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10 UNITED STATES DISTRICT COURT
11
12 NORTHERN DISTRICT OF CALIFORNIA

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

19 Plaintiffs,

20 v.

21 METROPOLITAN TRANSPORTATION
COMMISSION,

22 Defendant.

Case No. C-05-1597-EDL

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR SUMMARY
ADJUDICATION, AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR SUMMARY
ADJUDICATION**

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

1 **NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, NOTICE IS**
3 **HEREBY GIVEN THAT** on June 24, 2008, at 9 a.m., in Courtroom E, 450 Golden Gate
4 Avenue, 15th Floor, San Francisco, California, Plaintiffs will and hereby do move the Court
5 pursuant to Fed. R. Civ. P. 56 for summary adjudication on the following issue: that they have
6 established a prima facie case of disparate impact discrimination, in violation of California
7 Government Code Section 11135 and its implementing regulations, with regard to MTC's
8 practice of funding transit capital shortfalls, but not operating shortfalls, in its Regional
9 Transportation Plans. Plaintiffs bring this motion on the ground that they are entitled to summary
10 adjudication as a matter of law. *See Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1441-42 (9th Cir.
11 1990) (motion pursuant to Rule 56 is proper vehicle to obtain summary adjudication of discrete
12 legal issue). This motion is based upon this Notice of Motion and Motion, this Memorandum of
13 Points and Authorities, the accompanying declarations of Thomas A. Rubin, Richard Berk,
14 Thomas W. Sanchez, and Richard A. Marcantonio, the complete files and records in this action,
15 and on such other argument or evidence as may be presented at or before the time of hearing.
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1 Dated: April 1, 2008

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I. INTRODUCTION

1 This is a civil rights class action brought on behalf of minorities who make up the vast
2 majority of the riders of the bus system run by the Alameda-Contra Costa Transit District (“AC
3 Transit”). California law prohibits recipients of state funding from engaging in practices that
4 have the *effect* of discriminating. Unfortunately, policies and practices of Defendant
5 Metropolitan Transportation Commission (“MTC”) have had the effect of creating and
6 maintaining two separate but unequal transit systems in the San Francisco Bay Area: a shrinking
7 bus system for minority transit riders of AC Transit, and an expanding rail system for the
8 substantially more white ridership of the region’s major rail providers. Plaintiffs’ motion for
9 summary adjudication focuses on MTC’s facially neutral practice of refusing to fund shortfalls in
10 the operating revenues transit providers require to operate their existing service levels, while
11 funding capital rehabilitation costing billions of dollars. As Plaintiffs demonstrate, the
12 undisputed facts establish a prima facie case of disparate impact discrimination. MTC’s practice
13 has left AC Transit no choice but to reduce critical bus service, to the severe detriment of its
14 minority riders. The disproportionately white ridership of the region’s rail providers have not had
15 to endure similar service cuts; quite the contrary, they have enjoyed dramatic expansions in the
16 levels of rail service available to them.

17
18 As the metropolitan planning organization (“MPO”) for the Bay Area region, with control
19 of the region’s transportation purse strings, MTC is directly responsible for the stark disparity in
20 levels of transit service run by operators within its jurisdiction. AC Transit serves a ridership that
21 is overwhelmingly made up of riders of color. Indeed, AC Transit carries the highest proportion
22 of minority riders – nearly 80% – of all the region’s transit operators. In contrast, the Bay Area
23 Rapid Transit District (“BART”) and the Peninsula Corridor Joint Powers Board (“Caltrain”)
24 serve riderships more than twice as white as AC Transit’s.

25 This motion focuses on the disparate impact of just one of MTC’s practices: its failure to
26 fund transit operating shortfalls in its long-range plan. In the process of preparing its long-range
27 plan, known as the Regional Transportation Plan (“RTP”), MTC is required by law to prioritize
28 the preservation of the existing transportation system. While MTC places great emphasis on

1 preservation of the existing *rail* system, it fails to accord the same priority to the existing *bus*
 2 system, instead allowing it to deteriorate. Since 1994, MTC has consistently directed billions of
 3 dollars to rectify shortfalls in revenues needed for *capital rehabilitation* (*i.e.*, the renewal and
 4 replacement of capital infrastructure), while not spending one dollar to remedy the shortfalls in
 5 revenues required by AC Transit for day-to-day *operations*. This decades-long practice has
 6 forced AC Transit to reduce the amount of service it can deliver to its heavily minority ridership,
 7 impairing the ability of the Plaintiffs, their members, and the Class of minority bus riders to get to
 8 work, school, the grocery store, and other essential destinations. The disproportionately white
 9 ridership of BART and Caltrain, by contrast, has not had to endure any service cuts, and indeed
 10 over this same period enjoyed remarkable service expansions of 48% and 80%, respectively.
 11 (See graph, Attachment A.¹)

12 At trial, Plaintiffs will present evidence that MTC engages in numerous other practices
 13 that have the intent and the effect of discriminating against minority riders. This motion for
 14 summary adjudication, however, focuses only on MTC's practice of funding transit capital
 15 rehabilitation, but not operating, shortfalls. The undisputed facts establish a *prima facie* case of
 16 disparate impact discrimination because this practice, while neutral on its face, has a
 17 disproportionate adverse impact on AC Transit's minority riders. Accordingly, Plaintiff's motion
 18 should be granted, shifting the burden to MTC to justify its practice as a "business necessity."

19 II. BACKGROUND

20 This Memorandum first discusses, in Part II-A, below, the Class of minority AC Transit
 21 riders, the importance of transit service to them, and the demographics of and changes in service
 22 levels on the region's main single-mode transit operators. It then, in Part II-B, describes
 23 defendant MTC's control over and responsibility for funding the region's transportation system.

24 //

25 //

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 28 ¹ Source: Declaration of Thomas A. Rubin ("Rubin Decl."), Exh. 1, attachment E.

1 **A. Plaintiffs, Their Members, And The Class Are Minority AC Transit Riders Who**
 2 **Suffer Severe Harm From Declining Levels Of The Bus Service On Which They**
 3 **Rely, While The More White and More Affluent Riders Of BART and Caltrain Have**
 4 **Enjoyed Dramatic Growth In Rail Service**

5 **1. The Class Consists Of Minority Bus Riders Who Use AC Transit To Get To**
 6 **Work, School, And Other Critical Destinations**

7 Bus service is a critical gateway that provides the communities it serves with access to a
 8 broad range of opportunities: from employment to education to health care and beyond. The
 9 Class, composed of minorities who use the crucial bus service provided by AC Transit, is
 10 represented by Sylvia Darensburg and Vivian Hain.²

11 Ms. Darensburg is a low-income, African-American single mother of three who resides in
 12 East Oakland. She and her children depend on AC Transit buses to get to work, school, college
 13 classes, medical appointments, grocery shopping, social services, and volunteer activities.
 14 Declaration of Richard A. Marcantonio In Support of Motion for Summary Adjudication
 15 (“Marcantonio Decl.”), Exh. 40 at 19, 24-25, 40-41, 62, 76-77, 84, 98-99, 137; *id.*, Exh. 63, No. 5
 16 at 12 & No. 10 at 19. Plaintiff Vivian Hain is a low-income Latina mother of three who formerly
 17 lived in East Oakland and now lives in Berkeley. She has owned several old and unreliable
 18 automobiles since 1998; during the frequent and lengthy periods when her car does not run, she
 19 and her family depend entirely on AC Transit buses for all of their transportation needs. *Id.*, Exh.
 20 42 at 9, 14-15, 25-26; *id.*, Exh. 64, No. 8 at 16.³

21 Service cuts have dramatically and negatively affected Plaintiffs and the Class. For
 22 example, since evening service was discontinued on the bus route nearest Ms. Darensburg’s
 23 home, she has been forced to walk 22 blocks in an unsafe area to get home late at night after
 24 working overtime or attending her evening college classes. *Id.*, Exh. 63, No. 18 at 35-36.
 25 Because she has been followed and harassed, she is afraid of making this trip by foot and now

26 ² On December 10, 2007, this Court certified a Plaintiff Class consisting of Black, Hispanic,
 27 Asian or Pacific Islander, and American Indian or Alaskan native individuals who are patrons of
 28 AC Transit. *See* D.Ct. Order (Doc. No. 145) at 6.

³ Plaintiffs Communities for a Better Environment and Amalgamated Transit Union, Local
 192 have members who, like Plaintiffs Darensburg and Hain, are minority riders who use AC
 Transit for their transportation needs; they, too, have been harmed by cuts in the service they use.
Id., Exh. 48, Nos. 12-14 at 31-34; *id.*, Exh. 49, Nos. 12-14 at 31-34.

