Golden Gate University Law Review

Volume 43
Issue 1 *Ninth Circuit Survey*

Article 5

February 2013

If You Give a Mouse a Cookie: California's Section 11135 Fails to Provide Plaintiffs Relief in Darensburg v. Metropolitan Transportation Commission

Kate Baldridge
Golden Gate University School of Law

NOTE

IF YOU GIVE A MOUSE A COOKIE: CALIFORNIA'S SECTION 11135 FAILS TO PROVIDE PLAINTIFFS RELIEF IN *DARENSBURG v. METROPOLITAN TRANSPORTATION COMMISSION*

*KATE BALDRIDGE**

INTRODUCTION

Transportation inequity is deeply rooted in American history.[1] While the civil rights movement[2] and Title VI of the Civil Rights Act of 1964[3] formally outlawed racial segregation in transportation, remnants of inequity are still evident in modern society.[4] Metropolitan transportation

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* J.D. Candidate, Golden Gate University School of Law, 2013. I would like to thank Professor Deborah Behles for her advice and support of my research. I would also like to thank the *Golden Gate University Law Review* Editorial Board and Professor Ed Baskauskas for their contributions to this Note. Finally, I want to express my sincere appreciation to Elizabeth Chase for her everlasting patience and support.

[1] In 1896, the United States Supreme Court held that maintaining "separate but equal" railroad cars for African-American train passengers was constitutional. Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896).

[2] *E.g.*, Bailey v. Patterson, 369 U.S. 31, 33 (1962) ("We have settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities.").

[3] *See* 42 U.S.C.A. § 2000d (Westlaw 2012).

[4] Many transportation inequities described by Dr. Martin Luther King in 1968 have not been remedied by the passage of time:

> Urban transit systems in most American cities, for example, have become a genuine civil rights issue—and a valid one—because the layout of rapid-transit systems determines the accessibility of jobs to the black community. . . . A good example of this problem is my home city of Atlanta, where the rapid-transit system has been laid out for the convenience of the white upper-middle-class suburbanites who commute to their jobs downtown.

agencies across the nation are massively subsidizing the expansion of inter-city rail systems that largely serve white, suburban commuters.[5] Meanwhile, these same agencies are disproportionately raising fares and cutting services to inner-city bus systems that serve a mostly minority ridership.[6] These funding allocations create a disparity not only between inner-city riders and inter-city riders, but also between minority riders and white riders.[7] Transportation equity is the new face of the environmental justice movement, grounded in the belief that "the benefits and burdens of transportation projects [should be] equally distributed among various income levels."[8]

The discriminatory patterns one might expect to find in old southern cities[9] are evident today even in the San Francisco Bay Area, despite its characterization as having "liberal political attitudes" and a "culture of tolerance."[10] The Bay Area is somewhat unique among American cities in that all socio-economic groups use public transit.[11] Even so, low-income minority residents tend to depend more on public transit, particularly the inner-city bus system, for their daily trips than do other groups.[12]

In *Darensburg v. Metropolitan Transportation Commission*, the United States Court of Appeals for the Ninth Circuit confronted these issues of transportation inequity and the discriminatory effects attributable to the disproportionate funding practices of metropolitan transportation agencies.[13] A class composed of members of racial minority groups (collectively the "plaintiffs") alleged that the

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MARTIN LUTHER KING, A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 325-26 (James M. Washington ed., 1991).

[5] Kevin L. Siegel, *Discrimination in the Funding of Mass Transit Systems: Formulating a Title VI Challenge to the Subsidization of the Alameda Contra Costa Transit District as Compared to the Bay Area Rapid Transit District*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 107 (1997).

[6] *Id.*

[7] *Id.*

[8] Kevin J. Klesh, Note, *Urban Sprawl: Can the "Transportation Equity" Movement and Federal Transportation Policy Help Break Down Barriers to Regional Solutions?*, 7 ENVTL. LAW. 649, 671 (2001) (citing Rich Stolz, *Race, Poverty & Transportation*, 9 POVERTY & RACE 1, 2 (Mar./Apr. 2000), *available at* www.prrac.org/newsletters/marapr2000.pdf).

[9] Orlyn O. Lockard, III, Note, *Solving the "Tragedy": Transportation, Pollution and Regionalism in Atlanta*, 19 VA. ENVTL. L.J. 161, 180 n.139 (2000) (citing William Schmidt, *Racial Roadblock Seen in Atlanta Transit System*, N.Y. TIMES, July 22, 1987, at A16 ("The development of a regional transit system in the Atlanta area is being held hostage to race, and I think it's high time we admitted it and talked about it." (quoting J. David Chestnut, then-chairman of the Metropolitan Atlanta Rapid Transit Authority))).

[10] Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 524 (9th Cir. 2011) (Noonan, J., concurring).

[11] Siegel, *supra* note 5, at 114.

[12] *Id.*

[13] *Darensburg*, 636 F.3d at 514.

Metropolitan Transportation Commission's (MTC's) practice of persistently underfunding the Alameda-Contra Costa Transit (AC Transit) inner-city bus system, while heavily investing in the Bay Area Rapid Transit (BART) inter-city rail system, amounted to intentional discrimination and had a disparate impact on low-income persons of color.[14] The Ninth Circuit rejected the plaintiffs' constitutional and statutory claims, holding that MTC's funding decisions did not intentionally discriminate against, nor have a disparate impact on the minority class.[15] In a concurring opinion, one judge went even further, decrying the fact that the lawsuit was brought in the first place.[16]

While courts continually narrow the reach of disparate-impact litigation under federal law,[17] the California Legislature has expanded the scope of its state antidiscrimination laws.[18] California has given plaintiffs challenging institutional disparities a proverbial "cookie" by providing a private right of action for disparate-impact discrimination, but, ultimately, plaintiffs are denied their glass of milk by the overwhelming evidentiary burdens required to substantiate these claims. The burden-of-proof issues faced by plaintiffs in *Darensburg* illustrate the uphill road ahead for future litigants challenging institutional disparities still present in today's "culture of tolerance."[19]

This Note examines *Darensburg* and the evidentiary problems faced by plaintiffs entangled in the bus-versus-rail controversy that are inherent to disparate-impact litigation. Part I discusses the factual background of *Darensburg* and relevant federal and state law concerning claims of both intentional and disparate-impact discrimination. Part II examines disparate-impact jurisprudence in the context of the unequal distribution of municipal services as background to the complexity of the issues presented in *Darensburg*. Part III analyzes the *Darensburg* opinion in

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[14] *Id.*

[15] *Id.* at 514-15.

[16] *Id.* at 524 (Noonan, J., concurring) ("The notion of a Bay Area board bent on racist goals is a specter that only desperate litigation could entertain.").

[17] Alexander v. Sandoval, 532 U.S. 275, 280 (2001) ("[I]t is . . . beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination."); Save Our Valley v. Sound Transit, 335 F.3d 932, 944 (9th Cir. 2003) (providing that section 601 does not create a right "to be free from racially discriminating effects").

[18] *See* CAL. GOV'T CODE § 11135(a) (Westlaw 2012) (prohibiting intentional discrimination); CAL. CODE REGS. tit. 22, § 98101(i)(1) (Westlaw 2012) (prohibiting disparate-impact discrimination); CAL. GOV'T CODE § 11139 (Westlaw 2012) (providing a private right of action to bring claims of disparate-impact discrimination).

[19] *Darensburg*, 636 F.3d at 523-24 (Noonan, J., concurring) ("The twentieth century racial categories so confidently deployed no longer correspond to American life among the young. What is true of the young is already characteristic of the Bay Area where social change has been fostered by liberal political attitudes, and a culture of tolerance." (internal citation omitted)).

light of that background and shows that the burden-of-proof issues faced by plaintiffs are illustrative of the lack of effective guidance to plaintiffs seeking relief from institutional disparities.

I. BACKGROUND

A. FACTS AND HISTORY OF *DARENSBURG V. MTC*

The named plaintiff, Sylvia Darensburg, a low-income African-American resident of East Oakland, relied on AC Transit bus service to meet the transportation needs of herself and her family.[20] Increases in transit fares since 2001 stretched her budget so tightly that she could not pay other bills on time.[21] Because of the unreliable service AC Transit provided, she was unable to accept or retain employment.[22] Cuts in service required that she take two or three buses to reach her destinations.[23] And due to the discontinuation of a service line near her home, she had to walk long distances in bad neighborhoods at night on her return home from college classes.[24] Darensburg represented a class of minority patrons of AC Transit, all with similar stories.[25] Due to funding shortfalls, AC Transit had been forced to cut urban bus service, to the plaintiffs' detriment.[26] Meanwhile, MTC's long-term financial plan for the allocation of federal and state subsidies for transportation dedicated ninety-four percent of its $10.5 billion budget to new rail projects, leaving only five percent to fund new bus projects.[27]

The plaintiff class filed suit in federal court, alleging that defendant MTC's funding practices, though facially race-neutral, actually diverted funding from AC Transit bus service to costly BART rail expansion projects, resulting in disproportionate harm to AC Transit's minority bus ridership.[28] The plaintiffs' first claim was based on Equal Protection.[29]

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[20] Second Amended Complaint at 6, Darensburg v. Metro. Transp. Comm'n, 611 F. Supp. 2d 994 (N.D. Cal. 2009) (No. C-05-01597 EDL), *aff'd*, 636 F.3d 511 (9th Cir. 2011), 2007 U.S. Dist. Ct. Pleadings LEXIS 18425, at *8.

[21] Darensburg, v. Metro. Transp. Comm'n, 611 F. Supp. 2d 994, 1001 (N.D. Cal. 2009), *aff'd*, 636 F.3d 511 (9th Cir. 2011).

[22] *Id*.

[23] Second Amended Complaint at 6, *Darensburg*, 611 F. Supp. 2d 994 (No. C-05-01597 EDL), *aff'd*, 636 F.3d 511 (9th Cir. 2011), 2007 U.S. Dist. Ct. Pleadings LEXIS 18425, at *9.

[24] *Id*.

[25] *Darensburg*, 611 F. Supp. 2d at 1001.

[26] *Id*. at 1038.

[27] Appellants' Opening Brief at 19, Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511 (9th Cir. 2011) (No. 09-15878), 2009 WL 6866035, at *11.

[28] *Darensburg*, 611 F. Supp. 2d at 997.

They alleged that MTC's disparate funding allocations violated their rights under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983, because they had the purpose and effect of discriminating against transit riders on the bases of race and national origin.[30]

The plaintiffs' second claim alleged a violation of Title VI.[31] They claimed that because MTC was a recipient of federal funds, and because the allocations of those funds had the purpose and effect of discriminating against transit riders on the bases of race and national origin, MTC was acting in violation of section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 42 U.S.C. § 1983.[32]

The plaintiffs' third claim was based on California Government Code section 11135.[33] Like Title VI, section 11135 prohibits intentional discrimination, but it goes further to prohibit disparate-impact discrimination in state-funded programs and activities.[34] The plaintiffs claimed that MTC's funding allocations created a disparate impact against transit riders on the bases of race, national origin, and ethnic group identification, effectively denying the plaintiffs full and equal access to public transportation.[35]

The U.S. District Court for the Northern District of California granted in part and denied in part MTC's motions for summary judgment, holding that there were triable issues of fact as to disparate-impact discrimination under California statutory law, but finding insufficient evidence as to intentional discrimination under federal or state law.[36] At trial, the district court found that the plaintiffs had established a prima facie case of disparate-impact discrimination because MTC's process for prioritizing transportation funding in its long-range plan caused "a disparity in funding for rail projects that on the whole are

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[29] Second Amended Complaint at 28-29, *Darensburg*, 611 F. Supp. 2d 994 (No. C-05-01597 EDL), 2007 U.S. Dist. Ct. Pleadings LEXIS 18425, at *55-56.

[30] *Id*.

[31] Second Amended Complaint at 29, *Darensburg*, 611 F. Supp. 2d 994 (No. C-05-01597 EDL), 2007 U.S. Dist. Ct. Pleadings LEXIS 18425, at *56-57.

[32] *Id*.

[33] Second Amended Complaint at 29-30, *Darensburg*, 611 F. Supp. 2d 994 (No. C-05-01597 EDL), 2007 U.S. Dist. Ct. Pleadings LEXIS 18425, at *57-58.

[34] Danfeng Soto-Vigil Koon, *Cal. Gov't Code § 11135: A Challenge to Contemporary State-Funded Discrimination*, 7 STAN. J. C.R. & C.L. 239, 241-42 (2011).

[35] Second Amended Complaint at 29-30, *Darensburg*, 611 F. Supp. 2d 994 (No. C-05-01597 EDL), 2007 U.S. Dist. Ct. Pleadings LEXIS 18425, at *57-58.

