, MTC requested $179,000,000 in federal Section 5309 funds for BART, as well

III. CONCLUSION

For the reasons stated above and in Plaintiffs' opening brief, Plaintiffs request that the Court grant Plaintiffs' motion for partial summary adjudication on prima facie disparate impact discrimination arising from MTC's failure to fund operating shortfalls identified in its RTP. Plaintiffs also request that the Court deny MTC's several summary judgment motions.

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as $2,500,000 in federal Section 5309 funds to build park-and-ride lots at BART stations, but only requested $12,000,000 in discretionary federal Section 5309, Section 3037 JARC, and Section 5208 Intelligent Transportation Systems Program funds for AC Transit. In 2004, MTC requested $110 million in federal Section 5309 funds for BART, as well as $11 million to improve BART stations, but only requested $15 million in discretionary federal Section 5309, JARC, and Intelligent Transportation Systems Program funds for AC Transit.

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