1 hesitates to go out at night. *Id.* Other service cuts in 2003 have forced her to walk through unsafe
2 areas just to visit her daughter. *Id.*, Exh. 41 at 195. Route 58X used to provide a direct route
3 from her neighborhood to downtown Oakland, linking Ms. Darensburg to job searches and legal
4 appointments for her daughter; since its elimination in 2003, however, it takes Ms. Darensburg
5 twice as long to get downtown. *Id.*, Exh. 40 at 139; Exh. 41 at 160. For Ms. Hain, service cuts
6 have made it difficult to complete her college courses and for her daughters Jasmine and Janina to
7 get to school. Marcantonio Decl., Exh. 64, No. 11 at 21-23. Thus, when the bus route to
8 Jasmine’s elementary school was eliminated in 2004, Ms. Hain struggled daily to find a way to
9 get her daughter to school. When Ms. Hain’s car was not running – periods that lasted as long as
10 two months – Jasmine missed one or two days of school per week and Ms. Hain was frequently
11 forced to spend \$20 on cab fare just to get her daughter to school. *Id.* at 22; Exh. 42 at 107-08.

12 The Class Representatives are also vulnerable to fare increases. Ms. Darensburg’s limited
13 monthly budget requires careful planning for every expense; even small increases in
14 transportation costs leave less money for food, rent, utilities, or other life necessities. *Id.*, Exh.
15 63, No. 18 at 36 & No. 19 at 37. Similarly, Ms. Hain has been forced to choose between
16 spending scarce family income on food or bus fare. *Id.*, Exh. 64, No. 19 at 37.

17 The predicaments of Class Representatives Sylvia Darensburg and Vivian Hain are typical
18 of the Class. Like them, many other low-income minority riders of AC Transit are particularly
19 vulnerable to bus service reductions and fare increases. As MTC has noted, when inadequate
20 operating funding leads to service cuts and fare hikes, these riders are the “[h]ardest hit.”
21 Marcantonio Decl., Exh. 57 at 13 & App. at 5. MTC has also found that the cost of transportation
22 is one of their “top transportation barriers.” *Id.*, Exh. 65 at 1.

23 **2. The Region’s Three Major Single-Mode Operators Serve Demographically** 24 **Distinct Riderships**

25 The Bay Area region is home to three large single mode transit agencies – AC Transit,
26 which operates the Bay Area’s largest bus-only system, and BART and Caltrain, which operate
27 rail systems. MTC’s 2006 demographic survey of transit operators confirmed that the rail
28 providers serve riderships that are substantially more white and affluent than the riders who

1 depend on AC Transit's bus service.

2 AC Transit currently serves about 65 million riders a year, providing local and Transbay
3 service within Alameda and Contra Costa counties with connecting service to three other
4 counties, including San Francisco. Class Representatives Darensburg and Hain represent a Class
5 of minorities who ride AC Transit. *See* D. Ct. Order (Doc. No. 145) (order certifying Class). As
6 low-income members of racial minorities, they share common characteristics with many other AC
7 Transit riders: taken as a whole, 78% of AC Transit's riders (local plus Transbay) are minorities.
8 *Id.*, Exh. 46 at 10 & Table 1.⁴ Indeed, as MTC's proffered statistical expert acknowledges, AC
9 Transit carries the highest percentage of minority riders of any transit agency in the Bay Area. *Id.*
10 Its ridership is also less affluent than BART or Caltrain's, as more than a third of all AC Transit
11 riders are extremely-low income, earning below \$25,000.⁵

12 BART, with a ridership of about 100 million, is the region's largest rail-only operator.
13 Declaration of Thomas A. Rubin In Support of Plaintiffs' Motion for Summary Adjudication
14 ("Rubin Decl."), Exh. 2 at 46 n.27. Originally serving three counties (Alameda, Contra Costa and
15 San Francisco), BART expanded its coverage to a fourth (San Mateo) in 2003. Although
16 BART's geographical service area overlaps extensively with that of AC Transit, the
17 demographics of its ridership are entirely different: almost half of its riders (46%) are white and
18 fewer than 13% have incomes below \$25,000.⁶

19 Like BART, Caltrain provides only rail service. And like BART, almost half (49%) of its
20 riders are white. Fewer than 16% of Caltrain riders have incomes below \$25,000. Caltrain serves

21 ⁴ Although some of AC Transit's routes are designated "Transbay" and others "local," the
22 service provided on these two types of routes overlaps, with Transbay buses carrying local riders
23 before crossing the Bay Bridge. *Id.*, Exh. 14 at 559. Even if it were appropriate to distinguish
24 AC Transit's Transbay from its local service, the proportion of white riders on AC Transit's
25 Transbay service, like its local service, is still far lower, at 33.1%, than that of BART or Caltrain.
26 *Id.*, Exh. 56 at 4.1-18.

27 ⁵ In Alameda and Contra Costa Counties, a family of four with an income of \$25,100 is
28 "[e]xtremely-low income," defined under state law as 30% or less an area median income. Cal.
29 Health & Safety Code §50106; http://www.hcd.ca.gov/hpd/hrc/rep/state/cdbg_home07.pdf.
30 Annual ridership: Marcantonio Decl., Exh. 20 at 12, 14; Rubin Decl., Exh. 2 at p. 47 n.27.
31 Service area: Exh. 32 at 2.1-7. Demographics: Marcantonio Decl., Exh. 46 at 10 & Table 1; *id.*,
32 Exh. 14 at 501 & Exh. 15; *id.*, Exh. 19 at 6; *id.*, Exh. 56 at 4.1-19; Berk Decl., Exh. A, ¶4.

33 ⁶ Service area and ridership: Marcantonio Decl., Exh. 20 at 24-26. Demographics: *Id.*,
34 Exh. 14 at 501 & Exh. 15; *id.*, Exh. 19 at 6; *id.*, Exh. 56 and *id.* at 4.4-19.

1 about 10 million riders annually (one-sixth as many as AC Transit), providing service in three
2 counties, from Gilroy and San Jose in the south to San Francisco in the north.⁷

3 These three transit agencies share common traits that are otherwise unique among the
4 region's major transit agencies: each operates a single "mode" (bus or rail) and each serves
5 multiple counties. AC Transit and BART, in particular, serve overlapping areas.⁸ Despite these
6 similarities, they serve radically different riderships. The percentage of white riders on the rail
7 service provided by BART and Caltrain is more than *double* that of AC Transit's bus service
8 (46% on BART and 49% on Caltrain, but 22% on AC Transit). At the same time, the percentage
9 of BART and Caltrain riders with extremely-low incomes is less than *half* that of AC Transit
10 (12.6% on BART and 15.6% on Caltrain, but 36.2% on AC Transit). Marcantonio Decl., Exh. 56
11 at 4.1-19, 4.4-19, 4.6-18.

12 3. AC Transit's Riders Suffer Repeated Cuts in Bus Service While BART and 13 Caltrain Riders Enjoy Expanding Rail Service

14 Over the period that MTC prepared and adopted its last four long-range plans (1992-93 to
15 2005-06), as the population of AC Transit's service area grew by 11.3%, AC Transit service
16 levels declined sharply: Its 2005-06 service levels were 9.6% lower than its initial "baseline" in
17 1992-93. Rubin Decl., ¶¶11-12 & Exh. 1 at ¶¶103, 106.⁹ These declining service levels have
18 included the elimination of some evening service and of entire routes, forcing Plaintiffs and the
19 class to walk through unsafe neighborhoods simply to get home or to visit family, requiring them
20 to spend significantly more time in transit, sometimes leaving them no public transportation
21 alternative, and simply making it more difficult for them to go about their daily lives. *See supra*,
22 Part II-A-1. MTC's proffered expert, Stefan Boedeker, acknowledges that "[t]he sharp decrease

23 ⁷ Demographics: Marcantonio Decl., Exh. 14 at 501 & Exh.15; *id.*, Exh. 19 at 6; *id.*, Exh.
24 56. Service area and description: Marcantonio Decl., Exh. 20 at 32; *id.*, Exh. 32 at 2.1-9.
25 Annual ridership: Exh. 20 at 34. Income demographics: Marcantonio Decl., Exh. 56 at 4.6-17.

26 ⁸ Other large transit agencies are multi-modal and serve smaller service areas. For instance,
27 San Francisco MUNI and Santa Clara Valley Transit Authority each operates both rail and bus
28 service, and each serves primarily one county. Marcantonio Decl., Exhs. 19, 20.

⁹ Service levels are measured in revenue vehicle miles, which the Federal Transit
Administration defines as "miles that vehicles . . . actually travel while in revenue service."
Rubin Decl., Exh. 1 at ¶102.