[36] *Darensburg*, 611 F. Supp. 2d at 998.

used by a lower percentage of minority riders, as opposed to bus projects."[37]

A prima facie case under section 11135 requires that a plaintiff establish the occurrence of certain outwardly neutral practices that are related to a significantly adverse or disproportionate impact on minorities.[38] Unlike intentional discrimination claims, proving disparate-impact discrimination does not require a showing of discriminatory intent.[39] Plaintiffs may prevail by offering "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of [plaintiffs] because of their membership in a protected group."[40] Thus, the plaintiffs here bore the initial burden of showing a disparate impact using some appropriate measure that could adequately capture how they were treated differently as members of a protected group.[41] The district court found that the plaintiffs' ridership statistics combined with the fact that MTC applied wholly different funding criteria to bus projects than to rail projects[42] satisfied this burden by showing increased and disparate funding for rail projects that, on the whole, are used by a lower percentage of minority riders as compared to bus projects.[43]

Once the plaintiffs met their burden to establish a prima facie case regarding MTC's long-range plan, the burden shifted to MTC to justify its practices.[44] However, the appropriate standard for MTC's rebuttal burden was a point of contention between the parties.[45] The plaintiffs argued for the "business necessity" rebuttal standard[46] originally

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[37] *Id.* at 1044. However, the court held that MTC's apportionment of committed and uncommitted funds did not constitute disparate-impact discrimination. *Id.* at 1051.

[38] *Id.* at 1042 (citing Gamble v. City of Escondido, 104 F.3d 300, 306 (9th Cir. 1997)).

[39] *Id.* (citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); *Gamble*, 104 F.3d at 306).

[40] *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988)).

[41] *Id.*

[42] *Id.* at 1043.

[43] *Id.* at 1044.

[44] *Id.* at 1051. The state burden-shifting framework for analyzing disparate-impact claims is analogous to the framework under Title VI (imported from Title VII): (1) a plaintiff establishes a prima facie case if the defendant's facially neutral practice causes a disproportionate adverse impact on a protected class; (2) to rebut, the defendant must justify the challenged practice; and (3) if the defendant meets its rebuttal burden, the plaintiff may still prevail by establishing a less discriminatory alternative. Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 519 (9th Cir. 2011).

[45] *Darensburg*, 611 F. Supp. 2d at 1051.

[46] *Id.* at 1051-52 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)).

incorporated by reference into section 11135's final regulations.[47] This standard requires a defendant to prove that the challenged practice is "necessary for safe and efficient operation of the business," is related to the stated business purpose, and cannot be replaced by an equally effective but less discriminatory alternative.[48] This standard demonstrates the California Legislature's intent to provide broad protections against discrimination.[49]

Nevertheless, the district court rejected the business-necessity standard and instead required that MTC justify its conduct only by a "preponderance of competent, relevant evidence, which need not consist of rigorous statistical studies as long as it is persuasive."[50] The court distinguished the cases relied on by the plaintiffs for the business-necessity standard because they were employment discrimination cases brought under Title VII concerning a "discrete practice," which did not readily translate to the facts in *Darensburg* because MTC's practice involved complex and multi-faceted decisions regarding differently situated service operators.[51] The court reasoned that the more relaxed "substantial legitimate justification"[52] standard was appropriate because MTC was responsible for making policy and budgetary decisions within a complex web of statutory, regulatory, and administrative constraints.[53] The court concluded that MTC met this burden by showing that its funding decisions were based on existing funding constraints and the legitimate goal of improving interconnectivity and convenience for all transit riders.[54]

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[47] Section 11135's regulations incorporate by reference the definitions and prohibitions contained in California's Fair Employment and Housing Act's (FEHA's) implementing regulations. CAL. CODE REGS. tit. 22, § 98400 (Westlaw 2012). *See* Appellants' Reply Brief at 26, *Darensburg*, 636 F.3d 511 (No. 09-15878), 2010 WL 3708467, at *19.

[48] CAL. CODE REGS. tit. 22, § 98400; *see also id.* tit. 2, § 7286.7(b) ("Business Necessity. Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact.").

[49] *See, e.g.*, *id.* tit. 22, § 98400 (incorporating FEHA regulations which require a business necessity to overcome adverse impact).

[50] *Darensburg*, 611 F. Supp. 2d at 1054.

[51] *Id.* at 1053. *But see id.* at 1040 ("[A] successful disparate impact claim must identify a discrete practice.").

[52] The court imported the substantial legitimate justification standard from a transportation case in the Second Circuit. *Id.* at 1053 (adopting the standard employed by the Second Circuit in N.Y. Urban League v. N.Y., 71 F.3d 1031 (2d Cir. 1995) (per curiam)).

[53] *Id*. at 1054.

[54] *Id*. at 1057-58.

The burden then shifted back to the plaintiffs to show by a preponderance of the evidence that an equally effective, yet less discriminatory, alternative existed.[55] The court held that while the plaintiffs' proffered alternatives held merit, they failed to meet their burden of showing those alternatives to be equally effective while causing less of a discriminatory impact.[56] Consequently, the plaintiffs' prayer for relief against MTC was denied.[57]

The plaintiffs appealed to the Ninth Circuit, arguing that the lower court erred in applying the "substantial legitimate justification" standard and that the complex and competing goals used to satisfy the standard did not justify the court's departure from the prevailing business-necessity standard.[58] Rather than addressing the appropriate rebuttal standard, the Ninth Circuit affirmed the judgment on entirely different grounds.[59] It held that the statistical measure of disparity the plaintiffs used was unsound, and it went even further by remarking that the plaintiffs' claim rested upon a "logical fallacy."[60] The court of appeals found that the district court's finding of a prima facie case of disparate-impact discrimination was "clearly erroneous," reasoning that the plaintiffs' general population statistics, offered to demonstrate the disparity between minority bus riders and rail riders, failed to establish that MTC's funding practices favoring rail projects actually disadvantaged minorities.[61]

While conceding that the statistical evidence proffered by the plaintiffs showed that minorities make up a greater percentage of bus riders than rail riders, the court did not agree that it necessarily followed that a rail expansion plan that took money from AC Transit would harm its minority ridership.[62] The court faulted the plaintiffs' theory because, it reasoned, the plaintiffs had not considered that a rail expansion plan could, in the alternative, actually *help* minority transit users.[63] Without a precise measure of how future rail projects would eventually serve the Bay Area's transit ridership, the court declined to come to a conclusion on whether rail-centered funding allocations would help or harm the

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[55] *Id.* at 1060-61.

[56] *Id.* at 1061.

[57] *Id.*

[58] Appellants Opening Brief at 10, Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511 (9th Cir. 2011) (No. 09-15878), 2009 WL 6866035, at *2.

[59] *Darensburg*, 636 F.3d at 514-15.

[60] *Id.* at 514.

[61] *Id.* at 522.

[62] *Id.* at 514-15.

[63] *Id.* at 515.

minority ridership.[64] Because the court found error in the district court's finding of a prima facie case of disparate impact, it did not address the burden-shifting framework used by the district court.[65]

B. RELEVANT LAW

Because no legislation addresses transportation inequities specifically, plaintiffs may use a variety of legal theories to fit their case.[66] As was the case in *Darensburg*, those seeking redress for the disproportionate distribution of municipal services often base their claims on civil rights statutes grounded in Equal Protection.[67] In addition, because metropolitan transportation agencies like MTC are the recipients of both federal and state funding, plaintiffs may pursue Title VI claims under federal law and equivalent claims under state law.[68]

1. *Federal Law*

a. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides the primary constitutional cause of action available to remedy inequities.[69] The constitutional prohibition on disparate treatment in this context prevents government actors from allocating environmental benefits and burdens on racial grounds.[70] To prove a violation, plaintiffs must show that persons who are similarly situated are being treated differently (i.e., a disparate impact) and must also provide evidence of intent to effectuate the discriminatory practice.[71] In the absence of direct proof of intentional discrimination by government actors, courts have been reluctant to infer intentional discrimination solely from evidence of

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[64] *Id.*

[65] *Id.*

[66] *See generally* Sten-Erik Hoidal, Note, *Returning to the Roots of Environmental Justice: Lessons from the Inequitable Distribution of Municipal Services*, 88 MINN. L. REV. 193 (2003) (describing the various legal tools available to environmental justice plaintiffs, including environmental statutes, common-law property claims, constitutional challenges, and civil rights laws).

[67] *Id.* at 195.

[68] Koon, *supra* note 34, at 241-42.

[69] *See* U.S. CONST. amend. XIV, § 1 (providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws").

[70] Hoidal, *supra* note 66, at 204.

[71] *See, e.g.*, Terry Props., Inc. v. Standard Oil Co., 799 F.2d 1523, 1536 (11th Cir. 1986) (finding no discriminatory intent in the siting of an industrial plant in a largely African-American community).

racially disparate impact.[72] The difficulty of meeting the intentional discrimination burden has severely hampered plaintiffs pursuing this remedy.[73]

b. Title VI of the Civil Rights Act of 1964

Rooted in Congress's taxing and spending powers, Title VI prohibits discrimination by recipients of federal funding.[74] In the context of the disproportionate allocation of municipal services, sections 601[75] and 602[76] provide the relevant authority. Section 601 provides that "[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[77] Section 602 authorizes federal agencies to create regulations to effectuate the goals of section 601 and provides the means of enforcement.[78] For example, the Federal Transit Administration's (FTA's) guidelines for carrying out the U.S. Department of Transportation's Title VI implementing regulations[79] provide that recipients of federal funds should "[e]nsure that the level and quality of public transportation service is provided in a nondiscriminatory manner" and "[p]romote full and fair participation in public transportation decision-making without regard to race, color, or national origin."[80]

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[72] *See* Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 680 (S.D. Tex. 1979) (holding that plaintiffs failed to prove discriminatory intent, despite showing disparate impact of hazardous waste facility siting); E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Cnty. Planning & Zoning Comm'n, 706 F. Supp. 880, 886 (M.D. Ga. 1989) (holding that plaintiffs failed to provide evidence to support a determination that race was a motivating factor, despite strong evidence of disparate impact); R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1149-50 (E.D. Va. 1991) (holding that plaintiffs lacked the evidence necessary to show discriminatory intent, despite the existence of a disparate impact on minorities).

[73] Hoidal, *supra* note 66, at 204.

[74] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598-99 (1983) (stating that Title VI was enacted under Congress's power to spend for the general welfare of the United States).

[75] 42 U.S.C.A. § 2000d (Westlaw 2012) (prohibiting intentional discrimination caused by disparate treatment).

[76] *Id.* § 2000d-1 (prohibiting discrimination resulting from policies and actions that have a disparate impact on protected groups).

[77] *Id.* § 2000d.

[78] *Id.* § 2000d-1.

[79] Nondiscrimination in Federally-Assisted Programs of the DOT—Effectuation of Title VI of the Civil Rights Act of 1964, 49 C.F.R. pt. 21 (Westlaw 2012).

[80] FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., FTA C 4702.1B, TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS II-1 (2012), *available at* www.fta.dot.gov/documents/FTA_Title_VI_FINAL.pdf.

A successful claim under section 601 requires proof of discriminatory intent.[81] Consequently, as with Equal Protection claims, the majority of environmental justice claims alleging intentional discrimination to date have failed.[82]

Conversely, section 602 requires only a showing of disparate-impact discrimination.[83] However, there is no explicit private right of action for plaintiffs to file suit under section 602.[84] Agency regulations promulgated under section 602 may go further than the statute they implement by "proscribing activities that have disparate effects on racial groups, even though such activities are permissible under section 601,"[85] thus creating "considerable tension" between section 601 and disparate-impact regulations.[86]

While the Supreme Court had numerous opportunities to address the scope of Title VI's reach, it did not decide until 2001 whether there existed a private right of action to enforce agency disparate-impact regulations promulgated under section 602.[87] In *Alexander v. Sandoval*,[88] the Court answered the question in the negative and held that there is no private right of action to enforce agency regulations,[89]

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[81] Alexander v. Sandoval, 532 U.S. 275, 280 (2001) ("[I]t is . . . beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination."); Save Our Valley v. Sound Transit, 335 F.3d 932, 944 (9th Cir. 2003) (providing that section 601 does not create a right "to be free from racially discriminating effects").

[82] *See, e.g.*, cases cited *supra* note 72.

[83] *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598-99 (1983) (upholding administrative regulations implementing Title VI, which prohibit disparate-impact discrimination).

[84] 42 U.S.C.A. § 2000d-1 (Westlaw 2012); *see also Sandoval*, 532 U.S. at 288-89; *Save Our Valley*, 335 F.3d at 944 ("The disparate-impact regulation cannot create a new right; it can only "effectuate" a right already created by § 601. And § 601 does not create the right that [plaintiff] seeks to enforce, the right to be free from racially discriminatory effects.").

[85] *Save Our Valley*, 335 F.3d at 935 n.2.

[86] *Sandoval*, 532 U.S. at 282.

[87] *See Guardians*, 463 U.S. 582; Alexander v. Choate, 469 U.S. 287 (1985); Cannon v. Univ. of Chi., 441 U.S. 677 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[88] *Sandoval*, 532 U.S. at 275.

