Civil Rights Implications of the Allocation of Funds between Bus and Rail

DETAILS

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CIVIL RIGHTS IMPLICATIONS OF THE ALLOCATION OF FUNDS BETWEEN BUS AND RAIL

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Larry W. Thomas, Attorney-at-Law, Washington, DC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

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The Problem and Its Solution

The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide this insight.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including environmental requirements; construction and procurement contract procedures and administration; civil rights and labor standards; and tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit equipment and operations guidelines, Federal Transit Administration (FTA) financing initiatives, and labor or environmental standards.

Applications

Transit funding decisions are often economically and sometimes politically motivated. Social economic policy experts argue that there is a bias toward highway-centered transit networks as opposed to intracity transit networks. Notwithstanding the motivation, such decisions must be made in consideration of Title VI of the Civil Rights Act of 1964. Federally funded programs may not exclude, deny benefits to, or subject to discrimination, any person on the grounds of race, color, or national origin. Federal agencies that extend financial assistance are authorized to "effectuate" the provisions of Title VI by issuing regulations that require compliance by recipients of the funding.

The Transportation Research Board's Transit Cooperative Research Program (TCRP) published TCRP Legal Research Digest 7, *The Impact of Civil Rights Litigation Under Title VI and Related Laws on Transit Decision Making*, in June 1997. This publication, *inter alia*, instructed transit officials and other interested persons on "the issues surrounding the provision of rail and bus services to minority and nonminority, passengers, including *recent* litigation that called into question whether such services are being provided in accordance with the DOT grants, applicable regulations and legislation, and the United States Constitution."

Almost 10 years have passed since the publication of the aforementioned TCRP LRD 7. Since that time, the courts have prescribed limits on affected citizens' right to sue. But funding agencies may promulgate regulations that validly bar activities that, even though permissible under Title VI, have a disparate impact on racial groups. In short, Title VI challenges based on administrative regulations are unlikely to diminish. This digest reviews cases and regulatory actions since publication of TCRP LRD 7.

This digest should be useful to transit officials, administrators, attorneys, financial personnel, minority groups, civil rights advocates, and members of communities affected by transit agencies' allocation of resources.

TRANSPORTATION RESEARCH BOARD
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CIVIL RIGHTS IMPLICATIONS OF THE ALLOCATION OF FUNDS BETWEEN BUS AND RAIL

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I. INTRODUCTION

Historically, with insufficient public funding to cover the public transportation needs of most densely populated cities and suburban areas in the United States, transportation agencies have been called upon to make budgetary allocations between bus and rail service and facilities.[1] These decisions on funding may be economically or sometimes politically motivated. Some social economic policy experts have argued that there is a bias in favor of highway-centered transit networks as opposed to intra-city transit networks or that budgetary allocations have had disparate impact on minorities and violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[2] Whatever the motivation, decisions by transportation departments and transit systems affecting minority riders must be made in compliance with Title VI of the Civil Rights Act of 1964. Programs may not exclude, deny benefits to, or subject any person to discrimination on the ground of race, color, or national origin.[3] Federal agencies empowered to extend financial assistance to transit systems are authorized to implement Title VI's provisions through regulations requiring compliance with Title VI by recipients of federal funding.[4]

Section 601 of Title VI expressly prohibits discrimination by a recipient of federal funds and provides a private right of action for individual lawsuits, but the courts have interpreted Section 601 to prohibit only intentional discrimination. Section 602 authorizes grantor agencies to promulgate regulations prohibiting discriminatory practices by its grantees. For instance, the regulations promulgated by the United States Department of Transportation (USDOT) in effect create a *per se* violation for actions by a grantee of federal funds that have a disparate impact resulting in discrimination. However, as explained herein, the courts have held that there is no private right of action to enforce disparate-impact regulations such as those promulgated by the USDOT. Disparate-impact regulations must be enforced, such as by a grantor agency withholding all or part of a culpable grantee's funding.

In June 1997, the Transit Cooperative Research Program (TCRP) published *The Impact of Civil Rights Litigation under Title VI and Related Laws on Transit Decision Making*, TCRP Legal Research Digest 7, hereinafter the "1997 TCRP Report." The 1997 TCRP Report, *inter alia*, provided information for transit officials and other interested persons on the issues surrounding the provision of rail and bus services to minority and nonminority passengers, including recent litigation that called into question whether such services were being provided in accordance with the USDOT grants, applicable regulations and legislation, and the United States Constitution.

In June 2003, the National Cooperative Highway Research Program (NCHRP) published *Civil Rights in Transportation Projects*.[5] The report addressed the civil rights issues that may arise when transportation officials plan highways and related projects that allegedly affect minorities or ethnic groups in a discriminatory way in violation of Title VI of the Civil Rights Act of 1964. Another article that is relevant to some of the issues discussed herein is the December 2000 report published by NCHRP entitled *The State's Immunity from Suit in Federal and State Court*.[6]

In May 2000, the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), in compliance with Section 602 of Title VI, promulgated a policy guidance memorandum to federal regional and division administrators on the subject of implementing Title VI requirements in the area of metropolitan and statewide planning.[7] Pursuant to these directives, citizens and affected transit operators and public agencies are to be provided an opportunity to comment on a proposed transit program. During the planning process, transit agencies must certify that they are in compliance with the foregoing requirement and other requirements to receive federal funding. As part of their initial planning process, many local transit agencies

[1] Patrick Moulding, *Fare or Unfair? The Importance of Mass Transit for America's Poor*, 12 GEO. J. ON POVERTY L. & POL'Y 155 (2005).

[2] Paul Boudreaux, *Vouchers, Buses, and Flats: The Persistence of Social Segregation*, 49 VILL. L. REV. 55 (2004). *See also* J. MOTAVALLI, BREAKING GRIDLOCK: MOVING TOWARD TRANSPORTATION THAT WORKS (2002).

[3] *See* Tit. VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VI, § 60, 78 Stat. 252 (July 2, 1964), *codified at* 42 U.S.C. § 2000d.

[4] *See* Tit. VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VI, § 602, 78 Stat. 252 (July 2, 1964), *codified at* 42 U.S.C. § 2000d-1.