1 in number of routes served by AC Transit is an undisputed fact.” Marcantonio Decl., Exh. 46 at
2 ¶42.

3 While AC Transit’s overwhelmingly minority ridership has endured declining levels in
4 their bus service, the more white, more affluent ridership of BART and Caltrain has enjoyed
5 stunning growth in rail service levels. As reflected graphically in Attachment A to this brief,
6 during the same period in which AC Transit service declined by nearly 10%, BART and Caltrain
7 riders benefited from service levels that increased by 48.2% and 80.4%, respectively. Rubin
8 Decl., ¶11 & Exh. 1 at ¶103.

9 BART’s 48.2% growth in service levels included extensions of its pre-1993 71.5 mile, 33
10 station system to new stations at North Concord/Martinez, Colma, Pittsburg/Bay Point, and San
11 Francisco International Airport, as well as reductions in “headways” (time between trains) during
12 commute hours, thus reducing waiting times for commuters. BART currently has in various
13 stages of planning, design, and construction further system expansions, including extensions to
14 Warm Springs and San Jose. *Id.*, Exh. 1 at ¶104.

15 Caltrain’s 80.4% increase is attributable primarily to introduction of its “Baby Bullet”
16 service, providing rapid service between San Jose and San Francisco. Caltrain’s total weekday
17 service increased from 60 trains per day to 96 between 1992-93 and the present. *Id.* at ¶105.

18 **B. MTC’s Practice Of Funding Only Capital, But Not Operating, Shortfalls**
19 **Preserves Existing Rail Service While Causing AC Transit’s Bus Service To**
20 **Dwindle**

21 As the metropolitan planning organization for the Bay Area, MTC exercises substantial
22 control over transportation funding, both through its adoption of funding policies and through its
23 authorship of the region’s long-range transportation plan, known as the Regional Transportation
24 Plan (“RTP”). MTC effectively controls the type and amount of service that individual transit
25 operators are able to provide. By providing needed funding, MTC makes it possible for an
26 operator to provide service; by denying needed funding, MTC prevents it from doing so.
27 Although federal law requires MTC to “emphasize the preservation of the existing transportation
28 system,” 23 U.S.C. §134(h)(1)(H), MTC has consistently refused to fund shortfalls in the
revenues that AC Transit needs to continue operating its existing level of service. At the same

1 time, MTC channels billions of dollars to fund shortfalls in revenues that BART and Caltrain use,
2 not simply to maintain, but actually to expand, their respective levels of service.

3 **1. As The Region’s Metropolitan Planning Organization, MTC Is Required To**
4 **Prioritize Preservation Of The Existing Transportation System**

5 MTC is the metropolitan planning organization (“MPO”) for the nine-county San
6 Francisco Bay Area region. 23 U.S.C. §134(d)(1); 49 U.S.C. §5305(b)(1). It is the designated
7 recipient of numerous federal and state funding sources, charged with setting policies and making
8 decisions about the allocation and use of funds within its control. *See, e.g.*, Marcantonio Decl.
9 Exhs. 61 at 2; 62. It is also charged with adopting the region’s RTP. 23 U.S.C. §134(g)(1)
10 (1998);¹⁰ Cal. Gov. Code §§65080, 66508-13.

11 In carrying out these roles, federal law requires MTC to “emphasize the preservation of
12 the *existing* transportation system.” 23 U.S.C. §134(h)(1)(H) (emphasis added);¹¹ 49 U.S.C.
13 §5303(h)(1)(H); 23 C.F.R. § 450.306(a)(8); *see also* 49 U.S.C. §5309(d)(2)(C). Thomas A.
14 Rubin is an expert with over 30 years in the field of transit finance who, among other things, was
15 engaged by the predecessor to the Federal Transit Administration to develop guidelines for
16 assessing the financial capacity of applicants for federal transit grants; he explains that “[f]ederal
17 law makes it very clear to MPOs like MTC that preserving existing transit operations is the
18 highest priority of transit planning and transit funding.” Rubin Decl., ¶13 & Exh. 1 at ¶¶2-9, 56.
19 Although this requirement does not mean that no transit route should ever be eliminated, it does
20 require that MTC place emphasis on preserving existing levels of service “before any additional
21 system expansion is to be considered.” Marcantonio Decl., Exh. 8 at 19, MTCP 004449. MTC’s
22 own planning process claims to prioritize system preservation over system expansion. Rubin
23 Decl., ¶ 13 & Exh. 1 at ¶¶56-73; *id.*, Exh. 2 at ¶¶36-44; Marcantonio Decl., Exh. 4 at 150.

24 ¹⁰ The RTP practice at issue in this motion was governed by the law as it stood at the time
25 MTC prepared and adopted the current RTP (2003-2005) and its predecessors in 1994, 1998 and
26 2001. Accordingly, while Plaintiffs refer to current federal law, they also provide prior versions
27 of the key statute and regulation, as they were effective prior to the Congressional reauthorization
28 in August 2005. The 1998 version of the statute, 23 U.S.C. §134, is attached to the Marcantonio
Decl. as Exh. 5, while the 1997 version of the regulation, 23 C.F.R. §450.322, is attached as Exh.
6.

¹¹ *See* former provision at 23 U.S.C. §134(f)(1)(G) (attached to Marcantonio Decl. as Exh.
5.)

1 **2. MTC Exercises Control Over The Region’s Transportation Funding By**
 2 **Adopting Policies Governing The Use Of Funds And By Assigning Revenues**
 3 **In The RTP**

4 MTC exercises significant control, direct and indirect, over the distribution and use of
 5 federal, state, and local transportation funding sources.¹² It does so, *inter alia*, by adopting
 6 policies governing the use of specific funding sources and by assigning revenues in the RTP.

7 **a. MTC Policies Restrict The Use Of Funds For Operating Purposes**

8 Broadly speaking, transit expenditures are of three kinds: (a) “operating” expenses are
 9 used to operate existing transit service; (b) “capital rehabilitation” expenses (also called “capital
 10 renewal and replacement”) are used to renew and replace existing capital infrastructure; and (c)
 11 “capital expansion” expenses are used to expand the system. The first two kinds of expense are
 12 incurred in preserving the *existing* system, while the third is incurred in expanding or improving
 13 it. Rubin Decl., ¶18 & Exh. 1 at ¶36.

14 Although statutory restrictions limit the purposes for which some funding sources may be
 15 used, a wide range of sources may be used for multiple purposes, including both transit operations
 16 and capital replacement. Rubin Decl., Exh. 1 at ¶ 37. MTC has adopted policies that preclude
 17 numerous funding sources from being used for operating purposes, even though such use is
 18 authorized by statute. For instance, MTC does not allow federal “formula” funds under 49 U.S.C.
 19 §5307 to be used for the statutorily-authorized purpose of preventive maintenance, which is an
 20 operating cost. Rubin Decl., ¶20 & Exh. 1 at ¶¶37-38, 117-132. MTC instead uses these funds to
 21 address transit capital rehabilitation needs. *Id.*

22 **b. MTC Selectively Assigns RTP Revenues To Cover Shortfalls In The**
 23 **Funding Needed To Preserve The Existing System**

24 One of MTC’s most significant responsibilities is to prepare the region’s “long-range
 25 transportation plan,” or RTP. 23 U.S.C. §134(g)(1) (1998). The RTP must contain:

26 A financial plan that demonstrates how the adopted long-range
 27 transportation plan can be implemented, indicates resources from
 28 public and private sources that are reasonably expected to be made

¹² For a more complete account of MTC’s control over transportation funding, see the
 declaration of Plaintiffs’ transit finance expert, Thomas A. Rubin. Rubin Decl. at ¶¶19-21; *id.* at
 Exh. 1 at ¶¶38-39 & Exh. C; *id.* at Exh. 2 at ¶¶233-235.

1 available to carry out the plan, and recommends any additional
2 financing strategies for needed projects and programs.

3 *Id.* at 23 U.S.C. §134(g)(2)(B) (1998); *see also* Cal. Gov. Code § 65080(b)(3)(A). A
4 transportation project or program that MTC excludes from its RTP is ineligible for virtually
5 every source of federal and state funding. 49 U.S.C. §5309(c)(1)(A); *see also id.* at
6 §5303(j)(3)(C); Cal. Gov. Code §65089.2(b).