[89] *Id.* at 285-89 ("It is clear now that the disparate-impact regulations do not simply apply § 601-since they indeed forbid conduct that § 601 permits-and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.") At least one commentator has cogently argued that *Sandoval* was wrongly decided:

> The Court's implicit reasoning, based upon *Regents of the University of California v. Bakke*, is unpersuasive because, contrary to *Sandoval's* assertion, *Bakke* never held that there existed clear congressional intent to limit the scope of Title VI to intentional discrimination. Conversely, the *Guardians Association v. Civil Service Commission-Alexander v. Choate* line of cases is incapable of standing for the proposition that disparate-impact regulations are valid law. Rather, *Chevron U.S.A. v. Natural Resources Defense Council* provides the only appropriate means of determining the validity of disparate-impact regulations. After working through a *Chevron* analysis, it is apparent that the 88th Congress never expressed a clear and unambiguous intent as to the scope of Title VI's anti-discrimination mandate. Because the

effectively requiring Title VI plaintiffs to prove intentional discrimination under section 601, or to seek redress under other laws. Justice Stevens, dissenting, pointed to earlier case law[90] to show that *Sandoval* was a sharp departure from precedent and that "[l]itigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference [42 U.S.C.] § 1983 to obtain relief."[91]

c. 42 U.S.C. § 1983

In the wake of *Sandoval*, many environmental justice plaintiffs were successful in bringing section 602 disparate-impact claims under 42 U.S.C. § 1983 as Justice Stevens had suggested.[92] Section 1983 "allows suits for violations of the Constitution and other federal laws against persons acting under color of law."[93] Because a violation of section 602 is a breach of federal law, it would follow that such a violation should be actionable under § 1983.[94] Plaintiffs tried to use this logic to seek redress under section 602, but the success of this approach was short-lived.

In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, the Third Circuit held that "Title VI does not

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88th Congress did not precisely address whether "discrimination" embodied an intent or effects standard, under the holding of the Court's opinion in *Chevron U.S.A.*, the judiciary must defer to EPA's permissibly constructed disparate-impact regulations[, which] therefore remain[ ] valid federal law after *Sandoval*.

David J. Galalis, Note, *Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron*, 31 B.C. ENVTL. AFF. L. REV. 61, 101 (2004). Judge Berzon of the Ninth Circuit also noted that *Chevron* deference to agency interpretations of ambiguous statutes could help courts interpret the scope of statutory rights under § 1983, but she ultimately concluded that section 602 regulations did not establish an enforceable right under § 1983 because of the Supreme Court's clear direction in *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002), that only an explicit private right of action would support a cause of action under § 1983 in Spending Clause cases such as Title VI. *Save Our Valley*, 335 F.3d at 958-65 (Berzon, J., dissenting in part).

[90] *Sandoval*, 532 U.S. at 299-300 (Stevens, J., dissenting) (citing *Guardians*, 463 U.S. at 598-99).

[91] *Id.* at 300 (Stevens, J., dissenting).

[92] *See* Bradford C. Mank, *Using § 1983 To Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321 (2001); *see also* Robinson v. Kansas, 295 F.3d 1183, 1187 (10th Cir. 2002) (indicating that disparate-impact claims may still be brought under § 1983); Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 52-55 (D. Mass. 2002) (permitting a disparate-impact suit pursuant to § 1983); White v. Engler, 188 F. Supp. 2d 730, 743-45 (E.D. Mich. 2001) (permitting claims under § 1983 regarding the disbursement of education funds).

[93] CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA & CATHERINE A. O'NEILL, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 509 (2d ed. 2009); *see also* 42 U.S.C.A. § 1983 (Westlaw 2012).

[94] RECHTSCHAFFEN, GAUNA & O'NEILL, *supra* note 93, at 493.

establish a right to be free of disparate impact discrimination," and to hold that agency regulations promulgated under section 602 could "constitute a 'federal right' enforceable under [§] 1983" would "give the statute a scope beyond that [which] Congress contemplated."[95] The Supreme Court soon agreed and put an end to the use of § 1983 as a tool to entertain section 602 disparate-impact claims.[96]

2. *State Law: California Government Code Section 11135*

The California Legislature has provided the means to allow plaintiffs redress for discrimination under California Government Code section 11135 and its implementing regulations.[97] This section is analogous to Title VI in that it prohibits intentional discrimination[98] and disparate-impact discrimination[99] in state-funded programs and activities. California law is distinguishable from Title VI, however, in that it explicitly provides a private right of action to enforce section 11135 and its regulations.[100]

II. DISPARATE-IMPACT JURISPRUDENCE: PLAINTIFFS' BURDEN OF PROOF

After *Sandoval*, plaintiffs must be able to state a claim of intentional discrimination to bring a cause of action under Title VI.[101] If plaintiffs cannot proffer evidence supporting that claim, or if the gravamen of the

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[95] S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790-91 (3d Cir. 2001).

[96] Gonzaga Univ. v. Doe, 536 U.S. 273, 286-87 (2002).

[97] California Government Code section 11135 provides:

> No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.

CAL. GOV'T CODE § 11135(a) (Westlaw 2012).

[98] *Id.* § 11135.

[99] Section 11135's regulations prohibit practices that "utilize criteria or methods of administration that have the purpose or effect of subjecting a person to discrimination." CAL. CODE REGS. tit. 22, § 98101(i)(1) (Westlaw 2012).

[100] *See* CAL. GOV'T CODE § 11139 (Westlaw 2012) ("This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief, which shall be independent of any other rights and remedies."); Blumhorst v. Jewish Family Servs. of L.A., 24 Cal. Rptr. 3d 474, 480 (Ct. App. 2005) (recognizing the private right of action created by the Legislature).

[101] *See* Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

complaint lies in a disparate impact resulting from government action rather than an identifiable practice of discrimination, the claim will fail.[102] The critical distinction in a plaintiff's potential relief from discriminatory effects is therefore contingent on the standard of proof required to establish a prima facie case of either type of claim. The California Legislature has provided a private right of action for claims based solely on disparate impact under California law.[103] However, a survey of disparate-impact jurisprudence reveals that even California's broadened protections may not effectively remedy the overarching judicial reticence toward disparate-impact litigation.[104]

Further, using the disparate-impact analysis outside of the intentional discrimination framework "transform[s] essentially political questions about economic allocation . . . into courtroom battles that obscure, rather than illuminate, the choices that must be made."[105] The allocation of billions of dollars of state and federal funding requires the institutional decisionmaker to navigate "the messy mass of facts, factors, and guesses going into planning for regional transportation"[106]—a task perhaps better-suited to the political arena than the courtroom. This point is well-illustrated in *Darensburg*.[107]

A. THE ROOTS OF THE DISPARATE-IMPACT ANALYSIS

The disparate-impact analysis was first adopted by the Supreme Court in *Griggs v. Duke Power Company*, an employment discrimination case brought under Title VII.[108] Prior to the passage of Title VII, Duke Power explicitly restricted African-American employees to low-level,

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[102] *See id.*

[103] *See* CAL. GOV'T CODE § 11139 (providing a private right of action to enforce the disparate-impact regulations of California Government Code § 11135).

[104] *See, e.g.*, discussion *infra* Part II.C.1-2.

[105] Todd B. Adams, *Environmental Justice and the Limits of Disparate Impact Analysis*, 16 T.M. COOLEY L. REV. 417, 418 (1999); *see also* Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 523 (9th Cir. 2011) (Noonan, J., concurring) ("The American instinct to cast controversies into a legal forum has been an American characteristic at least since Alexis de Tocqueville observed in 1835, 'Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.'" (citing 1 TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., Henry Reeve trans., rev. by Francis Bowen ed., 1945) (1898))).

[106] *Darensburg*, 636 F.3d at 524 (Noonan, J., concurring).

[107] *Id.*

[108] Griggs v. Duke Power Co., 401 U.S. 424 (1971). However, Title VII did not explicitly mention disparate-impact analysis until 1991. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.); 42 U.S.C.A. § 2000e-2(k) (Westlaw 2012). The Act essentially codified *Griggs* in response to the Court's subsequent lowering of that standard. *See id.*; Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 659-60 (1989).

low-paying jobs.[109] Following the passage of Title VII, Duke Power traded its explicitly discriminatory policies for facially neutral testing requirements that, according to plaintiffs, continued to effectively deny African-American employees jobs for which they were qualified, perpetuating racial segregation within the company.[110] The district and appellate courts, however, found the policies valid under Title VII because "there was no showing of racial purpose or invidious intent."[111]

The Supreme Court reversed, holding that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[112] Therefore, the Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation," or, in other words, practices that result in a disparate impact.[113]

The Supreme Court later described the operation of the disparate-impact analysis as "functionally equivalent to intentional discrimination"[114]—"[t]he distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where . . . [the intentional discrimination] analysis is used."[115] However, this approach raises the question of "whether disparate impact analysis should apply where statistical studies show a disparate impact on minorities but the statistical studies do not, for various reasons, give rise to an inference of intentional discrimination."[116] This question is especially important after *Sandoval*, where the distinction between evidence of intentional discrimination and disparate impact discrimination will determine whether a plaintiff's

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[109] *Griggs*, 401 U.S. at 426-27.

[110] *Id.* at 427, 431-32.

[111] *Id.* at 429.

[112] *Id.* at 431.

[113] *Id.* After establishing that the policies had a disparate impact, the court moved on to the second prong of the analysis, under which an employer has "the burden of showing that any given requirement [resulting in a disparate impact] must have a manifest relationship to the employment in question." *Id.* at 432. Because Duke Power could not meet this burden, the Court never reached the third prong of the disparate-impact analysis. The Court later articulated the third prong in *Albemarle Paper Co. v. Moody*, providing that if the defendant proved a business necessity for the challenged practice, the plaintiff could still prevail by showing that a less discriminatory alternative existed. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[114] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

[115] *Id.* It is important to note that *Watson* was decided prior to *Sandoval*. In the post-*Sandoval* world, this distinction is critical in determining whether plaintiffs will get their day in court.

[116] Adams, *supra* note 105, at 426.

claims are litigable under Title VI. Yet, prior to *Sandoval*—and even in California where section 11135 provides a private right of action for disparate-impact discrimination—the lack of clarity between the two standards serves to inhibit a plaintiff's success under either theory.[117]

B. THE IMPORTANCE OF STATISTICAL EVIDENCE

Titles VI and VII contain similar distinctions between intent and impact in the context of prohibiting discrimination. Similarity also lies in the fact that circumstantial evidence of impact may prove intent.[118] Because case law is far more developed under Title VII, courts often look to that analytical model when construing Title VI.[119] Similarly, "[i]n light of the parallel language of state and federal [antidiscrimination] law[s]," the federal framework also guides California disparate-impact analyses.[120] Therefore, as under Title VI, a prima facie case of disparate-impact discrimination under section 11135 requires "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."[121]

In a case in which a facially neutral practice is challenged, the plaintiffs' burden is to identify specific "practices that are allegedly responsible for any observed statistical disparities."[122] Plaintiffs must then establish causation by presenting "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of [plaintiffs] because of their membership in a protected group."[123] This "formulation" has "never been framed in terms of any rigid mathematical formula," but the Supreme Court has "consistently stressed that statistical disparities must be *sufficiently substantial* that

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[117] *See, e.g.*, Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 523 (9th Cir. 2011) ("Plaintiffs' failure to establish . . . discriminatory impact prevents any inference of intentional discrimination.").

[118] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

[119] *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983).

[120] *E.g.*, City & Cnty. of S.F. v. Fair Emp't & Hous. Comm'n, 236 Cal. Rptr. 716, 721-23 (1987) (using Title VII standards to analyze a claim under California's Fair Employment and Housing Act).

[121] Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745 (9th Cir. 1996) (using Title VII standards to analyze a claim under California's Fair Employment and Housing Act).

[122] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

[123] *Id.* at 994-95.

they raise such an inference of causation."[124] Plaintiffs' statistical evidence must also reflect an "'appropriate measure' for assessing disparate impact,"[125] as "[c]ourts [and] defendants [are not] obliged to assume that plaintiffs' statistical evidence is reliable."[126] However, the meaning of the terms "sufficiently substantial" and "appropriate measure" are subject to disagreement, as courts have not clearly defined either.

One commentator has suggested that societal change since *Griggs* may explain why clear standards in this area are lacking.[127] For example, "[i]n 1979, the Supreme Court was close to taking judicial notice that racial discrimination had excluded African-Americans from jobs in crafts throughout the country."[128] Yet "[t]oday, many Supreme Court Justices may view society as less pervasively racist, as well as be more skeptical of statistics."[129] Thus, "[a] fundamental disagreement over the role of disparate impact analysis . . . with respect to societal discrimination probably hindered the articulation of a consistent underlying model."[130] This disagreement is evident in Supreme Court precedent[131] and in the legislative history and text of the Civil Rights Act of 1991.[132]

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[124] *Id.* at 995 (emphasis added) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (hiring practices that "select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants"); Washington v. Davis, 426 U.S. 229, 246-47 (1976) (hiring "practices disqualifying substantially disproportionate numbers of blacks"); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (hiring practices that "select applicants for hire in a significantly discriminatory pattern"); N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979) ("statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities"); Conn. v. Teal, 457 U.S. 440, 446 (1982) ("significantly discriminatory impact")).