[5] ANDREW H. BAIDA, CIVIL RIGHTS IN TRANSPORTATION PROJECTS (NCHRP Legal Research Digest No. 48, 2003).

[6] *See* ANDREW H. BAIDA, THE STATE'S IMMUNITY FROM SUIT IN FEDERAL AND STATE COURT (NCHRP Legal Research Digest No. 45, 2000).

[7] *See* BAIDA *supra* note 5, at 6 (*citing Policy Guidance Concerning Application of Title VI of the Civil Rights Act of 1964 to Metropolitan and Statewide Planning*, 65 Fed. Reg. 31803 (May 19, 2000)).

now provide notices of upcoming projects and requests for modifications, as well as information on making administrative complaints.[8]

As discussed in Section V.D, *infra*, on April 13, 2007, a Final Notice was given of the issuance of FTA's new Title VI Circular entitled, "Title VI and Title VI-Dependent Guidelines for Federal Transit Administration Recipients."[9] The circular supersedes the FTA Circular dated May 26, 1988.

Almost 10 years have passed since the publication of the 1997 TCRP Report on the impact of civil rights litigation under Title VI. However, since the 1997 TCRP Report, the U.S. Supreme Court has made it clear that individuals *may* sue only for intentional discrimination under Section 601 of Title VI and that there is no private right of action to enforce disparate-impact regulations issued pursuant to Section 602 of Title VI.[10] An increased emphasis on the opportunity to comment on proposed agency action combined with the Supreme Court's limitations on the right to sue under Title VI, Section 602, may help explain why there has been a notable drop in the number and frequency of Title VI complaints against transit agencies in the past 10 years (see Section II *infra*). Nonetheless, judicial actions have been filed, as discussed in Section II.C.

This report identifies Title VI complaints filed with the FTA during the past 10 years, the legal forum in which challenges were brought, and whether there is an ongoing Title VI controversy involving transit agencies and the communities and riders they serve (see Section II, *infra*).

This report examines whether Title VI challenges have increased or diminished (see Section III); the nature of the transit agencies' responses to Title VI challenges, including efforts other than regulatory ones that transit agencies have made to uphold Title VI protections and avoid adverse actions (see Section IV, *infra*); and specific strategies and defenses transit systems have utilized when confronted with Title VI complaints (see Section IV, *infra*).

Furthermore, the report discusses U.S. Supreme Court and other decisions holding that there is no private right of action under Section 602 for disparate-impact violations (see Sections V and VI, *infra*) and that administrative enforcement is the only remedy for Section 602 disparate-impact violations (see Section VI, *infra*). The questions concerning whether an alleged violation of Section 602 or an alleged failure to comply with the Equal Protection Clause of the Fourteenth Amendment may be pursued by a § 1983 action may not have been resolved fully as yet (see Section VIII.B, *infra*).[11]

This report also discusses whether claims for intentional discrimination in violation of Section 601 or for disparate impact under Section 602 of Title VI may be made under 42 United States Code (U.S.C.) § 1983 (see Section VIII, *infra*); whether transit authorities that are agencies of the state have immunity from § 1983 actions under the Eleventh Amendment (see Section IX.A, *infra*); and the factors that may govern whether a transit authority that is organized as a public corporation is an agency of the state for the purpose of immunity under the Eleventh Amendment from § 1983 claims (*see* Section IX.B, *infra*).

With respect to other transit authorities, the report discusses whether actions may be brought against municipal transit authorities pursuant to § 1983 for alleged violations of Title VI (see Section IX.C, *infra*) and whether, regardless of Section 601 or 602 and regulations issued pursuant to Section 602, a policy or custom of a municipal transit authority could give rise to a § 1983 action (see Section IX.D, *infra*).

II. TITLE VI CHALLENGES BASED ON DISPARATE IMPACT OF ALLOCATION OF FUNDS BETWEEN BUS AND RAIL

A. Title VI Challenges as Reported by Transit Agencies

In January 2007, 31 transit agencies out of 200 to whom the survey was mailed responded to a questionnaire in which they were asked whether there had been any Title VI complaints based on increases in fares or fees or allocation of funds between bus and rail or the neighborhood served. (A copy of the questionnaire is included as Appendix A.) Of the 31 respondents, only three responded that they had had Title VI complaints filed against them during the 10-year period, 1997 to 2006 (see list of respondents identified in Appendix B). (Two of the transit providers responding to the survey are included among the complaints filed with the FTA that are discussed in Section II.B.) One transit agency responding to the survey had no specific Title VI complaints, but advised that it had received a complaint opposing increases in fares or capital outlays based on

[8] *See* Caltrans Tit. VI Program, Civil Rights, *Have Your Rights Been Violated?,* http://www.dot.ca.gov/hq/bep/title_vi/t6_violated.htm (contains flow charts of the Caltrans discrimination complaint process); *see also* New York MTA public involvement process available at http://www.mdt.mt.gov/business/contracting/civil/titlevi.shtml and Montana's Tit. VI program available at http://www.mta.info/mta/planning/brt/pip.htm.

[9] Fed. Reg., vol. 72, no. 71, at 18732 (Apr. 13, 2007). The FTA Tit. VI Circular, C 4702.1A (May 13, 2007), is available at http://www.fta.dot.gov/documents/Title_VI_Circular_2007-04-04_(FINAL)_(3).doc.

[10] Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[11] This report is consistent with the findings of NCHRP *Legal Research Digest* 48, *supra*, in which the author concludes that "[w]hile private suits may be brought under Title VI and § 1983 for intentional discrimination, the Supreme Court has eliminated Title VI and its implementing regulations as the means by which private redress may be sought for government action alleged to have a disparate impact on minority groups." BAIDA, *supra* note 5, at 18.

alleged discriminatory impact. Several of the respondents to the survey, however, did report that they did not provide rail service.