7 Since 1991, Congress has required long-range transportation plans to be fiscally
8 constrained. *See* Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240.
9 Fiscal constraint means that MTC may not include in an RTP any project or program that costs
10 more than can be funded out of reasonably anticipated revenues. Marcantonio Decl., Exh. 7 at
11 MTCP062960-61; Exh. 43 at 46-47. Thus, the adopted RTP may not include “shortfalls,” *i.e.*,
12 programs or projects for which anticipated revenues exceed expenditures. *Id.*, Exh. 4 at 215-16;
13 Rubin Decl., ¶15 & Exh. 1 at 33, ¶ 77. To avoid adopting an RTP that contains shortfalls, federal
14 law requires MPOs first to “identify” shortfalls, and then to “cover” them:

15 The estimated revenue by existing revenue source (local, State, and
16 Federal and private) available for transportation projects shall be
17 determined and *any shortfalls identified*. Proposed new revenues
18 and/or revenue sources to cover shortfalls shall be identified,
19 including strategies for ensuring their availability for proposed
20 investments. Existing and proposed revenues *shall cover* all
21 forecasted *capital, operating, and maintenance costs*.

22 23 C.F.R. §450.322(b)(11) (1997) (emphasis added) (Marcantonio Decl., Exh. 6). The regulation
23 does not distinguish between operating and capital shortfalls; it requires the *total* shortfall to be
24 “covered,” without regard to its capital and operating components. Rubin Decl., Exh. 1 at ¶81.
25 Anything less would not meet the strict requirement of fiscal constraint.

26 MTC follows a four-step process in identifying and covering shortfalls in its RTPs:

- 27 • First, it identifies the inventory of revenues that will be reasonably available from all
28 sources over 25 years.
- Second, it assesses the cost of operating and maintaining the existing transportation
system over that same period, operator by operator. (As noted above, both operating and
capital rehabilitation expenditures are needed to operate and maintain the existing system.
MTC projects operating and capital rehabilitation costs separately.)
- Third, it assigns revenues to existing system operations and maintenance costs based on
(1) their statutory eligibility and (2) MTC Commission policies governing the use of
funding sources. As also noted above, MTC has adopted various policies that impose

1 additional limitations on the use of various funds, beyond those found in statute. Thus, as
 2 to funding sources that are statutorily eligible for both capital and operating purposes, but
 3 that MTC has by policy chosen to limit to capital, MTC will assign revenues from this
 4 source only to capital needs. If the assigned revenues are insufficient to meet the costs, a
 5 shortfall exists. After assigning revenues, MTC “identifies” shortfalls. MTC identifies
 6 each operator’s operating and capital rehabilitation shortfalls separately.

- Fourth, MTC determines how it will assign “uncommitted” or “new commitment” RTP
 5 funding (sometimes known as “Track 1,” “regional discretionary” or “Transportation
 6 2030” funding). MTC first funds “prior commitments” to *existing* projects (e.g., projects
 7 already included in a prior RTP), and thereby “covers” shortfalls previously identified in
 8 step three above. MTC then assigns any remaining funds to *new* projects.

9 Rubin Decl, Exh. 1 at ¶¶41-48; Marcantonio Decl., Exh. 4 at 138-139 & Exh. 32 at 2.1-1. In
 10 short, after assigning revenues to costs, MTC identifies shortfalls in the funds needed to operate
 11 and maintain the existing system; then, in the last RTP step, MTC determines which of the
 12 previously identified shortfalls it will “cover” – and to what extent – with additional revenues.

13 Despite the fact that the requirement to “cover” shortfalls applies to all “capital, operating,
 14 and maintenance costs,” 23 C.F.R. §450.322(b)(11) (1997), MTC distinguishes between
 15 operating and capital rehabilitation shortfalls, separately identifying them in the RTP and, as
 16 discussed below, assigning funding to cover the latter but not the former. Rubin Decl, Exh. 1 at
 17 ¶81; *see infra*, Part II-B-4.

18 **3. MTC’s RTPs Identify Persistent Shortfalls In The Funds AC Transit 19 Requires To Operate Its Existing Level Of Service**

20 Since Congress imposed the requirement of fiscal constraint, MTC has adopted four RTPs
 21 – in 1994, 1998, 2001, and 2005. Each one covers a 20- to 25-year time horizon, and each
 22 identifies operating shortfalls and capital replacement shortfalls separately for each transit
 23 operator. Marcantonio Decl., Exh. 4 at 247.

24 Operating Shortfalls: In each of these four RTPs, MTC identified an *operating shortfall*
 25 for AC Transit: \$360.5 million in the 1994 RTP, \$136.2 million in the 1998 RTP, \$36.7 million in
 26 the 2001 RTP, and \$64.4 million in the 2005 RTP. Rubin Decl., Exh. 1 at ¶95. AC Transit is the
 27 only major operator that experienced operating shortfalls in each and every RTP. Marcantonio
 28 Decl., Exh. 22 at 1 (2005 RTP), 2 (2001 RTP), 3 (1998 RTP) & 4 (1994 RTP). Moreover,
 MTC’s figures substantially understate the full magnitude of the shortfall in funds required by AC
 Transit to operate its existing level of service. As AC Transit’s persistent operating shortfall has

1 forced it to reduce service over time, the “baseline” that MTC has treated as its “existing” service
 2 level has progressively diminished in each new RTP. Rubin Decl., ¶34 & Exh. 1 at ¶108. And in
 3 2003, AC Transit riders suffered significant cuts in their “baseline” of existing service that, due to
 4 the timing of the cuts relative to when the “baseline” was measured, are not reflected in AC
 5 Transit’s operating shortfall in the 2005 RTP. Accounting for the cost of restoring that lost
 6 service, AC Transit’s true operating shortfall for the 2005 RTP period is not \$64.4 million but
 7 instead over *half a billion dollars* – approximately \$565 million. *Id.* ¶¶35, 39 & Exh. 2 at ¶96.

8 BART, by contrast, did not have an operating shortfall in any of these four RTPs, even
 9 though – unlike AC Transit – it dramatically increased its baseline of service over this same
 10 period, expanding its existing rail system to new locations and increasing the frequency of its
 11 service. *See supra*, II-A-3; Marcantonio Decl., Exh. 31 at 448-49 & Exh. 32 at 2.1-7; Rubin
 12 Decl., Exh. 1 at ¶¶ 104-07. Although BART’s system preservation costs were measured against a
 13 baseline of service that expanded 48% over its 1992-93 baseline, it suffered *no shortfalls* in the
 14 revenues needed to operate even this increasing baseline of service in any of the last four RTPs.¹³

15 Only one of the four RTPs reflects an operating shortfall for Caltrain, \$22.9 million in the
 16 2005 RTP. Rubin Decl. at ¶ 94. Unlike AC Transit’s operating shortfalls, however, which have
 17 been measured against a baseline of *declining* service, Caltrain’s one operating shortfall was
 18 measured against a baseline of *expanded* service, as Caltrain had just inaugurated its new “Baby
 19 Bullet” service expansion. Marcantonio Decl., Exh. 22; *id.*, Exh. 31 at 449-50; *id.*, Exh. 32 at
 20 2.1-9; Rubin Decl., Exh. 1 at ¶¶94, 105.

21 Capital Rehabilitation Shortfalls: All three operators had *capital rehabilitation shortfalls*
 22 in the three most recent RTPs. Rubin Decl. at ¶37 & Exh. 1 at ¶92, 95; *see also* Marcantonio
 23 Decl., Exh. 22 at 1-3. BART and Caltrain’s capital rehabilitation shortfalls are substantial – not

24 ¹³ The point here is that, while AC Transit’s “baseline” declined in each successive RTP,
 25 BART’s service levels increased, establishing a new, higher baseline for successive RTPs; even
 26 so, BART still did not experience any operating shortfalls. At trial, Plaintiffs will additionally
 27 address MTC’s separate practice of spending billions of dollars on BART *expansion* projects that
 28 have been responsible, in part, for allowing BART to establish higher baselines in each
 successive RTP. Rubin Decl. at ¶¶98-99. This motion, however, focuses solely on MTC’s
 practice regarding use of funds to operate and maintain the existing “baseline” system (*i.e.*, its
 spending decisions regarding operating and capital rehabilitation funds); it does not address
 MTC’s spending decisions regarding capital expansion funds.

1 surprisingly, as rail is a highly capital intensive mode of transit. *Id.*, Exh. 44 at 16, ¶4 (MTC’s
2 expert).