[125] Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 519 (9th Cir. 2011) (quoting N.Y.C. Envtl. Justice Alliance v. Giuliani, 214 F.3d 65, 69 (2d Cir. 2000) (citing N.Y. Urban League v. N.Y., 71 F.3d 1031, 1038 (2d Cir. 1995) (per curiam))).

[126] *Watson*, 487 U.S. at 996.

[127] Adams, *supra* note 105, at 432. The author argued that "viewing disparate impact analysis as a sophisticated from of 'pretext analysis' better harmonizes the evolving law and explains the judicial reluctance to extend the doctrine into certain areas." *Id.* at 418 (internal citations omitted).

[128] *Id.* at 432 (citing United Steelworkers v. Weber, 443 U.S. 193, 198 n.1 (1979)).

[129] *Id.* (citing Johnson v. Santa Clara Cnty. Transp. Agency, 480 U.S. 616, 664-66 (1987)); *cf. Darensburg*, 636 F.3d at 523-24 (Noonan, J., concurring) ("What is true of the young is already characteristic of the Bay Area where social change has been fostered by liberal political attitudes, and a culture of tolerance. An individual bigot may be found, perhaps even a pocket of racists. The notion of a Bay Area board bent on racist goals is a specter that only desperate litigation could entertain.").

[130] Adams, *supra* note 105, at 432.

[131] *Id.* (citing McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 806 (1973); *United Steelworkers*, 443 U.S. at 218 (1979) (Burger, C.J., dissenting); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 348-50 (1978) (Brennan, J., concurring in part, dissenting in part); *Johnson*, 480 U.S.

In the absence of any "rigid mathematical formula"[133] or articulation of a model disparate-impact analysis, case law may serve as a guide in proving disparate-impact discrimination.[134] However, the lack of significant case law outside of the employment context leads to varied results,[135] and this variation often hinders plaintiffs' claims of institutional disparate-impact discrimination.[136] Absent clear evidentiary standards, the evidentiary burden plaintiffs face in proving a prima facie case of disparate-impact discrimination may serve only as an "evidentiary dragnet" designed to "smoke[] out" instances of hidden—but deliberate—intentional discrimination rather than to "dismantle racial hierarchies" alleged in cases such as *Darensburg*.[137]

C. STATISTICAL EVIDENCE IN PRACTICE: ILLUSTRATING THE BENEFITS AND BURDENS OF INFRASTRUCTURE PROJECTS

Pre-*Sandoval* cases involving disparate-impact claims brought by aggrieved plaintiffs claiming unequal distribution of funds between bus and rail illustrate the evidentiary burdens faced by plaintiffs challenging institutional disparities in this context and provide background for the court's analysis in *Darensburg*. The first two cases involved claims that

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at 659-60 (1987) (Scalia, J., dissenting)); *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

[132] Adams, *supra* note 105, at 432 (citing Symposium, *The Civil Rights Act of 1991, Unraveling the Controversy*, 45 RUTGERS L. REV. 887 (1993)); Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.); 42 U.S.C.A. § 2000e-2(k) (Westlaw 2012).

[133] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 (1988).

[134] However, a survey in this area of law may leave one wondering if the appropriate standard is that articulated by Justice Stewart in defining "hard-core pornography": "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 196 (1964) (Stewart, J., concurring).

[135] The standards articulated under Title VII do not easily translate to analyses outside of the employment discrimination context. For example, a prima facie case of discrimination under Title VII requires the plaintiff to establish (1) his or her membership in a protected class, (2) his or her qualification for the position, (3) an adverse employment action, and (4) circumstances giving rise to an inference of discrimination on the basis of membership in the protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[136] For example, although the Supreme Court has never ruled on whether Title VIII includes a disparate-impact standard, the circuits have agreed that it does apply in the housing context. *See* John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination*, 31 HOFSTRA L. REV. 141, 174 (2002) ("[V]irtually every jurisdiction has held that the 'disparate impact' discrimination analysis is appropriate in FHA cases."). However, the circuits disagree on whether Title VI's burden-shifting framework or the balancing test utilized in early Title VIII cases is appropriate. *Compare* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147-48 (3d Cir. 1977) (utilizing Title VI's burden-shifting framework), *with* NAACP v. Town of Huntington, 844 F.2d 926, 940 (2d Cir. 1988) (utilizing a balancing test).

[137] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 520-21 (2003) (describing competing constructions of disparate-impact discrimination).

the distribution of federal subsidies and fare structures had a disparate impact on racial minorities in low-income neighborhoods.[138] The third case involved a claim alleging both discriminatory intent and impact.[139] Although this third case was resolved through settlement, the resulting consent decree withstood appeals both before and after *Sandoval*, and the case is therefore "the best example that Title VI, . . . though wounded, [is] not dead."[140] However, a case arising post-*Sandoval* involving both discriminatory intent and impact, including a section 11135 claim, shows that while *Sandoval* may have foreclosed disparate-impact claims under Title VI, the analysis under section 11135 remains the same—only the forum has changed to litigate these claims.[141]

1. *Pre-Sandoval Bus-Versus-Rail Disparate-Impact Cases*

In *New York Urban League v. New York*, plaintiffs challenged the State of New York's and the Metropolitan Transportation Authority's (MTA's) allocation of funds for mass transit.[142] Plaintiffs alleged that riders of the New York City Transit Authority (NYCTA) subway and bus systems, "the majority of whom are members of protected minority groups, pay a higher share of the cost of operating the system than commuter line passengers who are predominantly white."[143] The U.S. Court of Appeals for the Second Circuit reversed the district court's grant of a preliminary injunction barring the implementation of a twenty percent fare increase for riders of the NYCTA subway and bus systems.[144] The district court had concluded that the "plaintiffs had

[138] N.Y. Urban League v. N.Y., 71 F.3d 1031, 1033 (2d Cir. 1995) (per curiam) (finding favoritism for suburbanite users of rail a rational exercise of transit system's business judgment); Comm. for a Better N. Phila. v. Se. Penn. Transp. Auth., No. 88-1275, 1990 WL 121177, at *1 (E.D. Pa. Aug. 14, 1990), *aff'd mem.*, 935 F.2d 1280 (3d Cir. 1991) (recognizing such disparities but not finding them actionable).

[139] Labor/Cmty. Strategy Center v. L.A. Cnty. Metro. Transp. Auth., No. CV-94-05936 TJH (CMX) (C.D. Cal. Oct. 29, 1996), *aff'd*, 263 F.3d 1041 (9th Cir. 2001).

[140] Eric Mann, *Los Angeles Bus Riders Derail the MTA*, *in* HIGHWAY ROBBERY: TRANSPORTATION RACISM & NEW ROUTES TO EQUITY 33, 33 (Robert D. Bullard et al. eds., 2004). However, the current climate illustrates that the long-term success of litigation in this area may be called into question. *See* Sunyoung Yang, *Unprecedented Findings of Civil Rights Violations in Federal Audit of Los Angeles Metro*, BUS RIDERS UNION (Dec. 13, 2011), www.thestrategycenter.org/blog/2011/12/13/unprecedented-findings-civil-rights-violations-federal-audit-los-angeles-metro.

[141] Comm. Concerning Cmty. Improvement v. City of Modesto, No. CV-F-04-6121 LJO DLB, 2007 WL 2408495, at *1-2 (E.D. Cal. Aug. 21, 2007), *vacated in part*, 583 F.3d 690 (9th Cir. 2009).

[142] *N.Y. Urban League*, 71 F.3d at 1033.

[143] *Id.*

[144] *Id.*

made a prima facie showing that the proposed fare increases, taken together, would have a disparate impact upon members of protected minority groups."[145]

The Second Circuit disagreed, holding that the district court had "focused on the proposed NYCTA fare increase without examining the broader financial and administrative context in which the fare increase was adopted."[146] A distinguishing factor in the case was that New York state law commanded the allocation of subsidies between NYCTA and commuter lines and that both systems were required to be self-sustaining—that is, when faced with operating shortfalls due to the state's or city's withholding of funds from NYCTA, the agency was forced to respond in some manner, be it through raising fares or cutting services.[147] Therefore, many of NYCTA's decisions were not as discretionary as they appeared in the plaintiffs' statistical evidence.

The appellate court faulted the district court's finding that the plaintiffs had made a prima facie showing of disparate impact based "upon a comparison of the so-called 'farebox recovery ratios' of the NYCTA and the commuter lines."[148] The farebox recovery ratio quantifies the percentage of each system's operating costs recovered through fare revenues.[149] The Second Circuit did not fault the level of significance of the disparity established through that measure, but rather the use of the measure itself.[150] The court held that because the essence of the plaintiffs' claim was based on the total allocation of subsidies to the systems, the farebox recovery ratio could not "adequately capture the impact of these subsidies upon NYCTA and commuter line passengers."[151]

The court concluded that the farebox recovery ratio was not a sufficient basis for a finding of disparate impact, in part because it failed to "reveal the extent to which one system might have higher costs associated with its operations—costs stemming from different

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[145] *Id.* at 1037.

[146] *Id.* at 1033.

[147] *Id.* at 1037.

[148] *Id.* The court noted that the district court appeared to have accepted the farebox recovery ratio as a measure of disparate impact "simply because the MTA records this statistic." *Id.* at 1038. The parties argued as to why MTA records farebox recovery ratios, with plaintiffs suggesting the statistics were kept to track the percentage of costs allocated to users of each system, while MTA provided that the statistics were used to measure operating efficiency rather than disparities in subsidization. *Id.*

[149] *Id.* at 1037.

[150] *Id.* at 1037-38. The district court found that the NYCTA fare increase would lead to a "significant" increase in the farebox recovery ratio of the subway and bus systems at 12.6%, as compared to a much smaller increase in the commuter lines' ratios—around 2%. *Id.* at 1037.

[151] *Id.* at 1037.

maintenance requirements, schedules of operation, labor contracts, and so on."[152] Further, the fundamental differences in the operation of each transportation system and their relative costs foreclosed any assumption that each system's expenses bore any "proportionate relationship" and could "obscure the level of subsidies to each," leaving the court to conclude that the "farebox recovery ratio itself [was] insufficient to support a conclusion that the total allocation of subsidies ha[d] a disparate impact upon minority NYCTA riders."[153]

Another pre-*Sandoval* case, *Committee for a Better North Philadelphia v. Southeastern Pennsylvania Transportation Authority*, involved a similar claim of unequal distribution of subsidies between inter-city bus (City Transit) and intra-city commuter rail (Regional Rail) services operated by the Southeastern Pennsylvania Transportation Authority (SEPTA).[154] Plaintiffs alleged that SEPTA used an "unfair portion of its subsidy dollars in Regional Rail at the expense of City Transit," which had a higher percentage of African-American riders than did Regional Rail.[155] Plaintiffs argued that SEPTA's system of "cross-subsidization" resulted in City Transit riders paying "a higher percentage of that division's operating budget," resulting in a disparate impact to minority riders.[156]

SEPTA conceded that City Transit had a higher percentage of African-American riders than Regional Rail and that City Transit fares would have been lower had it "allocated the subsidies available to it in direct proportion to the passenger fare revenues rather than in response to operating deficits of its individual divisions."[157] SEPTA argued, however, that cross-subsidization was necessary in order to balance its budget while increasing Regional Rail ridership to boost revenues.[158] The court agreed this was a legitimate, non-discriminatory reason for SEPTA's disproportionate allocation of subsidies.[159] The court held that plaintiffs failed to meet their burden to show an equally effective yet less discriminatory alternative because plaintiffs "oversimplifie[d] the

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[152] *Id*. at 1038.

[153] *Id*.

[154] Comm. for a Better N. Phila. v. Se. Penn. Transp. Auth., No. 88-1275, 1990 WL 121177, at *1 (E.D. Pa. Aug. 14, 1990), *aff'd mem.*, 935 F.2d 1280 (3d Cir. 1991). While this case was analyzed under the pre-Civil Rights Act of 1991 evidentiary structure, it does not affect the plaintiffs' initial evidentiary burden as discussed herein. *See* 42 U.S.C.A. § 2000e-2 (Westlaw 2012).

[155] *Comm. for a Better N. Phila.*, 1990 WL 121177, at *1.

[156] *Id*.

[157] *Id*. at *3.

[158] *Id*.