Respondents provided other information requested by the survey. Thus, as to whether the respondents had an annual or other report on Title VI complaints, five responded affirmatively. As for whether the agencies have a Web site where information on Title VI complaints is made available to the public, seven responded that they had such Web sites. Furthermore, the respondents were asked to report on what information the agency makes available to the public regarding administrative complaints or challenges. Agencies that responded to the inquiry had the following comments:

- "The agency makes available to the public a 'special complaint form' for Title VI discrimination claims, an explanation of 'What is Title VI,' and a description of the [agency's] Title VI complaint process via the [agency's] Web site."
- "[The agency] provide[s] information to the public on how to file a Title VI complaint. Complaint information is also provided in our triennial Title VI report to the FTA."
- "[The agency] gives public notice on its vehicles and at some of its public facilities."
- "Through regulatory and advocacy groups."
- "Pursuant to the Georgia Open Records Act, information is made available upon request."
- "A customer rights section is included in our fixed route bus book, dial-a-ride guide, and valley metro ADA policy brochures for passengers with disabilities. The section provides guidance on how to make a discrimination complaint under Title VI."
- "Post notices on all of our rolling stock service vehicles explaining they can file Title VI complaints if they believe they have been discriminated against by the transit system."
- "All related information is available from the Title VI coordinator."
- "[The agency] is currently developing public outreach in this area."
- "Posters containing Title VI information [are] prominently displayed [with the] District's name [and] contact information. [The transit agency] annually publish[es] a notice that [the agency] operates in accordance with Title VI of the Civil Rights Act of 1964 and related statutes."
- "Everything—Open Records."
- "As requested by the FTA."
- "Upon request."
- "If we had any persons or groups who were dissatisfied with the allocation of service after the regularly scheduled public participation process, we would advise them of their options, including filing a Title VI complaint."
- "Part of Title VI update process."

Although only a few agencies reported having had a Title VI complaint of a nature relevant to the subject of this report, three agencies replied to a question regarding any responses or defenses that had been developed to deal with Title VI disparate-impact challenges.

- "We have [had] a Title VI Complaint procedure in place since 2004 for investigating complaints of race, color, and national origin filed by [the agency's] customers."
- "We have had a Title VI benchmark analysis done regarding the provision of our service. We also now do 'environmental justice' analyses that the FTA office of Civil Rights reviews when a fare or service revision is considered for implementation."
- One respondent stated that "[w]e do the analysis on an ongoing basis."

As noted, three agencies reported having had within the past 10 years a Title VI complaint based on opposition to increases in fares or fees or in the allocation of funds between bus and rail or the neighborhood served. One transit agency for a large metropolitan area advised that it had had 55 Title VI administrative complaints during the period 1997–2006, some of which involved fare increases or the allocation of funds between bus and rail and between neighborhoods. The agency did not provide details on the complaints but did provide a summary of the status or disposition of 46 complaints. As of February 2007, the agency indicated that 17 complaints were classified as "Allegations Unfounded;" seven were classified as "Administrative Closure;" two were classified as "Allegations Founded;" one was classified as "Revolved/Settled;" and 19 were classified as "Pending." The agency did not disclose the status of the other nine complaints. The agency advised that there had been two civil actions of a Title VI nature, one filed in 1995 that had been dismissed and another one filed in 1998 that had been settled and dismissed.

A second agency also serving a large metropolitan area advised of one Title VI complaint in the past 10 years challenging the agency's alleged disparate treatment in its delivery of services. The agency advised that the complaint focused on disparate treatment in delivery of services to minority riders; the agency's decision to raise its fares that would disproportionately burden poor, transit-dependent African Americans; and the agency's disparate treatment in its delivery of services to its disabled riders. According to the agency, among other things, the agency agreed to dispatch more clean-burning natural gas buses; improve maintenance at one of its facilities; allocate new diesel buses to replace aging vehicles; install a substantial number of additional bus shelters and benches; place a certain number of the additional shelters and buses in "environmental justice" areas; and take steps to provide greater security in the affected riders' areas.

A third agency, also serving a large metropolitan area, said that it had had at least 365 Title VI complaints during the period 1997–2006, but advised that

none of these complaints related to increases in fares or fees or allocation of funds between bus and rail or between neighborhoods.[12]

B. Title VI Challenges as Reported by the FTA

As explained by FTA,

> [i]ndividuals or organizations who believe they have been denied the benefits of, excluded from participation in, or subject to discrimination on the grounds of race, color, or national origin by a recipient of [FTA] funding can file an administrative complaint with the [FTA's] Office of Civil Rights under Title VI of the Civil Rights Act of 1964.[13]

Complaints are investigated "on the basis of intentional discrimination or on the basis of disparate impact discrimination, where a neutral policy or practice has the effect of disproportionately excluding or adversely affecting minority beneficiaries or other protected individuals and the recipient's practice lacks a substantial legitimate justification."[14] After FTA concludes its investigation, the agency transmits "a letter of finding to the complainant and the recipient" of FTA funds. If the FTA determines that the recipient is not in violation of Title VI, the FTA will "explain why the recipient was found in compliance."[15] If the FTA determines that a recipient is in violation of Title VI, the [FTA] will document the violation and instruct the recipient to take action to come into compliance.[16]

Information received from the FTA is consistent with a 2002 article stating that the USDOT receives relatively few Title VI complaints. FTA provided files in response to a Freedom of Information Act (FOIA) request made in March 2007 concerning complaints that FTA had received since the year 2000 alleging disparities in funding between bus and rail or inequitable impact of service and fare changes:

Piras and Williams v. Metropolitan Transportation Commission, 2000-0315.

West Harlem Environmental Action v. Metropolitan Transportation Agency and New York City Transit, 2001-0062.

Metropolitan Atlanta Transportation Equity Coalition v. Metropolitan Atlanta Transit Authority, 2001-0084.

Washington Street Corridor Coalition v. Massachusetts Bay Transportation Authority, 2001-0177.

Brazen v. Harris County Metropolitan Transit Authority, 2003-0110.

Winkelman v. Bi-State Development Agency, 2003-0241.

Payne v. Chicago Transit Authority, 2004-0194.

Leese v. Suburban Mobility Authority for Rapid Transit, 2006-0238.

The details of the complaints and the outcomes are discussed in Section III, *infra*.

C. Judicial Proceedings Involving Title VI Complaints for Disparate Impact

In response to the survey, only two transit providers reported a disparate impact judicial action that had been filed in the past 10 years. However, prior to the *Sandoval* decision in 2001 that rejected Title VI claims for disparate impact, there were some reported cases.