3 **4. MTC’s Practice Of Refusing To Fund AC Transit’s Operating Shortfalls But**
4 **Devoting Billions Of Dollars To Funding Capital Rehabilitation Shortfalls**
5 **Overwhelmingly Benefits Rail Riders**

6 Under federal law, *identifying* the shortfalls in the funds required to operate and maintain
7 the existing “baseline” of service is but a prelude to *covering* those shortfalls. 23 C.F.R.
8 §450.322(b)(11) (1997). After initially identifying those shortfalls, MTC determines which
9 shortfalls it will *cover*, and to what extent. Both operating and capital replacement expenditures
10 are necessary to operate and maintain a “baseline” of existing transit service, Rubin Decl., ¶¶18,
11 22-23 & Exh. 1 at ¶36; Marcantonio Decl., Exh. 4 at 247, the preservation of which MTC is
12 charged with emphasizing. 23 U.S.C. §134(h)(1)(H); 49 U.S.C. §5303(h)(1)(H). MTC’s
13 longstanding practice, however, has been to fund capital rehabilitation, but not operating,
14 shortfalls.

15 MTC has failed to fund *any* transit operating shortfalls in *any* of its RTPs, leaving AC
16 Transit with unfunded shortfalls in the revenue it needs to operate its existing service level.
17 Rubin Decl., ¶¶29, 36 & Exh. 1 at ¶¶95-97; Marcantonio Decl., Exh. 31 at 447-48. MTC admits
18 that it did not take or consider taking “any steps or actions to cover AC Transit’s RTP transit
19 operating shortfall at any time since the adoption of the 1994 RTP.” Marcantonio Decl., Exh. 47,
20 No. 54 at 5-6.

21 In contrast to MTC’s failure to fund *operating* shortfalls, MTC has funded a significant
22 portion of the *capital rehabilitation* shortfalls identified in the RTP process. Pursuant to that
23 practice, MTC has devoted on the order of \$1 billion in each of the last three RTPs to covering
24 transit capital rehabilitation shortfalls. *Id.*, Exh. 22 at 1-3; Rubin Decl., ¶¶36-37 & Exh. 1 at ¶95.

25 Because AC Transit has had persistent operating shortfalls and because rail is capital
26 intensive, Marcantonio Decl., Exh. 44 at 16, ¶4, MTC’s practice of funding capital rehabilitation
27 but not operating shortfalls has overwhelmingly favored the needs of BART and Caltrain riders.
28 *See, e.g.*, Rubin Decl., Exh. 1 at ¶ 92. For example, MTC assigned \$598.3 million to BART and
\$312.1 million to Caltrain in the 1998 RTP to cover their capital rehabilitation shortfalls, and

1 \$472.8 million to BART and \$143.8 million to Caltrain in the 2001 RTP. Rubin Decl. at ¶37 &
2 Exh. 1 at ¶95. Although MTC assigned some funds to AC Transit to cover its capital
3 rehabilitation shortfalls, the amounts assigned covered a far smaller proportion of its total
4 shortfalls (operating plus capital rehabilitation) than of BART or Caltrain's. In the 1998 RTP,
5 MTC covered only 45.1% of AC Transit's total shortfall, while covering 75% of BART and
6 Caltrain's. *Id.* In the 2001 RTP, MTC covered only 83.7% of AC Transit's total shortfall, as
7 compared to 100% of BART and Caltrain's. *Id.* In the 2005 RTP, MTC assigned \$1.073 billion
8 to BART to cover 43.6% of its total shortfall, but only covered 14.02% of AC Transit's total
9 shortfall. *Id.* at ¶39 & Exh. 2 at ¶102. (A chart summarizing these figures is provided at Rubin
10 Decl. at ¶¶37-39.)

11 MTC's practice of funding capital rehabilitation, but not operating, shortfalls is notable
12 not only because of its differential impact on AC Transit, but also because the regulation
13 requiring MTC to "cover" shortfalls makes no distinction between the types of shortfalls that
14 must be covered. *See* 23 C.F.R. §450.322(b)(11) (1997) (Marcantonio Decl., Exh. 6); Rubin
15 Decl., ¶17 & Exh. 1 at ¶81. If any distinction is to be drawn, it is operating shortfalls that should
16 be prioritized. Rubin Decl., Exh. 1 at ¶82. The reason is that "operating shortfalls more
17 immediately jeopardize the existing system, while capital rehabilitation shortfalls do not." *Id.* As
18 MTC acknowledges, a shortfall for transit capital replacement generally means deferred
19 maintenance, not that unsafe transit vehicles are being operated. *Id.*; Marcantonio Decl., Exh. 16
20 at 792-93. By contrast, "if an operator faces a shortfall in its operations funding, the standard
21 result is an immediate reduction in transit service operated" because "[t]ransit agencies operate on
22 the basis of balanced annual budgets, where revenues must not be less than operating expenses."
23 Rubin Decl., ¶ 23 & Exh. 1 at ¶82.¹⁴

24 ¹⁴ Mr. Rubin does *not* assert that "capital rehabilitation shortfalls can or should be
25 completely ignored." *Id.* at ¶24 & Exh. 1 at ¶83. His expert opinion is "simply that long-term
26 transportation requires a balance. Operating shortfalls cannot be subordinated wholesale to
27 capital rehabilitation shortfalls without jeopardizing the existing system in the very short term."
28 *Id.*; *see also id.* ("[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 services provided.").

5. MTC's Failure To Fund AC Transit's Operating Shortfalls Forces AC Transit To Cut Service

MTC's consistent failure to fund AC Transit's operating shortfalls has forced AC Transit to cut service. A transit provider's operating shortfall – by definition – measures the extent to which it lacks the funds needed to continue to deliver its baseline of existing service. Rubin Decl. at ¶22 & Exh. 1 at ¶ 178. MTC acknowledges that operating shortfalls require either a reduction in costs or an increase in revenues.¹⁵ Indeed, MTC has long acknowledged that the operating shortfalls it leaves unfunded in its RTPs translate into service reductions, potentially coupled with fare increases. *See, e.g.*, Marcantonio Decl., Exh. 54 at 60 (“Transit Baseline operating shortfalls . . . are left unfunded [in the 1994 RTP]. . . . Consequently, service reductions are assumed to account for significant shortfalls.”); *id.* at 63 (shortfall in transit operating funds “has required a projected 5 percent service cutback from planned service levels for,” *inter alia*, “AC Transit”). More recently, MTC explained to the California Legislature that its draft 2005 RTP “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.*, Exh. 58 at 9 (emphasis added).

III. LEGAL DISCUSSION

A. As A Recipient Of State Funds, MTC Is Prohibited From Engaging In Practices That Have An Unjustified Disparate Impact On Racial Minorities

California's analogue to Title VI of the federal Civil Rights Act of 1964, 42 U.S.C. §2000d-1 *et seq.*, found in Section 11135 of the Government Code, prohibits recipients of state funding from engaging in practices that have the intent *or effect* of discriminating. Cal. Gov.

¹⁵ Marcantonio Decl., Exh. 4 at 211-12 (MTC's Deputy Director of Policy testifying that operators have “a number of different things they can do to deal with” operating shortfalls: “raise fares to cover the difference, do . . . cost efficiency measures to realign their services, or they may choose to cut service”); *see also id.*, Exh. 12 at 384-85. Similarly, MTC's Executive Director identified “options for addressing . . . operating shortfalls”: “a) increases in local revenue under the control of the operator—in most cases, this will be fare revenue increases”; “b) reductions in costs that do not result in decreased service delivery: i.e. increased operating efficiencies”; “c) reductions in costs through service reductions”; “d) increases in federal, state or regional operating subsidies . . . Under a financially constrained plan, the Commission . . . does not have the ability to assume the fourth option.” *Id.*, Exh. 18 at MTCP103504 (emphasis added). MTC's expert agrees. *See* Marcantonio Decl., Exh. 43 at 48-50, 137-38.

1 Code §11135(a); 22 Cal. Code Regs. §98101(i) (prohibiting “recipient[s]” of state funds from,
 2 *inter alia*, “utiliz[ing] criteria or methods of administration that . . . (1) have the purpose *or effect*
 3 of subjecting a person to discrimination on the basis of ethnic group identification, religion, age,
 4 sex, color, or a physical or mental disability”) (emphasis added). As a “recipient” of state funds,
 5 MTC is subject to these prohibitions.¹⁶

6 To establish a prima facie case of disparate impact discrimination, a plaintiff must show:

7 (1) the occurrence of certain outwardly neutral practices, and (2) a
 8 significantly adverse or disproportionate impact on persons of a
 9 particular type produced by the defendant’s facially neutral acts or
 practices. Demonstration of discriminatory intent is not required
 under disparate impact theory.