[159] *Id*.

objectives of SEPTA" as it had the "responsibility for operating an integrated mass transit system throughout the five county area while maintaining a balanced budget," which required "responses to the economic realities of a diversified transportation business."[160] The court characterized the "action [as] nothing more [than] an attack on the business judgment of SEPTA," and granted summary judgment to defendants.[161]

In *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*,[162] a group of bus passengers challenged the Los Angeles County Metropolitan Transportation Authority's (LACMTA's) choice to "spend several hundred million dollars on a new rail line," while neglecting "overcrowding problems on city buses" and "increase[d] bus fares" while eliminating discounted monthly passes.[163] Plaintiffs alleged LACMTA "was spending a disproportionately large portion of its budget on rail lines and suburban bus systems that would primarily benefit white suburban commuters, while intentionally neglecting inner-city and transit-dependent minority bus riders who relied on the city bus system."[164] LACMTA's CEO "openly acknowledged" the "fact that separate, unequal, and second-class service was being provided to an inner-city bus ridership comprised overwhelmingly of people of color."[165]

The bus-versus-rail controversy in Los Angeles began in the 1970's, peaking with the plaintiffs' decade-long legal fight against the LACMTA,[166] and arguably is not yet over.[167] Plaintiffs' first legal victory was the issuance of a six-month temporary restraining order halting bus fare increases intended to fund rail projects, which also served as an impetus to settlement discussions between the plaintiffs and

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[160] *Id.*

[161] *Id.* at *3 n.10, *4.

[162] Labor/Cmty. Strategy Center v. L.A. Cnty. Metro. Transp. Auth., No. CV-94-05936 TJH (CMX) (C.D. Cal. Oct. 29, 1996), *aff'd*, 263 F.3d 1041 (9th Cir. 2001).

[163] Labor/Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth., 263 F.3d 1041, 1043 (9th Cir. 2001) (affirming district court's remedial order after LACMTA failed to comply with the consent decree).

[164] *Id.*

[165] Mann, *supra* note 140, at 39.

[166] *Id.* at 34, 36.

[167] *See, e.g.*, Press Release, Bus Riders Union, New Study Finds MTA Policies Squeezing Transit Riders at Both Ends (Feb. 24, 2011), *available at* www.thestrategycenter.org/blog/2011/02/24/new-study-finds-mta-policies-squeezing-transit-riders-both-ends; Memorandum from Peter Rogoff, Administrator, Federal Transit Administration, to Arthur Leahy, Chief Executive Officer, LACMTA (Apr. 23, 2012), *available at* www.fta.dot.gov/printer_friendly/12328_14553.html.

LACMTA.[168] When those initial settlement discussions failed, plaintiffs filed a class action alleging that LACMTA "intentionally discriminated against poor minority bus riders, and that their actions had a discriminatory impact on poor people of color."[169] After two years of discovery, and shortly before the trial was set to begin, the parties reached a settlement through a comprehensive consent decree aimed at improving bus service.[170] The LACMTA arguably conceded to plaintiffs' demands in order "to avoid having a finding of racial discrimination entered against them," given that the plaintiffs' evidence included both damning statistics of disparity[171] and the overtly discriminatory practices of the agency.[172] The resulting ten-year, multibillion-dollar consent decree was the largest settlement in civil rights history.[173]

2. *Post-Sandoval: Only the Forum Has Changed*

Another case of interest involving a section 11135 claim that arose post-*Sandoval* shows that, in practical effect, *Sandoval* did not change anything in relation to burdens of proof. In *Committee Concerning Community Improvement v. City of Modesto*, the plaintiffs brought federal and state-law claims based on discrimination with regard to the unequal distribution of municipal services.[174] The plaintiffs alleged that

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[168] Mann, *supra* note 140, at 39.

[169] TIM CRESSWELL, ON THE MOVE: MOBILITY IN THE MODERN WESTERN WORLD 168 (2006). Plaintiffs presented the following statistics:

> Although almost 94% of the MTA's riders are bus riders and 80% of them are people of color, MTA spends only 30% of its resources on buses. A typical MTA rider is a woman of color, in her twenties, with a household income under $15,000 and no car available to use in lieu of public transit, according to the MTA's own studies. In sharp contrast, the MTA spends 70% of its resources on rail, which carries only 6% of its riders and serves a disproportionately white ridership.

Id.

[170] Labor/Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth., 263 F.3d 1041, 1043 (9th Cir. 2001).

[171] Mann, *supra* note 140, at 40.

[172] *Id*. at 39.

[173] Sean B. Seymore, *Set the Captives Free! Transit Inequity in Urban Centers, and the Laws and Policies Which Aggravate the Disparity*, 16 GEO. MASON U. CIV. RTS. L.J. 57, 82 (2005). LACMTA dragged its feet in complying with the consent decree, was found out of compliance at many of the settlement milestones, and continued to fight the validity of the consent decree. Mann, *supra* note 140, at 43. However, the court-appointed Special Master, the district court, and the Ninth Circuit upheld the consent decree and the U.S. Supreme Court rejected LACMTA's final appeal. *Id.*

[174] Comm. Concerning Cmty. Improvement v. City of Modesto, No. CV-F-04-6121 LJO DLB, 2007 WL 2408495, at *1-2 (E.D. Cal. Aug. 21, 2007), *vacated in part*, 583 F.3d 690 (9th Cir. 2009).

over the preceding fifty years, the City of Modesto had grown steadily by annexing certain predominantly white residential developments and leaving predominantly Latino neighborhoods unincorporated.[175] This left residents of unincorporated (and largely Latino) neighborhoods without adequate infrastructure (i.e., without sidewalks, proper sewage, and effective law enforcement).[176] Plaintiffs alleged that Latinos living in these unincorporated neighborhoods were being discriminated against and had suffered disproportionate harm as a result of the municipality's annexation and funding decisions.[177]

The district court dismissed the plaintiffs' § 1983 and Title VI claims for failure to show discriminatory intent.[178] In this regard, *Modesto* paralleled the lower court's decision in *Darensburg*.[179] However, rather than ruling on the merits of the state-law claims, as the court did in *Darensburg*, the court in *Modesto* declined to exercise supplemental jurisdiction over the section 11135 claim, dismissing the claim without prejudice.[180] The court explained that a showing of "intentional discrimination is not required for proof of a section 11135 claim, which may be proved by disparate impact," and "while the state and federal claims [arose] from the same set of operative facts, the proof of the federal claims versus the state claims is entirely different."[181] A decision on the state-law claims would have thus required "statutory construction or interpretation," better left to state courts, where the level of proof for disparate-impact claims had not yet been addressed.[182] Further, the court noted that "[a]ny decisions this [c]ourt would make on the state claims [would be] unnecessary because federal claims no longer exist[ed] in this action"[183] and the claim therefore "should be resolved by a state court."[184]

On appeal, the Ninth Circuit affirmed the district court in part and reversed and remanded in part.[185] The court reversed and remanded the district court's dismissal of the plaintiffs' intentional discrimination

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[175] Third Amended Complaint at 6, Comm. Concerning Cmty. Improvement v. City of Modesto, No. CIV-F-04-6121 LJO DLB (E.D. Cal. Feb. 16, 2007), 2007 WL 969224.

[176] *Id.* at 2.

[177] *Id.* at 2-3.

[178] *Comm. Concerning Cmty. Improvement*, 2007 WL 2408495, at *8.

[179] Darensburg v. Metro. Transp. Comm'n, 611 F. Supp. 2d 994, 998 (N.D. Cal. 2009), *aff'd*, 636 F.3d 511 (9th Cir. 2011).

[180] *Comm. Concerning Cmty. Improvement*, 2007 WL 2408495, at *8.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 715 (9th Cir. 2009).

claims relating directly to annexation.[186] Those claims were based on the exclusion of plaintiffs' neighborhoods from the Master Tax Sharing Agreement (MTSA) between the city and county—the plaintiffs argued that their exclusion disincentivized infrastructure projects in their neighborhoods and foreclosed the possibility their neighborhoods would be annexed in the future.[187] The Ninth Circuit held that evidence of "gross statistical disparities" may be used to satisfy the intent requirement of a Title VI claim where the evidence "tends to show that some invidious or discriminatory purpose underlies the policy."[188] Though statistical evidence of discriminatory impact *alone* does not prove intent to discriminate, it, along with supporting circumstantial evidence, may be "considered in determining whether there is evidence of intent or purpose to discriminate."[189] In reversing the district court, the Ninth Circuit held that the statistical evidence presented by the plaintiffs, along with other circumstantial factors, provided "evidence of discriminatory impact which . . . created a sufficient inference of discriminatory intent to permit [the plaintiffs] to present their MTSA claim to a fact-finder."[190]

In support of their MTSA claim, the plaintiffs in *Modesto* presented "statistical evidence comparing the ethnicity of the population in the . . . neighborhoods excluded by the MTSA to those covered by the MTSA."[191] These statistics showed that non-annexed neighborhoods that were excluded from the MTSA were seventy-one percent Latino, while those included were forty-eight percent Latino.[192] The court found "[t]he differences in the proportions of Latinos in the areas excluded and included [were] statistically significant."[193]

The district court rejected this evidence, faulting the statistical comparisons made by the plaintiffs as failing to provide an appropriate measure for assessing disparate impact.[194] Concluding that "plaintiffs' statistics [did] not account for the total Latino population of the

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[186] *Id*. at 716.

[187] *Id*. at 697. Unrelated to the quality of the evidence presented, the Ninth Circuit reversed the district court's holding that the MTSA claim was time-barred and that plaintiffs could use time-barred MTSAs "as evidence to establish motive and to put [their] timely-filed claims in context." *Id.* at 702 (citation omitted).

[188] *Id.* at 703 (citing Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1997); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977)).

[189] *Comm. Concerning Cmty. Improvement*, 583 F.3d at 703.

[190] *Id*. at 705.

[191] *Id*. at 703.

[192] *Id*. at 703-04.

[193] *Id*. at 703.

[194] Comm. Concerning Cmty. Improvement v. City of Modesto, No. CV-F-04-6121 LJO DLB, 2007 WL 1456142, at *10-12 (E.D. Cal. May 16, 2007), *rev'd*, 583 F.3d 690 (9th Cir. 2009).

unincorporated areas," the court held that plaintiffs "selectively analyze[d] the Latino population within each of the three impacted county islands, but [did] not adequately statistically analyze the Latino population in relation to either the total population or total Latino population."[195]

The Ninth Circuit found however, that the district court's reference to "the total Latino population" was unclear because the "[p]laintiffs did compare the total Latino population in the excluded areas to the total Latino population in the included areas."[196] The court noted that "plaintiffs compared the total non-Latino population of the excluded areas to the total non-Latino population of the included areas and found that . . . the MTSA included more non-Latinos than it excluded."[197] The court also faulted the defendants' contention that these statistics were "inconsequential" because they also included white residents.[198] The court found no "precedent for conducting this type of within-neighborhood analysis; as the question is whether particular islands have been excluded because of their racial composition, the type of island-to-island comparison conducted by plaintiffs *is appropriate*."[199] Therefore, the court held, these statistics combined with other non-statistical evidence should not have been dismissed at the summary judgment stage.[200]

The Ninth Circuit also noted that the district court "did not conclude, as a matter of law, that plaintiffs had not shown disparate impact."[201] Rather, in analyzing plaintiffs' federal claims the district court ruled that, even assuming the statistics showed a disparate impact, they "did not give rise to an inference of intentional discrimination."[202] Interestingly, although the district court rejected "plaintiffs' statistical evidence in the course of analyzing the MTSA claim under equal protection, it did find, in the course of analyzing plaintiffs' companion [section] 11135 claim, that plaintiffs **had** presented some evidence of disparate impact" and "that it could not 'conclude as a matter of law, that a reasonable jury would be unable to find disparate impact.'"[203]

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[195] *Id*. at *10.

[196] Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 704 (9th Cir. 2009).

[197] *Id*.

[198] *Id*.

[199] *Id*.

[200] *Id*.

[201] *Id*. at 705.

[202] *Id*.

[203] *Id*. (citing Comm. Concerning Cmty. Improvement v. City of Modesto, No. CV-F-04-6121 LJO DLB, 2007 WL 1456142, at *19 (E.D. Cal. May 16, 2007)). However, the district court ruled

The Ninth Circuit upheld dismissal of the claims related to sewage services, finding that "sewer services [were] provided to only 3 of the 26 unincorporated islands," including statistically non-minority unincorporated islands, therefore finding the statistical evidence failing to show a disparity and "insufficient to give rise to an inference of discriminatory intent."[204]

However, regarding the claims alleging lack of effective law enforcement, the Ninth Circuit found that a difference in dispatch and response times of one to two minutes between plaintiffs' neighborhoods and majority-white islands was "statistically significant."[205] The court would not conclude "as a matter of law" that even "a difference of one minute can be characterized as not making a 'meaningful difference' when one is waiting at one's home for law-enforcement or emergency personnel to arrive, particularly in the absence of any explanation for why the time difference exists."[206] The court remanded the issue to the district court to decide whether the difference was "explainable on grounds other than the ethnicity of the population of the neighborhoods."[207]

The Ninth Circuit found the district court's dismissal of the section 11135 claims "assuredly reasonable" and not "an abuse of discretion," but noted that the dismissal was intertwined with the dismissal of the federal-law claims.[208] Otherwise, the Ninth Circuit did not comment on the district court's inference that disparate-impact claims under state law would be entirely different than those under federal law and thus best resolved by a state court. The Ninth Circuit reinstated and remanded the section 11135 claims in case the district court was more inclined to exercise its supplemental jurisdiction over those claims along with the federal claims it remanded.[209] However, the Ninth Circuit noted that if the district court were to dismiss the state-law claims again it would not necessarily be an abuse of discretion.[210] That question was never answered by the district court, however, because shortly after the Ninth Circuit's decision the parties entered into a settlement agreement that

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that the disparate-impact claim under section 11135 was time-barred. *Comm. Concerning Cmty. Improvement*, 2007 WL 1456142, at *19. Having concluded the claims not to be time-barred, the Ninth Circuit reversed. *Comm. Concerning Cmty. Improvement*, 583 F.3d at 705.