The case does not come within the 10-year period covered by this report; however, in 1995 in *New York Urban League, Inc. v. New York*,[17] the Second Circuit reversed and vacated a district court's injunction based on a Title VI claim made on behalf of members of protected minority groups who used the New York City Transit (NYC Transit). It was alleged that the riders paid a higher share of the cost of operating the system than commuter line passengers, who were predominately white. The Second Circuit ruled that the lower court's conclusions were based on insufficient findings that a disparate impact existed.

In 1998 in *South Bronx Coalition for Clean Air, Inc. v. Conroy*,[18] an environmental group, alleging disparate impact on minority residents, sought an injunction to compel the return of buses that had been transferred to other bus depots. The court held, *inter alia*, that the civil rights claim was vague and that it was unclear whether a private right of action existed under Section 602 of Title VI.

Another case of interest, decided in 2001, is *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*.[19] The lawsuit was brought by a group of bus passengers because of decisions by the Los Angeles County Metropolitan Transportation Authority (LACMTA) "to spend several hundred million dollars on a new rail line" and to increase bus fares and eliminate monthly discount passes rather than reduce overcrowding problems on city buses.[20] LACMTA was allegedly spending a disproportionate amount 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."[21]

A district court approved a Consent Decree that settled the case; however, the LACMTA did not meet certain service improvement goals set forth in the Decree.[22]

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[12] This responding agency also provided a copy of a "Title VI Complaint Log 2004-2006" that listed 201 complaints by number, incident date, date received, ethnicity, provider, category code, completion date, and resolution code.

[13] *See* USDOT, FTA Web site available at http://www.fta.dot.gov/civilrights/title6/civil_rights_5104.html.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] 71 F.3d 1031 (2d Cir. 1995).

[18] 20 F. Supp. 2d 565 (S.D.N.Y. 1998).

[19] 263 F.3d 1041, 2001 U.S. App. LEXIS 19410 (9th Cir. 2001).

[20] *Labor/Community Strategy Center,* 263 F.3d at 1043.

[21] *Id.*

[22] To reduce bus overcrowding, the Consent Decree set forth specific "load factor targets" or "LTFs" that the MTA had to

Ultimately the district court entered an order that included a requirement that the LACMTA "immediately acquire 248 additional buses to reduce passenger overcrowding even if that meant diverting funds from other transportation services under MTA's jurisdiction."[23] In affirming the district court's order, the Ninth Circuit rejected the LACMTA's argument that the load factor targets in the Consent Decree "were simply performance goals that MTA promised to use its 'best efforts' to meet" and that the Decree "only required substantial compliance."[24] The appeals court agreed that the decree imposed an "obligation" on the LACMTA "to meet the scheduled load factor targets…."[25]

In 2003, in *Save Our Valley v. Sound Transit (Central Puget Sound Regional Transit Authority),*[26] discussed in more detail in Section V.C, *infra*, the plaintiff Save Our Valley (SOV), a community advocacy group, challenged the defendant Regional Transit Authority's plan to build a light-rail line through the community. The plaintiff argued that the project would "cause disproportionate adverse impacts to minority residents"[27] and that the proposed line "violated a Department of Transportation 'disparate impact' regulation—promulgated pursuant to Title VI of the Civil Rights Act of 1964…."[28] The court noted that the department's disparate-impact regulations go further than the statute they implement, "proscribing activities that have disparate effects on racial groups, even though such activities are permissible under § 601."[29]

The Ninth Circuit held that violations of rights, not violations of laws, give rise to Section 1983 actions; that plaintiffs suing under Section 1983 must demonstrate that a statute, not a regulation, confers an individual right; and that the paramount consideration is to determine whether Congress intended to create the particular federal right sought to be enforced. The court held that a "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 SOV seeks to enforce, the right to be free from racially discriminating effects."[30]

A case currently pending, *Darensburg v. Metropolitan Transportation Commission*, is predicated on claims of purposeful discrimination rather than disparate impact.[31] In 2005, the plaintiffs filed a class action in U.S. District Court for the Northern District of California, alleging that the Metropolitan Transportation Commission (MTC), which programs and allocates funding from various sources to Bay Area transit and highway projects, had channeled funds to projects that disproportionately benefited suburban BART and Caltrain riders, predominantly white, at the expense of projects that would benefit AC Transit minority bus patrons. On September 19, 2005, the court granted MTC's motion to dismiss the complaint with leave to amend; the plaintiffs filed an amended complaint October 11, 2005.

The amended complaint seeks injunctive and declaratory relief pursuant to the Fourteenth Amendment, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act, as well as California Government Code Section 11135. The amended complaint alleges *intentional discrimination* in challenging "a longstanding pattern of race discrimination" by the MTC in the funding of public transit services in the San Francisco, California, Bay Area with respect to "people of color who are riders of the Alameda–Contra Costa Transit District (AC Transit), which operates California's largest bus-only transit system."[32] The plaintiffs on behalf of themselves and others allege that MTC "has historically engaged, and continues to engage, in *a policy, pattern or practice of actions and omissions that have the purpose and effect of discriminating against poor transit riders of color* in favor of white, suburban transit users, on the basis of their race and national origin."[33]

The *Darensburg* amended complaint asserts:

- That "[o]ver many years Defendant MTC has channeled and continues to channel funds to projects and programs that benefit the disproportionately white riders of Caltrain and BART, at the expense of the disproportionately minority riders of AC Transit;"[34]
- That MTC "discriminates against [Communities for Better Environment's] people of color members by denying them equal treatment in its funding, advocacy, and other decisionmaking processes, by providing them with lower transit subsidies than white Caltrain and BART riders, and by denying them equal transportation benefits, on the basis of their race and national origin;"[35]
- That MTC "discriminates against [Amalgamated Transit Union, Local 192's] people of color members by denying them equal treatment in its funding, advocacy, and other decisionmaking processes, by providing them with lower transit subsidies than white Caltrain and BART riders."[36]
- That MTC "is the metropolitan planning organization and designated recipient of federal transportation funds for the San Francisco Bay Area;"[37] "makes fund-

meet by specific dates and established a Joint Working Group of representatives from the plaintiffs' class and the MTA. *See Labor/Community Strategy Center,* 263 F.3d at 1044.