10 *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997) (citations omitted) (construing
 11 the federal Fair Housing Act); *see also Sisemore v. Master Fin., Inc.*, 151 Cal. App. 4th 1386,
 12 1420-21 (2007) (prima facie case of disparate impact established where “facially neutral practice”
 13 “has a disproportionate adverse effect upon members of a [protected] class”) (construing state
 14 Fair Employment and Housing Act).¹⁷ Where the plaintiff has established a prima facie case of
 15 disparate impact, the burden shifts to defendant to establish a “business necessity” for the
 16 challenged practice. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *see also Larry P. v.*
 17 *Riles*, 793 F.2d 969, 982 (9th Cir. 1986) (“educational necessity”).¹⁸

18
 19 ¹⁶ MTC is a “local agency” that “regularly employs five or more persons,” Marcantonio
 20 Decl., Exhs. 2-3, and “receives State Support . . . in an amount in excess of \$10,000 in the
 aggregate per State fiscal year,” *id.*, Exh. 60 at 28-30, and thus is a “recipient” subject to the
 prohibitions of Section 11135. 22 Cal. Code Regs. §98010.

21 ¹⁷ California’s disparate impact regulations directly parallel federal Title VI regulations.
 22 Both prohibit “recipient[s] of” government funds from “utiliz[ing] criteria or methods of
 23 administration” which have the “effect” of discriminating against protected groups. *Compare* 49
 C.F.R. §21.5(b)(2), *with* 22 Cal. Code Regs. § 98101(i)(1)-(2). Although the federal prohibition
 24 against disparate impact discrimination by recipients of federal funding is no longer privately
 enforceable, *see Alexander v. Sandoval*, 532 U.S. 275, 293 (2001), it is appropriate to rely on
 25 federal disparate impact caselaw to construe Section 11135. *See Comm. Concerning Cmty.*
Improvement v. City of Modesto, No. CV F 04 6121 LJO DLB, 2007 WL 1456142, at *17-18 &
 n.12 (E.D. Cal. May 16, 2007); *see also, e.g., Sisemore*, 151 Cal. App. 4th at 1420-21 (relying on
 26 federal disparate impact caselaw to interpret state Fair Housing and Employment Act).

27 ¹⁸ On surrebuttal, the plaintiff can still prevail by showing the existence of less
 28 discriminatory alternatives. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *see*
also Cal. Gov. Code §12955.8(b) (establishing parallel burden shifting scheme under state Fair
 Employment and Housing Act).

1 A disparate impact case may be brought on one of two distinct theories. Under the first
2 theory – the one relevant here – a plaintiff contends that the challenged practice has an adverse
3 impact on minorities because the practice harms a population that, for reasons unrelated to the
4 defendant’s conduct, is racially imbalanced. Under the other theory, a plaintiff contends that the
5 defendant’s conduct actually causes the racial imbalance in the population at issue. Both theories
6 are cognizable. *See, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937
7 (2d Cir. 1988) (“The discriminatory effect of a rule arises in two contexts: adverse impact on a
8 particular minority group and harm to the community generally by the perpetuation of
9 segregation.”); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th
10 Cir. 1977) (*Arlington Heights II*) (“There are two kinds of racially discriminatory effects which a
11 facially neutral decision about housing can produce. The first occurs when that decision has a
12 greater adverse impact on one racial group than on another. The second is the effect which the
13 decision has on the community involved; if it perpetuates segregation and thereby prevents
14 interracial association[,] it will be considered invidious . . .”).

15 Cases brought in the employment context generally rely on the latter theory, *e.g.*, that an
16 employment test under-selects minorities and thus causes fewer minorities to be hired or
17 promoted. *See, e.g., Griggs*, 401 U.S. at 428-49 (“general intelligence test” and high school
18 requirement disproportionately excluded blacks seeking promotions from coal handling
19 department); *Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002). The statistical showing
20 required in such cases is rigorous because its purpose is to establish causation. *Stout*, 276 F.3d at
21 1122 (“Although statistical data alone, in a proper case, may be adequate to prove causation, the
22 statistical disparities must be sufficiently substantial that they raise such an inference of
23 causation.”) (internal quotations and citations omitted).

24 By contrast, in cases like the current one that are brought on the first theory, statistics play
25 a very different role. Information about the racial make-up of the affected population in such
26 cases goes to the issue of disproportionality, not causation. Thus, in *Garcia v. Spun Steak Co.*,
27 998 F.2d 1480 (9th Cir. 1993), the Ninth Circuit found an employer’s English-only policy to have
28 a disproportionate impact where the “vast majority of those workers . . . who speak a language

1 other than English – and virtually all those employees for whom English is not a first language –
2 are Hispanic.” *Id.* at 1486.¹⁹ As a result, while there was no argument that the employer’s policy
3 caused any racial imbalance in its workforce, the effects of that policy “will be suffered
4 disproportionately by those of Hispanic origin.” *Id.* In such a case, the Ninth Circuit explained,
5 “[i]t is of no consequence that not all Hispanic employees of Spun Steak speak Spanish; nor is it
6 relevant that some non-Hispanic workers may speak Spanish.” *Id.* In other words,
7 disproportionality is established where the “vast majority” of the affected population is minority.
8 This is so even if some minorities are *not* affected and some whites *are* affected. *See also Powell*
9 *v. Ridge*, 189 F.3d 387, 396 (3d Cir. 1999) (rejecting argument in disparate impact challenge to
10 state’s funding formula for school districts that plaintiffs’ claim defeated where “there are some
11 white students in the allegedly disadvantaged minority school districts and some non-white
12 students in the allegedly advantaged white school districts”), *overruled on other grounds*,
13 *Alexander v. Sandoval*, 532 U.S. 275 (2001).²⁰

14 Similarly, in *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988), the Ninth Circuit found a city’s
15 refusal to approve a low and moderate income housing project to have a disparate effect where
16 two-thirds of the persons who would have benefited from the project were minorities. Under
17 these circumstances, “[t]he failure to build the project had twice the adverse impact on minorities
18 as it had on whites. This showing established a racially discriminatory effect.” *Keith*, 858 F.2d at
19 484 (citations omitted). As in *Garcia*, the court found disproportionality because minorities made
20 up the majority of the adversely affected population.

21
22
23 ¹⁹ *Garcia* found that, although the impact of the policy was disproportionate, bilingual
24 employees could not establish a prima facie case because the English-only policy was not
25 “adverse” as to them. The court remanded the case in light of a material fact dispute over
26 whether limited English proficient employees were adversely impacted. *Id.* at 1490.

27 ²⁰ The Supreme Court held in *Alexander*, contrary to the Third Circuit’s procedural ruling in
28 *Powell*, that there is no private right of action under Title VI disparate impact regulations.
Alexander, 532 U.S. at 293. This motion focuses on one of Plaintiffs’ claims, brought under state
law, which provides a cause of action for disparate impact discrimination. *See Cal. Gov. Code*
§§11135, 11139; 22 Cal. Code Regs. §98101. *Alexander* did not reach the issue of the
substantive analysis used in disparate impact claims, and thus does not call into question *Powell*
on this point.

1 **B. Plaintiffs Have Established A Prima Facie Case Of Disparate Impact Because**
 2 **MTC’s Facially Neutral Practice Of Failing To Fund Operating Shortfalls**
 3 **Causes a Disproportionate Adverse Impact On Racial Minorities.**

4 Of multiple practices of MTC that, while neutral on their face, have a significant adverse
 5 impact on racial minorities, Plaintiffs focus here on MTC’s habitual failure to fund the shortfalls
 6 in operating revenues that affect the ability of AC Transit, but not BART or Caltrain, to continue
 7 to operate its existing level of service. Plaintiffs do not contend that MTC’s practice causes AC
 8 Transit’s ridership to be heavily minority. Instead, they contend that this practice has an adverse
 9 impact on AC Transit’s disproportionately minority riders. The undisputed facts establish a
 10 prima facie case of disparate impact discrimination.

11 MTC’s failure to fund AC Transit’s operating shortfalls has *caused* AC Transit to cut
 12 service. MTC has acknowledged that unfunded shortfalls lead to service cuts. *E.g.*, Marcantonio
 13 Decl., Exh. 4 at 211-12; *id.*, Exh. 12 at 384-85. By choosing not to provide AC Transit with the
 14 funds needed to cover its operating shortfalls, MTC has forced AC Transit to fill the gap by
 15 cutting service. *See supra*, Part II-B-5. The impact on Plaintiffs and the Class of minority AC
 16 Transit riders of the resulting service cuts is *adverse* because it severely impairs their overall
 17 mobility and ability to access employment, doctors, and other critical destinations. *See supra*,
 18 Part II-A-1. And finally, the effect of MTC’s practice is racially *disproportionate*. As MTC’s
 19 own statistical expert acknowledges, AC Transit’s minority ridership is 78%, the highest of any
 20 transit agency in the Bay Area. Marcantonio Decl., Exh. 46 at 10. Because AC Transit riders are
 21 nearly four times more likely to be minority than not, actions that adversely affect AC Transit’s
 22 ridership have a racially disproportionate effect. *See Keith*, 858 F.2d at 484.