[204] *Comm. Concerning Cmty. Improvement*, 583 F.3d at 707.

[205] *Id.* at 709.

[206] *Id.*

[207] *Id.*

[208] *Id.* at 715.

[209] *Id.*

[210] *Id.*

included "commitments by the city and County to support future annexation efforts by the plaintiff neighborhoods."[211]

Two clear patterns emerge from the above cases—the importance of an "appropriate measure" of disparity, and the question of whether that measure presents a "significantly discriminatory impact" to establish a prima facie case of disparate-impact discrimination. As one commentator observed, "The small universe of Title VI litigation appears to indicate that, when courts determine disparity, it is appropriate to measure the racial proportionality of the allegedly affected population against the population of the defendant entity's decision making jurisdiction."[212] Therefore, the preliminary question in building a prima facie case of disparate-impact discrimination is what will be measured and how data will be compared in the disparity analysis. However, the case law presents no clear picture of what exactly that would entail.

III. THE NINTH CIRCUIT'S OPINION IN *DARENSBURG*

A. PLAINTIFFS' PRIMA FACIE CASE OF DISPARATE IMPACT

In order to evidence a measure of disparity between subsidies per passenger among MTC's transit operators, plaintiffs in *Darensburg* could have presented statistical evidence comparing either: (1) MTC's allocation of operating subsidies between bus and rail; (2) MTC's allocation of capital subsidies between bus and rail; or (3) MTC's total allocation of subsidies between bus and rail.[213] The third option boasts

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[211] Press Release, California Rural Legal Assistance, Inc., Latino Residents Reach Settlement with City of Modesto and Stanislaus County on Equal Access to Municipal Services (June 30, 2011), *available at* www.crla.org/sites/all/files/content/uploads/pressreleases/2011/063011_Modesto PressRelease.pdf.

[212] Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 689 (2000) (citing Villanueva v. Carere, 85 F.3d 481, 487 (10th Cir. 1996) (comparing the percentage of Hispanic students enrolled at one school with the percentage of Hispanic students in the entire school district); Larry P. by Lucille P. v. Riles, 793 F.2d 969, 983 (9th Cir. 1984) (comparing the percentage of African-American students in the state school system's "educable mentally retarded" population with the percentage of African-American students in the entire state school population)); *see also* Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 927 n.1 (1997) (comparing racial composition of population affected by challenged permit and racial composition of the rest of the county); Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 575 (2d Cir. 2003) ("The basis for a successful disparate impact claim involves a comparison between two groups-those affected and those unaffected by the facially neutral policy."). *But see* Coal. of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 127 (S.D. Ohio 1984) (focusing solely on the racial composition of the neighborhoods through which the proposed highway would traverse).

[213] Siegel, *supra* note 5, at 119.

support from the cases discussed above,[214] but nevertheless failed to convince the Ninth Circuit that MTC's allocation of funding to expand rail services resulted in a disparate impact to minority bus riders.[215]

1. *The District Court's Oversimplication of the Facts*

Although the *Darensburg* district court observed that "comparing transit service is more an art than a science,"[216] it found that plaintiffs' statistics established a prima facie case under section 11135 in relation to the discretionary funds allocated by MTC under Resolution 3434, its strategic long-range plan for transit expansion projects,[217] but not in relation to committed funds that were dedicated to certain uses according to the mandates of the sources of those funds, leaving MTC little discretion in their allocation.[218]

In 2001, MTC adopted the Regional Transit Expansion Plan (RTEP), known as Resolution 3434.[219] Plaintiffs alleged that MTC's selection criteria for projects funded under Resolution 3434 caused a disparate impact.[220] The district court agreed, finding that "the evidence showed that MTC applied different criteria to bus projects than to rail projects."[221] This finding did not require an intensive statistical showing, as testimony revealed that "AC Transit was required to show that its proposed bus projects would lure travelers out of their single occupancy vehicles, whereas rail projects . . . were simply assumed to do so."[222] However, the statistical evidence bolstered plaintiffs' claim. "[A]pproximately 94% of the Resolution 3434 project costs were for rail projects, and less than 5% were for bus projects," and "84.4% of Resolution 3434 funds were dedicated to lower minority operators,

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[214] *See, e.g.*, N.Y. Urban League v. N.Y., 71 F.3d 1031, 1037 (2d Cir. 1995) (per curiam) (holding that because the underlying claim challenged the total allocation of subsidies, the district court should have "assessed whether any measure or combination of measures could adequately capture the impact of these subsidies upon NYCTA and commuter line passengers"); Labor/Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth., No. CV-94-05936 TJH (CMX) (C.D. Cal. Oct. 29, 1996), *aff'd*, 263 F.3d 1041 (9th Cir. 2001) (plaintiffs allegations that total allocations of funds were discriminatory resulted in a powerful settlement); Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 704 (9th Cir. 2009) (rejecting a narrow analysis of patterns within specific neighborhoods).

[215] Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 523 (9th Cir. 2011).

[216] Darensburg v. Metro. Transp. Comm'n, 611 F. Supp. 2d 994, 1048 (N.D. Cal. 2009), *aff'd*, 636 F.3d 511 (9th Cir. 2011).

[217] *Id*. at 1044.

[218] *Id*. at 1050.

[219] *Id*. at 1043.

[220] *Id*.

[221] *Id*.

[222] *Id*.

and . . . higher minority operators received only 8%."[223] Therefore, "MTC's selection process . . . cause[d] a disparity in funding for rail projects that on the whole are used by a lower percentage of minority riders, as opposed to bus projects."[224] The court held, "[o]n balance," in regard to Resolution 3434, that plaintiffs had shown a prima facie case of disparate impact.[225]

In regard to committed funds administered by the Federal Transit Administration (FTA), the State of California, and regional funding measures approved by local voters, plaintiffs alleged that MTC effectively diverted funds from the operational costs of AC Transit to costly rail expansion projects, "in effect starving the existing bus system to feed the growth of capital-hungry rail," producing a disparate impact on high-minority-percentage operators such as AC Transit.[226] However, the district court held that a statistical comparison "from the viewpoint of absolute numbers of minority riders advantaged or disadvantaged by MTC's funding policies" presented an oversimplified picture of MTC's funding practices.[227]

First, MTC's role in the allocation of committed funds was restricted by conditions placed on the receipt of those funds, with MTC's role in allocation largely limited to ensuring the funds went only to projects conforming to the Regional Transportation Plan.[228] Second, while AC Transit's budget shortfalls were lower than any other MTC operator, AC Transit started at a disadvantage, both because its declining ridership produced less revenue and because it received less support from dedicated state and local funds than did other operators, apart from any action by MTC.[229] Third, the court likened any comparison between different operating modes to "the proverbial apples and oranges issue."[230] Fourth, the court explained that "[d]efining the appropriate

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[223] *Id.*

[224] *Id.* at 1044.

[225] *Id.* However, under the burden-shifting framework of the disparate-impact analysis, the court held that MTC had satisfied its burden in justifying its practice and that plaintiffs failed to offer an equally effective alternative. *Id.* at 1051-61. This portion of the holding is not discussed here, as the Ninth Circuit did not reach that portion of the analysis because it found the district court's finding of a prima facie case "clearly erroneous." Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 522 (9th Cir. 2011).

[226] *Darensburg*, 611 F. Supp. at 1044-45.

[227] *Id.* at 1048.

[228] *Id.* at 1045.

[229] *Id.* at 1046.

[230] *Id.* at 1047. The court noted several factors: some operators are single-mode (i.e., only bus) while some operate several modes (i.e., bus, historic trolleys, light rail and cable cars), differences in short- and long-haul operations, eligibility for funding by geographical location, operators' ability to generate their own revenue through sales tax ballot measures, and the fact that bus systems have lower capital costs than rail systems. *Id.*

comparison groups to assess disparate impact is further complicated by the Bay Area's 'majority minority' population of transit users."[231] Sixty-one percent of all riders were minorities; therefore a comparison between the fifty-one percent minority ridership of rail operators and the sixty-six percent minority ridership of bus operators did not reflect a disparity, given that MTC's Title VI reporting benchmark for analyzing disparate impact was set at seventy percent.[232] Consideration of all of these factors led the court to conclude that while "MTC could take at least some additional steps to allocate committed funds in a way that would somewhat alleviate AC Transit's shortfalls, . . . on balance, [p]laintiffs [had] not met their burden of showing that MTC's funding practices regarding committed funds [had] a significantly disproportionate impact."[233]

In many ways, this portion of the district court's opinion illustrates a question similar to the one arising out of *Committee for a Better North Philadelphia*. In 1988, the Supreme Court described the disparate-impact analysis as "functionally equivalent" to that in cases of intentional discrimination.[234] This explains why the first two stages of the burden-shifting framework under disparate-impact analysis do not require proof of intentional discrimination, but it does not "answer whether disparate-impact analysis should apply where statistical studies show a disparate impact on minorities but the statistical studies do not, for various reasons, give rise to an inference of intentional discrimination."[235]

This question also creates problems in cases, such as *Darensburg*, where the plaintiffs' claims involve both intentional and disparate-impact discrimination theories. For example, on appeal, the Ninth Circuit held that the "[p]laintiffs' failure to establish that MTC's conduct ha[d] a discriminatory impact prevents any inference of intentional discrimination."[236] But "[i]f the prima facie case of a disparate impact raises an inference of intentional discrimination, then how does it differ from an intentional discrimination case built on statistics?"[237] If statistics in a disparate-impact case must paint the same picture as required in intentional discrimination cases, "then the disparate impact

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[231] *Id.*

[232] *Id.*

[233] *Id.* at 1051. The district court similarly dismissed plaintiffs' claims related to the allocation of uncommitted funds. *Id.*

[234] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

[235] Adams, *supra* note 105, at 426 (arguing that the "pretext model" would "solve the problem").

[236] Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 523 (9th Cir. 2011).

[237] Adams, *supra* note 105, at 432.

analysis loses both independent theoretical meaning and practical import."[238]

2. *The Ninth Circuit's Return to Obscurity*

On appeal, the Ninth Circuit reversed, stating that "[t]he district court's inference that minorities were adversely affected by the RTEP [was] based on an inappropriate statistical measure and a logical fallacy, and [was] therefore clearly erroneous."[239] The court found that plaintiffs' statistical evidence was not an 'appropriate measure' for presenting what, if any, adverse impact the RTEP would have on minority riders, and therefore they had not "carried their burden to establish a prima facie case of disparate impact discrimination."[240]

The court noted that the district court's finding of a "disparity in funding for rail projects that on the whole are used by a lower percentage of minority riders as opposed to bus projects" was based on the statistical comparison between the sixty-six percent minority ridership of bus operators and the fifty-one percent minority ridership of rail operators.[241] It also noted that "[t]he district court never expressly found that MTC's funding of rail over bus adversely affected San Francisco Bay Area minorities," but that the court "must have drawn that inference" in order to find that plaintiffs had established a prima facie case.[242] The Ninth Circuit found this inference to be based

> [O]n a faulty syllogism: (1) a greater percentage of bus riders than rail riders are minorities; (2) fewer bus expansion projects than rail expansion projects were included in the RTEP, and bus projects

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[238] *Id*. at 433.

[239] *Darensburg*, 636 F.3d at 522 (citing United States v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc) ("[W]e will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record." (footnote omitted))).

[240] *Id*. The court then explained that because the defendant's rebuttal burden was "a state law issue of first impression" and because plaintiffs had failed to present a prima facie case, it need not weigh in on any other aspects of the section 11135 claims. *Id*.

[241] *Id*. at 519. Perhaps, though, the court was guilty of the same oversimplification it accused the plaintiffs of by refusing to consider the other evidence considered by the district court in its determination. For example, the district court's opinion indicates that the statistics it used, in addition to the testimonial evidence, were related to the percentage of Resolution 3434 funds allocated among the various operators rather than the statistics the Ninth Circuit references here related to the overall minority ridership of bus versus rail operators considered by the district court when analyzing the allocation of committed funds. *See* Darensburg v. Metro. Transp. Comm'n, 611 F. Supp. 2d 994, 1044-48 (N.D. Cal. 2009), *aff'd*, 636 F.3d 511 (9th Cir. 2011).

[242] *Darensburg*, 636 F.3d at 519.