[23] *Labor/Community Strategy Center,* 263 F.3d at 1043.

[24] *Id.* at 1048.

[25] *Labor/Community Strategy Center,* 263 F.3d at 1049.

[26] 335 F.3d 932 (9th Cir. 2003).

[27] *Save Our Valley*, 335 F.3d at 934.

[28] *Id.* at 935.

[29] *Id*. at n.2.

[30] *Id.* at 944.

[31] No. C-05-01597, U.S. District Court, Northern District of California, hereinafter cited as "*Darensburg*."

[32] *Darensburg,* First Amended Complaint ¶ 1 (Oct. 11, 2005).

[33] *Id.* (emphasis supplied).

[34] *Id.* at ¶ 3.

[35] *Id.* at ¶ 17.

[36] *Id.* at ¶ 18.

[37] *Id.* at ¶ 21.

ing decisions on a 'continuous' basis"[38] and "was acting and continues to act under color of state law" within the meaning of § 1983.[39] The plaintiffs allege that MTC "is aware that BART and Caltrain have historically served disproportionately white riders."[40]

While whites make up 35 percent of the collective ridership of AC Transit, Caltrain, and BART, they account for 60 percent of Caltrain riders and 43 percent of BART riders. And while African Americans have a collective ridership on these three operators of 22 percent, they account for only 4 percent of Caltrain riders and only 14 percent of BART riders….[41]

While African Americans account for only 22 percent of all riders on these three transit systems, they account for more than one-and-a-half times that percentage, 37 percent, of AC Transit's riders.[42]

- That MTC "exerts substantial control over the capital and operating budgets of each of the transit operators within its jurisdiction" and that

> [i]n exercising this substantial control over the budgets of transit operators, Defendant MTC engages in a pattern and practice of actions and omissions that have the purpose and effect of discriminating against projects and programs that benefit the disproportionately minority ridership of AC Transit in favor of projects and programs that benefit the disproportionately white riders of Caltrain and BART, on the basis of these riders' race and national origin.[43]

- That MTC has control over AC Transit's budget,[44] and that MTC allegedly "reduced the quality and quantity of service that had previously been available to Plaintiffs,"[45]
- That MTC "systematically discriminates against low-income people of color in the selection of transit projects, with an explicit two-tiered approach to transit projects that benefit minority passengers and white passengers, fully funding the latter, but leaving an unfunded shortfall of several billion for the former,"[46] and,
- That MTC "consistently refused and continues to refuse to implement recommendations that would mitigate the harmful effects of its funding decisions…."[47]

The plaintiffs allege that MTC "continues to engage in these and other discriminatory funding practices, even though it knows they are discriminatory."[48] Paragraph 61 of the amended complaint summarizes the plaintiffs' allegations regarding what they say is MTC's "policy, pattern or practice of discriminatory funding…."[49]

The plaintiffs in the *Darensburg* case allege causes of action based on denial of equal protection of the law under § 1983[50] and purposeful discrimination under Title VI and § 1983,[51] as well as purposeful and disparate-impact discrimination under California Government Code Section 11135.[52] Among the requests for relief are that the court permanently enjoin MTC "from making any funding decision that has an unjustified disproportionately adverse impact on AC Transit riders of color"[53] and "from supporting the funding of or funding any improvement or expansion in service that detracts from the equitable funding of services that benefit AC Transit riders."[54]

One basis for a § 1983 action is that a constitutional violation was caused by a governmental official policy or custom (see Section IX.D, *infra*). In its answer to the amended complaint, MTC asserted various defenses including the defense that "MTC's policies, actions, and practices have substantial legitimate justification" and that the plaintiffs' amended complaint "fails to meet the requirements of *Monell et al v. Dept. of Social Services of the City of New York*, et al., 436 U.S. 658 (1978) to show that the alleged injuries are cause[d] by a governmental policy or custom."[55] The *Darensburg* action is still pending as of this writing; a Joint Scheduling Statement was filed July 30, 2007.

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[38] *Id.* at ¶ 22.

[39] *Id.* at ¶ 23.

[40] *Id.* at ¶ 31.

[41] *Id.* at ¶ 33.

[42] *Id.* at ¶ 34.

[43] *Id.* at ¶ 36 (emphasis supplied).

[44] *See id.* at ¶¶ 41, 42.

[45] *Id.* at ¶ 43.

[46] *Id.* at ¶ 45.

[47] *Id.* at ¶ 48.

[48] *Id.* at ¶ 59.

[49] Specifically the plaintiffs allege that:

> (1) Defendant MTC establishes funding criteria that favor projects and programs that benefit rail riders over bus riders; (2) Defendant MTC applies its own funding criteria and financial controls over transit operators inconsistently, to the disadvantage of AC Transit riders; (3) Defendant MTC declines to allocate or program discretionary funds for the benefit of AC Transit riders in a manner comparable to its allocation or programming of discretionary funds for the benefit of Caltrain and BART riders; and (4) Defendant MTC advocates with state and federal legislatures more aggressively on behalf of Caltrain and BART riders than AC Transit riders, for example, by giving Caltrain and BART projects a higher priority than AC Transit projects, requesting more money for projects and programs that benefit Caltrain and BART riders than AC Transit riders, and advocating for funds to be committed by law to projects and programs that benefit Caltrain and BART riders, but not advocating at all, or with comparable vigor, for similar earmarking of funds for projects and programs that benefit ACTransit riders.

Darensburg, First Amended Complaint ¶ 61.

[50] *Id.* at ¶¶ 70–72.

[51] *Id.* at ¶¶ 73–75.

[52] *Id.* at ¶¶ 76–78. The full text of CAL. GOV'T CODE § 11135 is available at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=11001-12000&file=11135-11139.7.

[53] *Darensburg*, First Amended Complaint (Prayer for Relief) ¶ 5.

[54] *Id.* at ¶ 6.

[55] *Darensburg,* Amended Answer of Defendant Metropolitan Transportation Commission to First Amended Complaint at 15.