23 **1. MTC Fails To Fund Operating Shortfalls, Leaving AC Transit With**
 24 **Insufficient Revenue To Preserve Its Existing Service Levels**

25 It is undisputed that MTC has consistently engaged in the “outwardly neutral” practice,
 26 *Gamble*, 104 F.3d at 306, of failing to fund operating shortfalls in its RTPs.

27 As described above, one of MTC’s principal responsibilities as the region’s MPO is to
 28 prepare and adopt the region’s long-range transportation plan, or RTP. The RTP must be fiscally
 constrained, 23 U.S.C. §134(g)(2)(B) (1998), and must “emphasize the preservation of the

1 existing transportation system.” 23 U.S.C. §134(h)(1)(H). As a result, it is a primary statutory
 2 objective of the RTP’s financial plan both to “identif[y]” shortfalls in revenues needed to
 3 maintain and operate the existing transportation system and to “cover” those shortfalls. 23 C.F.R.
 4 §450.322(b)(11) (1997). In the third step of its four-step process for preparing the RTP (*see*
 5 *supra*, Part II-B-2-b), MTC identifies transit shortfalls for both capital rehabilitation and
 6 operations. The *total* shortfall, including both capital and operating elements, must be funded in
 7 order to operate and maintain existing service levels. Rubin Decl. at ¶22. In the last step of its
 8 RTP process, in which MTC assigns revenues to cover shortfalls, however, it has been MTC’s
 9 consistent practice to fund capital rehabilitation shortfalls – in the amount of several billion
 10 dollars – while leaving operating shortfalls entirely unfunded. *See supra*, Part II-B-5.

11 Pursuant to this facially neutral practice, MTC left entirely unfunded AC Transit’s
 12 persistent operating shortfalls – \$136.151 million in the 1998 RTP, \$36.7 million in the 2001
 13 RTP, and at least \$64.355 million in the 2005 RTP. Marcantonio Decl., Exh. 22; Rubin Decl. at
 14 ¶37 & Exh. 1 at ¶95. As described above, these figures substantially understate the full
 15 magnitude of the shortfalls that MTC left unfunded, since they are not measured against a
 16 constant “baseline.” *See supra*, Part II-B-3. The 2005 RTP, fails to take account of a very
 17 significant reduction in AC Transit bus service that occurred in 2005; taking that reduction into
 18 account, AC Transit’s total operating shortfall for the 2005 RTP period is not \$64.355 million, as
 19 MTC reported, but instead well over half a billion dollars. Rubin Decl. at ¶¶34-35, 39 & Exh. 2
 20 at ¶¶95-98.

21 While consistently failing to assign a single dollar to cover AC Transit’s RTP operating
 22 shortfalls, MTC has chosen to direct billions of dollars to cover capital rehabilitation shortfalls,
 23 enabling BART and Caltrain to maintain their “baseline” levels of service.²¹

24 Both operating and capital rehabilitation costs are needed to preserve existing service.
 25 However, because rail systems are inherently more capital-intensive than bus systems, MTC’s

26 ²¹ Indeed, since capital rehabilitation needs grow as rail service expands and MTC has
 27 poured billions of dollars in capital expansion projects for BART and Caltrain, Rubin Decl., Exh.
 28 1 at ¶¶98-99; Marcantonio Decl., Exh. 16 at 794, MTC’s practice actually enables them to
increase their “baselines.”

1 preference for funding capital rehabilitation over operating costs inherently prioritizes
 2 preservation of rail systems over bus systems. The relevant measure is the extent to which MTC
 3 funds the *total* shortfalls of the respective operators in system preservation costs (*i.e.*, operating
 4 plus capital rehabilitation). By that measure, MTC has covered only 45.1% of AC Transit’s total
 5 shortfall, as compared to 75% of BART’s and Caltrain’s (1998 RTP); only 83.7% of AC Transit’s
 6 total shortfall, as compared to 100% of BART and Caltrain’s (2001 RTP); and only 14.02% of
 7 AC Transit’s total shortfall, as compared to 43.6% of BART’s in the 2005 RTP. Rubin Decl.,
 8 ¶¶37-39 & Exh. 1 at ¶95; *id.*, Exh. 2 at ¶102. *See supra*, Part II- B-4.²²

9 **2. MTC’s Practice Of Failing To Provide AC Transit With Funds To Cover Its**
 10 **Operating Shortfalls Causes AC Transit To Cut Service Levels**

11 It is undisputed that MTC’s consistent refusal to fund AC Transit’s operating shortfalls
 12 forces, and repeatedly has forced, AC Transit to cut service. *See supra*, Part II-B-5.

13 The fact that MTC does not itself provide transit services does not absolve MTC of
 14 responsibility or liability for the consequences of its funding practices. Under well-established
 15 causation principles, a defendant that is not the last link in the chain of causation is nonetheless
 16 liable for the discriminatory effects of its practices. In *Powell v. Ridge*, the Third Circuit
 17 addressed the elements of a disparate impact challenge to Pennsylvania’s formula for funding
 18 school districts. Pennsylvania’s funding formula directly affected school districts, not students.
 19 Nevertheless, the court held that plaintiffs could establish a claim of discrimination against the

20 ²² MTC engages in numerous other discriminatory practices that Plaintiffs intend to
 21 challenge at trial, but that are not the subject of this motion. For example, in the third step of the
 22 financial planning for the RTP, in which MTC assigns revenues to costs and identifies shortfalls,
 23 MTC projects anticipated revenues for operating and capital rehabilitation needs based on its
 24 funding policies – policies which in many instances prevent funds from being used for operating
 25 purposes even though they are statutorily eligible for such use. By artificially limiting the pool of
 26 operating funds through its funding policies, MTC effectively *creates* the operating shortfalls that
 27 it has consistently identified in AC Transit’s budget. Rubin Decl. at ¶27 & Exh. 1 at ¶¶21, 115-
 28 58. In addition, MTC’s fourth RTP step involves not only the assignment of revenues to *existing*
 system needs but also the assignment of revenues to system *expansion*. MTC has devoted
 billions of dollars to expand BART and Caltrain service levels while failing even to preserve
 existing levels of AC Transit service. Rubin Decl., Exh. 1 at ¶¶98-99. Furthermore, MTC
 disenfranchises minority communities by failing to engage in a meaningful public participation
 process, as it is required to do, 23 C.F.R. §450.212, and intentionally papers over inequities in its
 funding decisions by using an “equity analysis” that is designed to mask inequities between
 minority populations and other populations. Sanchez Decl., Exh. 1 at 5-7. Plaintiffs’ motion for
 summary adjudication does not address these and other discriminatory practices, and instead
 focuses only on the disparate adverse impact of MTC’s failure to fund operating shortfalls.

1 state if they proved that “the effect” of the state’s funding practices was to limit their educational
 2 opportunities. *Powell*, 189 F.3d at 396; *see also Robinson v. Kansas*, 117 F. Supp. 2d 1124, 1141
 3 (D. Kan. 2000) (where plaintiffs claimed harms such as disproportionately high dropout rates
 4 based on state’s funding formula to school districts, disparate impact claim was stated by
 5 allegation that such harms “are *caused* by the way the State funds the school districts”) (emphasis
 6 in original), *aff’d on other grounds*, 295 F.3d 1183 (10th Cir. 2002); *cf. also Bennett v. Spear*, 520
 7 U.S. 154, 169 (1997) (causation for Article III standing does not require “defendant’s actions [to
 8 be] the very last step in the chain of causation”; although “injury complained of” cannot be
 9 “result of the *independent* action of some third party,” causation established if it results from a
 10 “determinative or coercive effect” by defendant) (emphasis in original) (internal quotations and
 11 citations omitted).

12 An operating shortfall by definition measures the amount of funds an operator lacks to
 13 continue operating its existing level of service. MTC’s practice of not funding operating
 14 shortfalls in the RTP has left AC Transit with no choice but to close its recurring budgetary gap
 15 with service cuts. Indeed, MTC has long acknowledged that unfunded operating shortfalls
 16 translate into service reductions. *See, e.g., Marcantonio Decl., Exh. 54 at 60* (“Transit Baseline
 17 operating shortfalls . . . are left unfunded [in the 1994 RTP]. . . . Consequently, service reductions
 18 are assumed to account for significant shortfalls.”); *id.* at 63 (shortfall in transit operating funds
 19 “has required a projected 5 percent service cutback from planned service levels for,” *inter alia*,
 20 “AC Transit”); *see also supra*, Part II-B-5.²³ Over the 12-year period during which MTC
 21 prepared and adopted its last four RTPs, AC Transit’s persistent unfunded operating shortfalls
 22 caused AC Transit riders to experience a 9.6% decline in service levels. During this same period,
 23 MTC channeled billions of dollars to fund capital rehabilitation shortfalls, and BART and
 24

25 ²³ In theory, AC Transit could also address funding shortfalls by a combination of cuts in
 26 service levels and fare increases. The evidence demonstrates that AC Transit has cut service
 27 levels. *See supra*, Part II-A-3. To the extent its unfunded operating shortfalls also force it to
 28 increase fares, such an outcome also harms Plaintiffs and the Class. Even modest increases in
 transportation costs leave less money for food, utilities, and other life necessities. *See supra*, Part
 II-A-1. In short, MTC forces AC Transit to take actions that harm its riders. Whatever choice
 AC Transit has in the matter is only a choice between harms.