> received a lesser percentage of requested funding than did rail projects; (3) therefore, minorities were adversely affected.[243]

Reliance on overall ridership statistics therefore failed to take into account the particular ridership of the future rail projects.[244] Thus, in the court's view, the plaintiffs' evidence was structured to illustrate any existing disparities that may be present in the current system, while plaintiffs' claims actually related to future expansion projects positioned for funding in the RTEP.[245] Therefore, the court was looking for evidence showing that minority riders would be adversely impacted by those future projects.[246] The court found it impossible to predict how the expansion projects would affect future ridership without more precise data reflecting the ridership of the planned rail expansions.[247] Hence, "[the] court simply could not determine from Plaintiffs' statistical evidence whether the projects in the RTEP will benefit or harm the Bay Area's minority transit riders."[248]

However, this raises important questions about how future ridership can be estimated and what the appropriate comparison population would be. If one were to project future ridership statistics based on current trends, it is arguable that rail expansion would magnify any current disparities. The district court poignantly noted that "as capital-intensive rail operators such as BART increase their fleets of rail cars, there will be even more demand on Resolution 3434 funds for rail expansion likely at the expense of bus services."[249] In sharp contrast, the Ninth Circuit noted that under the theory presented by the plaintiffs, where "the population of bus riders contains a greater percentage of minorities than the population of rail riders, any RTEP that emphasizes rail expansion over bus expansion, even where such a plan may confer a far greater benefit upon minorities than whites, would be subject to legal challenge."[250] This comparison highlights the differences in the courts' analyses—the Ninth Circuit's analysis was focused on comparisons of minority ridership among the operators,[251] while the district court's analysis was based on the lack of equal standards for the allocation of

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[243] *Id.* at 520.

[244] *Id.*

[245] *Id.* at 521.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] Darensburg v. Metro. Transp. Comm'n, 611 F. Supp. 2d 994, 1044 (N.D. Cal. 2009) (internal citation omitted), *aff'd*, 636 F.3d 511 (9th Cir. 2011).

[250] *Darensburg*, 636 F.3d at 521.

[251] *Id.* at 519.

Resolution 3434 funds and the resulting disparity among the allocation to bus versus rail operators.[252]

As further support for its holding that the plaintiffs failed to provide an appropriate statistical measure, the Ninth Circuit pointed to the fact that $9 billion of the $13.5 billion RTEP funds allocated to rail expansion projects were sponsored, at least in part, by operators with a majority-minority ridership.[253] The court suggested that if it were the plaintiffs' belief that these operators were making sponsoring decisions to the detriment of their minority ridership, their complaint would be better aimed specifically at those operators rather than MTC.[254]

The Ninth Circuit "simply could not determine" from existing ridership statistics "whether the projects in the RTEP will benefit or harm the Bay Area's minority transit riders,"[255] leaving the question of what comparison population would present an "appropriate measure" unanswered. In a 2011 presentation at the annual California Transit Association conference, one of the attorneys who had represented MTC in *Darensburg* expressed gratitude that he did not have to answer that hard question.[256]

Noting there are few cases factually similar to those presented in *Darensburg*, the court cited *Bean v. Southwestern Waste Management Corp.* as illustrative of the "importance of providing an appropriately precise statistical measure of disparate impact."[257] In challenging the siting of a waste management facility in their neighborhood as discriminatory, plaintiffs in *Bean* presented statistical evidence showing a concentration of waste sites in a predominantly minority quadrant of the city.[258] However, more precise census data showed that non-minorities lived closer to the new site, suggesting that the location may have actually favored minorities in that regard.[259]

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[252] *Darensburg*, 611 F. Supp. 2d at 1043-44.

[253] *Darensburg*, 636 F.3d at 521 n.3.

[254] *Id.*

[255] *Id.* at 521.

[256] Kimon Manolius, Presentation at the California Transit Association's Annual Fall Conference & Exposition, *Surviving Title VI Litigation: (Is This What Survival Feels Like?) Darensburg v. Metropolitan Transportation Commission* (Nov. 4, 2011) (PowerPoint presentation available at www.caltransit.org/files/resources/FISCAL%20Title%20VI-Manolius.ppt) ("Thankfully, the Court did not ask me for my thoughts on what an appropriate comparison might be.").

[257] *Darensburg*, 636 F.3d at 521 (citing Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Texas 1979)).

[258] *Bean*, 482 F. Supp. at 679.

[259] *Id.* at 678-69. However, future litigants must be wary of relying on census data, which are notoriously unreliable, to illustrate any particular data set as there are very few guidelines for how they are collected, and they are not consistent throughout the country.

The *Darensburg* court therefore found *Bean* "directly applicable to [p]laintiffs' prima facie case" because "[i]f the court had more precise data that would allow it to evaluate each project's impact on transit ridership, it could very well find that the proposed expansion plan actually favors minorities, or harms minorities to a greater extent than regional-level statistics may suggest."[260] Herein lies the problem for plaintiffs in *Darensburg*. This showing would require a glimpse into the future to predict the ridership of both planned and existing transit services when the new services are completed. Assessing population statistics near future transit projects could presumably make that showing, but that evidence would largely ignore the plaintiffs' underlying claim—that future rail projects were funded to the obvious detriment of the bus service they relied on and that MTC's long-range plan would aggravate that disparity.

Nevertheless, the Ninth Circuit's reliance on *Bean* announced the court's message in *Darensburg* to disparate impact claimants: to make a prima facie case, plaintiffs must provide statistical evidence showing impacts to the specific persons affected on a project level. This lesson, however, is particularly problematic for plaintiffs such as those in *Darensburg*. The court pointed out that, in absolute numbers, BART actually serves two million more minority riders than does AC transit, implying that future rail projects may serve to benefit minorities.[261] While minority riders do make up a greater percentage of bus riders, a rail expansion project into areas that are predominantly minority would in fact benefit those riders.[262] The court pointed to the example of the MUNI central subway project that, when completed, will connect two of San Francisco's highest minority populated neighborhoods, Bayview and Chinatown.[263] This point, however, still ignores the fact that AC Transit riders faced reductions in service while there were no plans to expand rail into plaintiffs' neighborhoods.

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[260] *Darensburg*, 636 F.3d at 522.

[261] *Id*. at 521.

[262] *Id*.

[263] *Id.* In large metropolitan regions with a majority-minority population, such as the Bay Area and the Los Angeles Basin, it is possible that no set of data would present a clear picture of disparity. Looking at cases such as these strictly through the eyes of race in the future may disguise serious adverse effects of decisions, as the country's population grows increasingly diverse. While not a protected class under federal law, low-income populations may serve as a better guide to measure disparity under agency regulations. *See, e.g.*, Dep't of Transp. Updated Envtl. Justice Order 5610.2(a), 77 Fed. Reg. 27,534 (May 10, 2012) ("The Order sets forth steps to prevent disproportionately high and adverse effects to minority or low-income populations through Title VI analyses and environmental justice analyses conducted as part of Federal transportation planning and NEPA provisions.").

In absolute terms, looking at the ridership trends between bus and rail in the recent past would likely present the picture painted by the district court—if future funding continues to be dominated by rail projects, bus service will continually decline, likely to the detriment of inner-city minorities who are effectively denied access to rail.[264] However, as the Ninth Circuit suggested,[265] delving into the facts at the project level for at least one of the projects funded by Resolution 3434 does not paint a prettier picture.

Resolution 3434 included $350 million earmarked for the BART/Oakland Airport Connection (OAC) rail expansion project.[266] Concurrent with litigation in *Darensburg*, three parties (represented by two of the *Darensburg* plaintiffs' attorneys) filed an administrative complaint with FTA, alleging noncompliance with Title VI when BART sought funding under the American Recovery and Reinvestment Act (ARRA) for the OAC project.[267] The facts arising out of the resulting investigation make two important points: first, administrative complaints filed under Title VI section 602 agency regulations *may* be a viable alternative to disparate-impact litigation and, second, even if plaintiffs in *Darensburg* had presented the type of statistical evidence the Ninth Circuit sought, their claim would have been unsuccessful against MTC. This example suggests, however, that if plaintiffs must present evidence on a project-level basis, plaintiffs' complaint should have been against individual operators, as the Ninth Circuit suggested,[268] as the Title VI violations here were attributable to BART, not MTC.[269]

The complaint alleged that BART failed to comply with Title VI in connection with the OAC project by failing to prepare the required service and fare equity analysis and therefore failed to evaluate whether the project would have a disproportionate impact on minority and low-income populations.[270] In response to the complaint, FTA conducted a Title VI compliance review that revealed BART's admitted

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[264] Darensburg v. Metro. Transp. Comm'n, 611 F. Supp. 2d 994, 1044 (N.D. Cal. 2009), *aff'd*, 636 F.3d 511 (9th Cir. 2011).

[265] *Darensburg*, 636 F.3d at 522.

[266] *Darensburg*, 611 F. Supp. 2d at 1016.

[267] Complaint Under Title VI of the Civil Rights Act of 1964 and Executive Order 12898, Urban Habitat Program v. Bay Area Rapid Transit Dist. (Before U.S. Dep't of Transp. & FTA Sept. 1, 2009), *available at* issuu.com/transform/docs/fta_title_vi_complaint_09-1-09_final [hereinafter OAC Title VI Complaint].

[268] *Darensburg*, 636 F.3d at 521 n.3.

[269] Letter from Peter Rogoff, Administrator, Federal Transit Administration, to Steve Heminger, Executive Director, Metropolitan Transportation Commission, and Dorothy Dugger, General Manager, Bay Area Rapid Transit 1 (Jan. 15, 2010), *available at* www.bart.gov/docs/BART_MTC_Letter_On_OAC.pdf.

[270] OAC Title VI Complaint, *supra* note 267, at 20.

noncompliance.[271] While BART hastily conducted and submitted an equity analysis to try to bring the project into compliance, MTA rejected the analysis as still "fail[ing] to analyze whether the [p]roject's improvement and the service reductions would have a discriminatory impact."[272] BART's subsequent "corrective action plan" was similarly rejected because "there [was] no way the agency [could] come into full compliance with Title VI" by the ARRA fund disbursement deadline later that year.[273] The $70 million in ARRA funds programmed for the project were then redistributed among other Bay Area operators, including AC Transit, to fill operating shortfalls and maintain existing service.[274]

Just months later, amidst significant public controversy, BART held a groundbreaking ceremony for the OAC project "after it was able, with much help and backroom dealing by [MTC], to secure alternative funding to replace the $70 million it lost [in] stimulus funds,"[275] including $25 million in federal dollars granted under a different program administered by the FTA.[276] Around the same time, local voters removed from office the BART director who had been the primary backer of the OAC project, followed a few months later by the resignation of the General Manager after significant pressure by the BART Board of Directors.[277] Soon thereafter, FTA's Office of Civil Rights opened an investigation into MTC's civil rights practices[278] and ultimately found deficiencies in five of fourteen Title VI compliance areas reviewed.[279] While the administrative complaint did not in effect halt construction of the challenged project, it did call attention to

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[271] Letter from Peter Rogoff to Steve Heminger and Dorothy Dugger, *supra* note 269, at 1.

[272] *Id.* at 2.

[273] Letter from Peter Rogoff, Administrator, Federal Transit Administration, to Steve Heminger, Executive Director, Metropolitan Transportation Commission, and Dorothy Dugger, General Manager, Bay Area Rapid Transit 1-2 (Feb. 12, 2010), *available at* transbay.files.wordpress.com/2010/02/fta_oac_02122010.pdf.

[274] *Bart/Oakland Airport Connector (OAC)*, PUB. ADVOCATES, www.publicadvocates .org/bartoakland-airport-connector-oac (last visited Dec. 21, 2012).

[275] *Id.*

[276] *Oakland Airport Connector News*, BART, www.bart.gov/about/projects/oac/news.aspx (last visited Dec. 21, 2012).

[277] *Bart/Oakland Airport Connector (OAC)*, *supra* note 274.

[278] Press Release, Pub. Advocates, MTC Failures Spark Federal Review of Fairness Practices (Aug. 17, 2010), *available at* www.publicadvocates.org/sites/default/files/press_releases/phase2 pressrelease081710.pdf.

[279] FED. TRANSIT ADMIN. OFFICE OF CIVIL RIGHTS, TITLE VI REVIEW OF THE METRO. TRANSP. COMM'N FINAL REPORT 16 (Apr. 2012), *available at* www.fta.dot.gov/documents/MTC_ compliance_review_4_9_12.doc.