Although in the past 10 years there have been few cases against transit providers under Title VI for alleged disparate-impact violations, in particular in connection with fare increases or allocation of funds between bus and rail, there are some disparate-impact cases against defendants other than transit providers that are discussed elsewhere in this report (see Sections VI and VIII.A, *infra*).

III. OUTCOME OF TITLE VI COMPLAINTS OF DISPARATE IMPACT CAUSED BY TRANSIT AGENCIES' DECISIONS

A. Discussion of Complaints and FTA Decisions

The United States Commission on Civil Rights stated, in a 2003 statutory report, that

> *[t]he Department of Transportation (DOT) receives relatively few Title VI complaints*. DOT attributes the lack of complaints to its outreach efforts and requirements for early community involvement in transportation planning. This, however, may not account for the low number of reported complaints. The number of complaints filed may also be a function of affected communities being unaware of how and when to participate in the decision-making process, lack of access to technical and scientific information, cultural and language barriers, and insufficient access to clear guidance on how to file Title VI complaints.[56]

Consistent with the above report's conclusion, FTA identified and produced files on eight Title VI complaints presenting an issue, *inter alia*, regarding allocation of funds between bus and rail, a reallocation of funds but not necessarily between bus and rail, inequitable impact of service and fare changes, or disparities in service or equipment, or both. The files produced by the FTA indicate that the outcomes on complaints for Title VI disparate-impact violations generally have been favorable to transit providers.

Allocation of funds was at issue in *Piras and Williams v. Metropolitan Transportation Commission*, FTA No. 2000-0315. The complaint alleged that there had been disparate and inequitable treatment of minority and low income residents in parts of two counties in California comprising the AC Transit; that the MTC effectively discriminated against low-income and minority bus riders when compared to passengers of other transit systems that operate heavy and commuter railroads in the region; and that there was a bias that favored railroads and their suburban passengers and a denial of similar benefits to urban-core bus passengers. However, FTA concluded that the facts did not support the allegations. The MTC's response to the complaint is discussed in more detail in Section IV, *infra*.

In *Washington Street Corridor Coalition v. Massachusetts Bay Transportation Authority,* FTA No. 2001-0177, the complaint alleged that the Massachusetts Bay Transportation Authority (MBTA) "tore down" the elevated Orange Line that serviced the Washington Street Corridor; that MBTA promised to replace the Orange Line with service equal to or better than the old line, a promise never fulfilled; and that MBTA consistently provided better transportation service to predominately white communities. FTA did not find that there had been any Title VI violations. MBTA's response also is discussed in Section IV, *infra*.

In *West Harlem Environmental Action v. Metropolitan Transportation Agency*, FTA No. 2001-0062, the complaint alleged that the Metropolitan Transportation Agency (MTA) and NYC Transit had taken actions that discriminated against African-American and Latino residents of Northern Manhattan in the development and operation of bus parking lots and bus depots and in the placement of diesel bus depots and open-air bus parking lots for diesel buses. The complaint alleged that MTA and NYC Transit discriminated against minority residents of Northern Manhattan because the residents were exposed disproportionately to increased health risks from diesel exhaust. FTA concluded that MTA and NYC Transit were not in violation of Title VI.

In *Metropolitan Atlanta Transportation Equity Coalition v. Metropolitan Atlanta Transit Authority,* FTA No. 2001-0084, the complaint alleged disparate treatment by the Metropolitan Atlanta Rapid Transit Authority (MARTA) in its delivery of services to minority riders; in its decision to raise fares; in its delivery of services to disabled riders; in its poorly maintained rail stations in minority communities; in its decision to raise fares that disproportionately affected African-Americans; and in its decision to commit $464 million in construction costs to two new train stations that benefited primarily white suburban communities. FTA did not disclose the "MARTA Title VI Resolution Agreement."

In *Brazen v. Harris County Metropolitan Transit Authority,* FTA No. 2003-0110, the complaint alleged that there was a violation of the civil rights of poor and mi-

[56] *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice,* available at http://www.usccr.gov/pubs/envjust/ch3.htm. The United States Commission on Civil Rights, created by the Civil Rights Act of 1957, 71 Stat. 634, 85 Pub. L. No. 315, pt. I, § 101 (Sept. 9, 1957), is empowered by statute: a) to investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; b) to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; c) to appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; d) to serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin; to submit reports, findings, and recommendations to the President and Congress; and e) to issue public service announcements to discourage discrimination or denial of equal protection of the laws. *See* U.S. Commission on Civil Rights, available at http://www.usccr.gov/index.html.

nority bus riders because of the transit authority's "callous slashing and gutting" of bus service throughout the service area while at the same time "continuing to spend precious taxpayer funds on a tram/trolley system." The FTA concluded that a violation of Title VI had not been established.

In *Winkelman v. Bi-State Development Agency*, FTA No. 2003-0241, the complaint, which requested FTA to require an amendment of the route alignment of the new Cross-County Metro Link Extension Project, alleged that the project was discriminating against those who rely on public transit in an effort to benefit Washington University. FTA determined that there had not been a violation of Title VI.

In *Payne v. Chicago Transit Authority*, FTA No. 04-0194, the complaint alleged that the Chicago Transit Authority (CTA) discriminated against the predominantly minority residents of Chicago's South Side when the CTA chose not to fund the Gray Line transit route proposal and that the Gray Line Proposal was not implemented because of the complainant's race. The FTA determined that there was no showing of a clear pattern of discriminatory impact.

In *Leese v. Suburban Mobility Authority for Rapid Transit,* FTA No. 2006-0238, the complaint alleged that the Suburban Mobility Authority for Rapid Transit's (SMART) implementation of a proposed service reduction in November 2005 as a result of the decision of the City of Livonia, Michigan, to opt out of the Wayne County Transit Authority was discriminatory because state funds were shifted; however, the FTA found that no violations of Title VI had been established. SMART's response to the complaint is discussed in Section IV, *infra*.

B. Summary of Title VI Issues, Outcomes, and Trends

FTA provided the foregoing files in response to a FOIA request for records of Title VI complaints alleging, for example, disparate impact in allocation of funding between bus and rail or in service and fare changes. Although complaints often involved more than one issue, at least two complaints involved allocation of funds between bus and rail; one complaint alleged that a fare increase benefited commuter lines serving predominately white communities; and one complaint alleged an inappropriate allocation of funds but not necessarily between bus and rail.