1 Caltrain riders benefited from service level *increases* of 48.2% and 80.4%, respectively. Rubin
2 Decl. at ¶11 & Exh. 1 at ¶103.

3 The RTP process highlights MTC's role in forcing AC Transit to cut service. Federal law
4 requires MTC to produce a fiscally-constrained RTP in which shortfalls are "covered." *See* 23
5 C.F.R. §450.322(b)(11) (1997). Thus, as both Plaintiffs' and Defendant's experts agree, if an
6 MPO does not fund a shortfall in a project or program, there is only one alternative: to cut that
7 project or program. Marcantonio Decl., Exh. 44 at 17-18, ¶1; Rubin Decl. at ¶¶16, 23 & Exh. 1 at
8 ¶80; *id.*, Exh. 2 at ¶15. Federal guidance makes this explicit, noting that once an MPO identifies
9 a shortfall it must "[m]odify the program to eliminate or reschedule projects and/or develop new
10 funding sources to implement priority projects." Marcantonio Decl., Exh. 8 at 19. Fiscal
11 constraint means that "if MTC is not going to provide the necessary funding to cover AC
12 Transit's operating shortfall, it must *ensure* that AC Transit cuts service, at least to the extent that
13 fare increases do not cover that shortfall." *See* Rubin Decl. at ¶40 & Exh. 2 at ¶20.²⁴

14 *Powell* makes clear that a claim of disparate impact discrimination is established where a
15 defendant's funding practices have "the effect" of harming the plaintiffs, even if the plaintiffs are
16 not the direct recipients of the funds at issue. 189 F.3d at 396. Here, the undisputed evidence
17 demonstrates that "the effect" of MTC's funding practices – in particular, its refusal to fund AC
18 Transit's operating shortfalls – has been cuts in the service levels that AC Transit is able to
19 deliver to Plaintiffs and the Class. Indeed, MTC's failure to fund AC Transit's operating
20 shortfalls has the "determinative or coercive effect" of forcing AC Transit to cut service. *Bennett*,
21 520 U.S. at 169. Under these circumstances, there can be no doubt that MTC has caused the
22 harmful reductions in service levels experienced by Plaintiffs and the Class.

23 ²⁴ MTC expert Prof. Cervero agrees that the shortfalls that MTC leaves unfunded in the RTP
24 prompt operators to cut service. Marcantonio Decl., Exh. 44 at 17-18. He then goes on to argue
25 that this result is a good thing because it forces operators to cut "unproductive service." *Id.* at 17-
26 18, 24-28. This argument addresses the question, not presented on this motion for summary
27 adjudication, of whether MTC's practice is justified by a business necessity. Moreover, his
28 assertion is factually unsupported, as MTC has never determined that any of the service AC
Transit has cut is "unproductive." *See* Rubin Decl., Exh. 2 at ¶¶157-169. MTC expert Cervero
himself acknowledges that it is "possible that a deficit could be so large that unproductive and
productive services are cut." Marcantonio Decl., Exh. 43 at 113; *see id.* at 57-58, 111-12 (Prof.
Cervero did not study whether services cut by AC Transit were unproductive).

1 **3. The Impact Of MTC's Failure To Cover AC Transit's Operating Shortfalls Is**
 2 **Adverse**

3 There is no dispute that the impact of these service level reductions is "adverse."
 4 Service cuts dramatically and negatively affect Plaintiffs and the Class of minority AC Transit
 5 riders, as these riders use AC Transit service to get to work and for a broad range of other critical
 6 life needs, such as getting to college classes, the grocery store, the doctor, and other essential
 7 destinations. In fact, virtually none of the opportunities our society has to offer are available to
 8 those who lack the mobility to access them. When AC Transit service is cut, its
 9 disproportionately minority riders are severely impaired in their overall mobility. For example,
 10 service reductions have forced Ms. Darensburg to walk through unsafe areas to get home or visit
 11 her daughter and deprived her of a direct route to downtown Oakland. Service cuts have also
 12 created difficulties for Ms. Hain and her family in getting to college and elementary school
 13 classes. *See supra*, Part II-A-1. This denial of equal transit opportunities is precisely the type of
 14 harm the prohibitions against discrimination by recipients of public funding were intended to
 15 prevent. *See Powell*, 189 F.3d at 395 (disparate impact claim established where plaintiffs can
 16 show that, *inter alia*, funding disparities "limit[] the[] educational opportunities" of minority
 17 students); *see also De La Cruz v. Tormey*, 582 F.2d 45, 53 (9th Cir. 1978) (discriminatory effect
 18 alleged based on denial of "educational opportunity" on the basis of sex);²⁵ *United Farmworkers*
 19 *of Fla. Hous. Project, Inc. v. Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1974) (city's refusal to
 20 provide water and sewer services appropriate subject of discrimination suit).²⁶

21
 22 ²⁵ Although *De La Cruz* raised an equal protection claim, the Ninth Circuit examined
 23 whether plaintiffs had established, as one element of that claim, a "discriminatory effect," and
 24 relied on Title VI and Title VII disparate impact cases in concluding that they had. 582 F.2d at
 25 51-52 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII), *Lau v. Nichols*, 414
 26 U.S. 563 (1974) (Title VI), and *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (Title VII)).

27 ²⁶ As noted above, *see supra* note 23, to the extent the operating shortfalls that MTC leaves
 28 unfunded in the RTP force AC Transit to raise fares (whether in place of service cuts, or in
 conjunction with cuts), such an outcome is also adverse. It inflicts an economic harm on
 Plaintiffs and the Class. *Cf.* D.Ct. Order (Doc. No. 33) at 6:20-21 ("excessive fares" establish
 "personal economic harm"). And in the case of low-income riders like Plaintiffs Darensburg and
 Hain, the effect is particularly stark as increased transportation costs mean less money for food
 and other life necessities. *See supra* Part II-A-1.

1 **4. The Impact Of MTC’s Failure To Cover Transit Operating Shortfalls Falls**
2 **Disproportionately On Minority Riders.**

3 Finally, there is no dispute that AC Transit’s service level reductions have a
4 disproportionate effect on minorities, because MTC’s own demographic survey establishes that
5 AC Transit’s ridership is overwhelmingly minority.

6 As noted above, “[t]here are two kinds of racially discriminatory effects which a facially
7 neutral decision . . . can produce.” *Arlington Heights II*, 558 F.2d at 1290. Plaintiffs here
8 contend that MTC’s consistent failure to cover AC Transit’s operating shortfalls has a
9 disproportionate adverse effect on minorities. That being so, Plaintiffs need only demonstrate
10 that the majority of AC Transit’s riders – the affected population – is minority, in order to
11 establish disproportionality. *Keith*, 858 F.2d at 484; *Garcia*, 998 F.2d at 1486. Seventy-eight
12 percent of AC Transit’s ridership is minority. Marcantonio Decl., Exh. 46 at 10. This is
13 substantially in excess of the two-thirds minority population found by the Court in *Keith* to
14 establish disproportionality of impact. 858 F.2d at 484. Because the “vast majority” of AC
15 Transit’s ridership is minority, minorities are “disproportionately impacted” by MTC’s practice.
16 *Garcia*, 998 F.2d at 1486.

17 **IV. CONCLUSION**

18 For the foregoing reasons, Plaintiffs have established a prima facie case of disparate
19 impact discrimination, in violation of California Government Code Section 11135 and its
20 implementing regulations, with regard to MTC’s practice of funding transit capital shortfalls, but
21 not operating shortfalls, in its Regional Transportation Plans. Therefore, this Court should grant
22 Plaintiffs’ motion for summary adjudication.
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Dated: April 1, 2008

LEWIS, FEINBERG, LEE,
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ATTACHMENT A

AC TRANSIT, BART, AND CALTRAIN Annual Vehicle Revenue Miles 1993-2006