BART's noncompliance with the mandates of Title VI and brought about changes both in administration and management of the agency.[280]

B. PLAINTIFFS' FAILURE TO PROVE DISPARATE IMPACT PRECLUDED A FINDING OF INTENTIONAL DISCRIMINATION

The *Darensburg* plaintiffs' federal claims required proof of intentional discrimination—success on the merits of those claims required a showing that MTC's funding decisions were not just objectionable, but rather were attributable to purposeful discrimination.[281] To make such a showing, plaintiffs needed to "present evidence based upon which any reasonable fact-finder could conclude that MTC acted at least in part because of, not merely in spite of, its adverse effects" on the plaintiff class.[282]

In cases such as *Darensburg*, where the challenged conduct is the result of facially neutral policies, direct evidence of discriminatory purpose makes the "evidentiary inquiry relatively easy," but such evidence is rare.[283] Therefore, proof of disparate impact, such as evidence showing statistical disparities, may be used to satisfy the intent requirement when that evidence provides an inference of discriminatory purpose.[284] However, the Supreme Court has cautioned that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted"; therefore, "their usefulness depends on all of the surrounding facts and circumstances."[285] Statistical disparities alone are rarely dispositive. Therefore, disparate impact is only one of several factors considered, and should supplement other

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[280] Similarly, while plaintiffs in *Darensburg* were unsuccessful in litigation, perhaps the case achieved a measure of success by bringing attention to MTC's lack of compliance with Title VI. *See* Darensburg v. Metro. Transp. Comm'n, 611 F. Supp. 2d 994, 999-1000 (N.D. Cal. 2009), *aff'd*, 636 F.3d 511 (9th Cir. 2011) (pointing out that the court's conclusion was supported in part by a recent change in MTC's policies that may have been brought about by the lawsuit).

[281] *See* discussion *supra* Part I.B.1.

[282] Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 523 (9th Cir. 2011) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)) (internal quotation marks omitted).

[283] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). The oft-cited example is *Yick Wo v. Hopkins*, in which the statistical disparity showed that the challenged practice involved enforcement *only* against Chinese individuals to their total exclusion from the permitting scheme of the ordinance at question. Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) ("The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified."). In *Arlington Heights*, Justice Powell, writing for the Court, was careful to distinguish *Yick Wo* as a rarity, stating that absent such a "stark" disparity, impact alone is not determinative of whether purposeful discrimination exists. *Vill. of Arlington Heights*, 429 U.S. at 266.

[284] Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977).

[285] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

circumstantial evidence, which, when considered together, may show discriminatory intent.[286]

The plaintiffs in *Darensburg* conceded that they had no direct evidence of any discriminatory purpose on the part of MTC, and they therefore relied on circumstantial evidence to argue their intentional discrimination claims.[287] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court articulated a non-exhaustive list of factors that may be illustrative for courts considering whether the "totality of the circumstances shown by [p]laintiffs' indirect evidence" may give rise to an inference of discriminatory intent in addition to disparate impact:[288]

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached. . . . The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.[289]

Despite having already concluded there were triable issues of fact as to plaintiffs' disparate-impact claim—therefore meeting at least one of the factors—the district court granted MTC's motion for summary judgment as to the claims of intentional discrimination.[290] The court found that the plaintiffs' circumstantial evidence had failed to raise a triable issue of fact under *Arlington Heights* because "[t]he circumstances include[d] too many strong contradictions of discriminatory motive that preclude drawing any reasonable inference of

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[286] Washington v. Davis, 426 U.S. 229 (1976) (holding that disparate impact alone is insufficient to evidence discriminatory intent absent exceptional circumstances); *Vill. of Arlington Heights*, 429 U.S. at 266-68 (establishing five factors as probative of intentional discrimination: (1) disparate impact, (2) historical background, (3) history of decisionmaking process, (4) departures from normal substantive factors or procedures, and (5) legislative or administrative history).

[287] *Darensburg*, 636 F.3d at 523.

[288] Darensburg v. Metro. Transp. Comm'n, No. C-05-01597 EDL, 2008 WL 3915349, at *24 (N.D. Cal. Aug. 21, 2008) (referencing *Vill. of Arlington Heights*, 429 U.S. 252).

[289] *Vill. of Arlington Heights*, 429 U.S. at 267.

[290] *Darensburg*, 2008 WL 3915349, at *24-26.

discriminatory intent."[291] While it did not delve into an extensive analysis of the factors, the court provided a poignant example of the court's inability to infer discriminatory intent by noting MTC's "treatment of the whitest of the seven major carriers, Golden Gate Transit, almost two-thirds of whose passengers are white in a transit area that is majority minority."[292] Like AC Transit, Golden Gate Transit faced "steep operating shortfalls."[293] The court noted that in 2005, while both transit agencies lacked the funding to cover both operating and capital rehabilitation shortfalls, MTC provided $13.7 million in preventative maintenance funds to AC Transit, yet did not cover any of Golden Gate Transit's shortfalls, forcing the agency to cut its service by thirty-five percent and lose twenty-one percent of its ridership, exacerbating the funding problem.[294] This fact, even in isolation, "would strain credulity to infer that [MTC] is motivated by racial discrimination to harm AC Transit's minority riders by not covering operating shortfalls, yet allows Golden Gate Transit's largely white riders to suffer steep cuts in service instead of covering its operating shortfalls."[295]

The Ninth Circuit affirmed but placed significant weight on its conclusion that the plaintiffs had failed "to establish that MTC's challenged conduct ha[d] a discriminatory impact," thus preventing "any inferences of intentional discrimination."[296] The court explained that the "[p]laintiffs' intentional discrimination claim relie[d] on drawing equivalences between (1) bus riders and minorities, and (2) rail-riders and whites, that [were] not borne out by the data."[297] While the court's simplistic view here may be valid in this instance, it surely did not mean to suggest that *because* plaintiffs failed to provide the correct measure of disparate impact they are precluded from a balancing of the remaining *Arlington Heights* factors.

Clearly, disparate impact alone is not enough to find constitutional violations in agency action; it is "not irrelevant, but it is not the sole touchstone of an invidious racial discrimination,"[298] and only a starting point in the analysis.[299] "Though relevant," since *Arlington Heights*, "[e]ven stark racial disparities are likely to be dismissed by courts," as "disparate . . . impacts lack the gravity required to offset the high

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[291] *Id.* at *25.
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 523 (9th Cir. 2011).
[297] *Id.*
[298] Washington v. Davis, 426 U.S. 229, 242 (1976).
[299] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

evidentiary burden required to prove intent by quasi-legislative bodies and administrative . . . agencies."[300] This suggests that a weighing of the remaining *Arlington Heights* factors is crucial to the analysis. For example, a string of Equal Protection cases represents situations in which courts have found municipalities engaging in intentional discrimination through historic patterns of the discriminatory distribution of municipal services, even in the absence of direct evidence.[301]

CONCLUSION

In many ways, the *Darensburg* decision was unremarkable. Like the Second Circuit in *New York Urban League*, the Ninth Circuit faulted plaintiffs for presenting an oversimplified picture of the complexity of the allocation of subsidies among various transit operators.[302] In both of these cases, the plaintiffs failed to "employ an appropriate measure for assessing disparate impact."[303] It still remains to be determined, however, how a plaintiff may adequately capture a picture of disparity if it truly exists. The complexity of the facts presented in a case involving multiple transit operators providing an array of dissimilar services makes this task difficult, if not impossible, for plaintiffs.

The evidentiary problems associated with institutional discrimination claims illustrate the problems faced by many environmental justice plaintiffs. Jurisprudence in this area is focused on the motivation of a single entity, often in the context of a single decision, to assess whether there is a constitutional violation, in essence legitimizing disparate effects by making the disparate-impact analysis a

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[300] Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51, 92 (2009); *see also* Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 680 (S.D. Tex. 1979) (holding that plaintiffs failed to prove discriminatory intent, despite showing disparate impact of hazardous waste facility siting); E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Cnty. Planning & Zoning Comm'n, 706 F. Supp. 880, 886 (M.D. Ga. 1989) (holding that plaintiffs failed to provide evidence to support a determination that race was a motivating factor, despite strong evidence of disparate impact); R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1149-50 (E.D. Va. 1991) (holding that plaintiffs lacked the evidence necessary to show discriminatory intent, despite the existence of a disparate impact on minorities).

[301] Waterhouse, *supra* note 300, at 92 (citing Dowdell v. City of Apopka, 698 F.2d 1181, 1181-82 (11th Cir. 1983); Neighborhood Action Coal. v. City of Canton, Ohio, 882 F.2d 1012 (6th Cir. 1989); Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fla. 1986); Ammons v. Dade City, Fla., 783 F.2d 982 (11th Cir. 1986); Tinsley v. Kemp, 750 F. Supp. 1001 (W.D. Mo. 1990); Midwest Cmty. Council, Inc. v. Chi. Park Dist., 98 F.R.D. 491 (N.D. Ill. 1983)).

[302] *See* N.Y. Urban League v. N.Y., 71 F.3d 1031, 1037 (2d Cir. 1995) (per curiam); Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 520 (9th Cir. 2011).

[303] N.Y.C. Envtl. Justice Alliance v. Giuliani, 214 F.3d 65, 69 (2d Cir. 2000) (citing *N.Y. Urban League*, 71 F.3d at 1038).

less-than-significant part of the equal protection analysis and tasking plaintiffs with the seemingly impossible undertaking of exposing impermissible motives.[304] Indicative of this point is the fact that in the thirty years since the adoption of the *Arlington Heights* test, the Court has rarely found discrimination under that analysis. The problem for environmental justice claimants, including the *Darensburg* plaintiffs, is that their focus lies in the outcome of multiple government decisions that create a disproportionate burden on these protected groups.[305] While courts may be sympathetic to the plight of environmental justice plaintiffs, only in the most egregious cases is impermissible government action found.[306]

It is well-established that state courts are the ultimate authority on state law, even where provisions of state law parallel provisions of federal law.[307] Accordingly, California courts are not bound by federal precedent construing parallel federal text[308] and, in the area of civil liberties, are free to provide greater protection under California law than that afforded by the United States Supreme Court under parallel provisions under federal law.[309] Therefore, a state court construing section 11135 could, in the future, veer away from the analysis presented here and provide greater protection from disparate-impacts arising out of government action.

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[304] *See Vill. of Arlington Heights*, 429 U.S. at 266-68 (citations omitted). The district court in *Darensburg* also referenced another factor from an age-discrimination case providing 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." Darensburg v. Metro. Transp. Comm'n, No. C-05-01597 EDL, 2008 WL 3915349, at *24 (N.D. Cal. Aug. 21, 2008) (quoting Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147 (2000)).

[305] *E.g.*, Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 677-79 (S.D. Tex. 1979).

[306] *See id.* at 679; Darensburg v. Metro. Transp. Comm'n, 611 F. Supp. 2d 994, 999-1000 (N.D. Cal. 2009) ("The [c]ourt was left with no doubt that AC Transit's bus riders would benefit from additional service and that many of them are burdened by fare hikes and service cuts, hampering their efforts to get to work, medical appointments, and grocery shopping and to meet other important needs."), *aff'd*, 636 F.3d 511 (9th Cir. 2011).

[307] *Cf.* Jankovich v. Ind. Toll Rd. Comm'n, 379 U.S. 487, 491 (1965) ("[E]ven though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment."); Cooper v. California, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."); People v. Brisendine, 531 P.2d 1099, 1112-13 (Cal. 1975) ("[T]he Supreme Court has clearly recognized that state courts are the ultimate arbiters of state law, even textually parallel provisions of state constitutions, unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter. . . . [T]he California Constitution is, and always has been, a document of independent force. Any other result would contradict not only the most fundamental principles of federalism but also the historic bases of state charters.").

[308] Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 808 (Cal. 1997).

[309] Alpha Standard Inv. Co. v. Cnty. of L.A., 173 Cal. Rptr. 328, 332 (Ct. App. 1981).

California has a long history of providing its citizens with broader civil rights protections than those available under federal law.[310] Statutes like section 11135 are designed to preserve the ability to challenge institutional disparities and to require public agencies to engage in thoughtful consideration of their actions. In recent years, while the federal courts have narrowed the ability of plaintiffs to present challenges alleging disparate-impact discrimination by government-funded programs,[311] the California Legislature has provided section 11135 as a powerful tool to address these disparities in California.[312] How powerful that avenue may be, however, will depend on future litigation in California courts. For now, absent smoking-gun evidence of discriminatory motive, it appears plaintiffs must re-think their litigation strategy in complex cases such as *Darensburg*.

[310] *E.g.*, Cal. Dairies, Inc. v. RSUI Indem. Co., 617 F. Supp. 2d 1023, 1039 (E.D. Cal. 2009) ("California labor statutes strive to protect the minimum wage rights of California employees to a greater extent than federal law." (internal quotation marks omitted)); Mardi Gras of San Luis Obispo v. City of San Luis Obispo, 189 F. Supp. 2d 1018, 1025 (C.D. Cal. 2002) ("The California Constitution, and California cases construing it, accords greater protection to the expression of free speech than does the United States Constitution."); Perez v. Sharp, 198 P.2d 17 (Cal. 1948) (striking down California's anti-miscegenation statute twenty years before the United States Supreme Court held that anti-miscegenation statutes violate the U.S. Constitution).

[311] Waterhouse, *supra* note 300, at 62-64 (noting the "federal courts' all but unanimous rejection of environmental justice claims under both the Fourteenth Amendment and Title VI" due to the requirement that plaintiffs prove a type of "'racial animus' typically associated with the actions of Bull Connor and other white segregationists").

[312] *See* discussion *supra* Part I.B.2.