Two complaints alleged disparate impact caused by a reduction in the level of service. One complaint alleged that there was disparate impact caused by the siting in minority communities of bus depots and open-air parking facilities used by diesel buses that polluted the affected communities.

Table 1 summarizes the above Title VI challenges. Table 2 shows that there has been a decline in the number of Title VI cases relevant to the subject of the report since the filing of four challenges in 2001.

TABLE 1. SUMMARY OF FEDERAL TRANSIT ADMINISTRATION TITLE VI COMPLAINTS—2000 TO AUGUST 2007

YEAR FILED	CASE NAME	ALLEGATIONS	STATUS	ACTION TAKEN
2000-0315	*Piras and Williams v. MTC*	Discrimination in funding against buses in favor of heavy and commuter railroads	Closed	No violation
2001-0062	*West Harlem Environmental Action v. MTA and MTA NYCT*	Siting of diesel bus depots and open-air parking lots in minority communities	Closed	No violation
2001-0084	*Metropolitan Atlanta Transportation Equity Coalition v. MARTA*	Fare increase, poorly maintained rail stations in minority communities, delivery of services to the disabled, committing funding for construction of new rail stations in primarily white suburban communities	Closed	Undisclosed mediation resolution agreement
2003-0110	*Brazen v. Harris County MTA*	Reduction in bus service in favor of funds for a tram/trolley system	Closed	No violation
2001-0177	*Washington Street Corridor Coalition v. MBTA*	Failure to replace elevated Orange Line; level of service provided consistently better in white communities	Closed	No violation
2003-0241	*Wimkelman v. Bi-State*	Route alignment of new Cross-County Metro Link Extension Project alleged to be discriminatory	Closed	No violation
2004-0194	*Payne v. CTA*	Decision not to fund Gray Line transit route proposal alleged to discriminate against South Side minority riders	Closed	No violation
2006-0238	*Leese v. SMART*	Reduction in level of service; shift in state funding	Closed	No violation

TABLE 2. NUMBER OF TITLE VI COMPLAINTS FILED WITH THE FTA BY YEAR

YEAR	NO. FILED
2000	1
2001	3
2002	0
2003	2
2004	1
2005	0
2006	1
2007[57]	0

IV. TRANSIT AGENCIES' STRATEGY AND DEFENSES TO TITLE VI DISPARATE-IMPACT CHALLENGES

This section of the report discusses some of the information that was provided by transit providers in responding to administrative complaints or challenges, beginning with a discussion of the variety of approaches taken in the transit providers' responses.[58]

First, it appears that transit providers have focused on the complaint's failure to show or allege any specific discriminatory intent or effect, the complaint's failure to identify any discrimination, the absence of proof of any alleged disparity, and/or the complaint's failure to prove a causal connection.

Second, with respect to a change or reduction in level of service or alleged disparity in the existing level of service, transit providers have explained the basis for the agency's decision; the adequacy of existing service or of new service; the provision, where applicable, of alternative service; or the need to reduce emissions as part of an emissions reduction program.

Third, transit providers have shown that a decision was the result of years of study, that various options were considered, and that there were public hearings and public participation in the decision-making process.

Fourth, transit providers have used statistics and demographic information to rebut the allegations.

Fifth, transit providers have explained the sources of the transit provider's funding; any statutory requirements or restrictions that may pertain to its funding; and why there is a lack of funding, including a lack of federal funding or the effect of the loss of any subsidies.

Sixth, transit providers have compared allocations of bus and rail funding and explained the reasoning for the allocations.

Seventh, transit providers have provided an overview of the transit provider's operations and facilities, discussed critical capital replacement needs of bus and rail systems, and explained the different preventive maintenance requirements of bus and rail systems.

Finally, transit providers have explained factors that were beyond its control, such as the effect of an election that resulted in discontinuance of service, federal objections to options that were considered, and the necessity of cooperation with other governmental agencies, as well as other administrative obstacles or difficulties.

Several of the agencies' responses to Title VI complaints are worth discussing in more detail.

In *Leese v. Suburban Mobility Authority for Rapid Transit,* FTA No. 2006-0238, SMART responded to the Title VI complaint, explaining that a significant source of its revenue was a property tax levied by the four counties to which SMART provides services. One of the areas served by the agency withdrew from the system, thereby causing the agency to reallocate limited resources. SMART conducted public hearings and made service changes in an attempt to ease the problems caused by the loss of revenue. The agency explained that it had added routes and altered existing routes in an effort to minimize the impact.[59]

In *Washington Street Corridor Coalition v. Massachusetts Bay Transportation Authority,* FTA No. 2001-0177, MBTA responded to a Title VI complaint alleging discrimination by the agency based on a decision to employ a modality other than light rail on a route previously served by the elevated Orange Line that was discontinued in 1988. MBTA provided a chronological report on the studies, public hearings, and unsuccessful attempts to secure federal funding for a light-rail system before the agency decided to construct a new rapid-transit line serviced by 60-ft articulated buses that would operate on compressed natural gas in dedicated rights-of-way. The response noted among other things that the solution chosen was sanctioned by local organizations, that the corridor in which the project is located has received a greater capital investment in rapid transit than any other part of the metropolitan area, that the heaviest concentration of minority residents in the corridor are not located on the new line, that the population characteristics of the area are not markedly different from the city as a whole, that the residents of the corridor favored surface transportation, and that members of the local community raised concerns regarding the alternative of providing light-rail service. Specifically, some residents were concerned that a light-rail line would divide the community geographically and that construction of the line would cause the loss of buildings and businesses.

MBTA noted more than once in its response to the Title VI complaint that USDOT's position was that light rail was not a reasonably cost-effective solution and, moreover, a light-rail proposal did not meet USDOT's cost-effective guidelines or satisfy certain environmental issues. (An electric-bus option that would have

[57] As of Aug. 2007.

[58] It may be noted that seven transit agencies stated that that they have a Web site where information on Tit. VI complaints is made available to the public.

[59] *See Leese,* Response by Suburban Mobility Authority for Rapid Transit, dated Nov. 30, 2006 (quotation marks omitted in the discussion of SMART's response).

been pursued entirely with state funds was opposed by various community groups because of the electric wires that would have to be erected.) Because MBTA determined that the line to be provided should be part of a continuous line and afford service to a number of areas including the airport, MBTA decided that the optimum type of vehicle for such a route was a 60-ft articulated bus that operates on low-emission natural gas.[60]

In *West Harlem Environmental Action v. Metropolitan Transportation Agency*, FTA No. 2001-0062, it was alleged that MTA and NYC Transit had discriminated against African-American and Latino residents of Northern Manhattan in the development and operation of bus parking lots and bus depots and that a disproportionately high number of the authority's bus depots were located in nonwhite neighborhoods. MTA and NYC Transit filed a detailed response and argument.[61]

MTA's and NYC Transit's response noted that most of the depots in the area in question had been constructed more than 50 years ago and that over the years the demographic patterns had changed. The response explained that the number of depots located in white, non-Hispanic neighborhoods citywide closely approximated the city's total white, non-Hispanic population under the 1990 Census. After providing a detailed overview of the authority's bus and subway operations throughout the entire service area, rather than just Northern Manhattan, the authority explained some of the considerations in the location of bus depots and parking lots, including the need to keep and maintain buses close to the routes they service so as to maximize bus service.

The response also pointed out that the complaint's demographic profiles were based erroneously on zip codes rather than "census tracts." MTA and NYC Transit contended in their response that the method of using zip codes meant that substantially larger areas were included, thereby encompassing a larger nonwhite population. The method of using census-tract data allowed the authority to consider an area within a 0.25-mi radius of each bus depot in the city. The transportation authority pointed out that the use of the census-tract method resulted in five, not six, of the eight Manhattan depots being located in predominately nonwhite neighborhoods.

The respondents also argued that the demographics of the entire area had to be considered because they operated a citywide system. A demographic analysis of the city as a whole using the census-tract method showed that eight of 20 depots were located in predominately white, non-Hispanic neighborhoods. Also, the MTA and NYC Transit showed that, since the 1990 Census, the Census Bureau's Population Estimates Program had indicated that the percentage of New York City's total white, non-Hispanic population had declined from approximately 43 percent to 37 percent; thus, the percentage of bus depots located in minority neighborhoods was slightly low, proportionately, when compared to the city's current nonwhite population.

MTA and NYC Transit explained that their policies on facilities and services are driven by race-neutral planning and that the planning framework consisted of four components: strategic context,[62] functional context,[63] financial context,[64] and community/environmental context.[65] There was emphasis as well in the response on MTA's and NYC Transit's significant commitment and capital investments and expenditures to reduce air emissions from the bus fleet.

In *Piras and Williams v. Metropolitan Transportation Commission*, FTA No. 2000-0315, MTC's response focused primarily on sources of funds and how they were allocated between bus and rail. MTC provided a detailed comparison of its operating allocations to AC Transit and BART, discussing, first, state and local operating funding that included Transportation Development Act (TDA) funds, State Transportation Assistance (STA) funds, and AB 1107 funds.[66] As for TDA funds, the MTC showed that the allocation of TDA funds for fiscal years (FYs) 1992–2001 were $373.8 million to AC Transit and $6.5 million to BART. MTC pointed out, for example, that with respect to STA funds the MTC had exercised its discretion to provide a significant benefit in funding to AC Transit. Thus, for the same FYs 1992–2001, the MTC allocation to AC Transit was $72.1 million and the allocation for BART was $9.8 million. As for the AB 1107 funds, by law 75 percent of the funds must go to BART; however, according to MTC, the re-

[60] *Washington Street Corridor Coalition,* "Response of the Massachusetts Bay Transportation Authority to the Washington Street Corridor Coalition's 'Title VI' Complaint' (undated) (quotation marks omitted in the discussion of MBTA's response).

[61] *West Harlem Environmental Action*, Respondents' Submission in Opposition to the Complaint, dated March 5, 2001 (quotation marks omitted in the discussion of MTA's and NYC Transit's response).

[62] The response's discussion of the strategic context centered on the transit system's rolling 20-year capital needs assessment program and 5-year capital program plans.

[63] The response's discussion of the functional context focused on three primary planning factors that affected a bus depot's location and design: bus route and fleet assignments, traffic circulation patterns, and maintenance area size and location.

[64] The response's discussion of the financial context discussed how most Manhattan properties were unsuitable for bus depot use because of expense, zoning, over-development, distance from bus routes, inappropriately sized street grids, and congestion.

[65] The MTA and NYC Transit stressed that because many of the bus depot projects involve improvement of existing facilities, the projects do not require the preparation of formal environmental assessments; however, the respondents stated that even if a project is exempt, the usual practice is to review a project's potential environmental impacts.

[66] AB 1107 Funds are funds derived from legislation sponsored by MTC in 1977 to make permanent a ½ cent general sales tax originally imposed to institute BART service in three counties.

maining 25 percent is made available to MTC to allocate among three recipients, one of which is AC Transit.

MTC's response also analyzed the allocation of federal operating funds.[67] For example, the response stated that with respect to FTA Section 9 Operating Funds under the Intermodal Surface Transportation Efficiency Act,[68] although BART was a major generator of the funds, MTC allocated all available Section 9 funds to AC Transit and other bus service providers. MTC also provided a table showing the allocation of FTA Section 5307 Operating Funds and discussed the "actual federal" Section 5307, Section 5309, and STP/CMAQ funds received by AC Transit and BART over certain periods. According to the MTC's analysis, during the FY 1992–2001 period, even though federal operating subsidies were being phased out, the MTC-administered subsidies to AC Transit increased by more than 49 percent. Finally, MTC's response argued that the complaint ignored the different capital and operating requirements of bus and rail systems, noting that rail systems have greater capital needs but more modest operating requirements.[69]

V. STATUTORY AND REGULATORY FRAMEWORK OF TITLE VI COMPLAINTS

A. Title VI, Section 601 of the Civil Rights Act of 1964

Civil rights issues arise when public transportation officials plan highways and related projects that are alleged to affect minority or ethnic groups on a discriminatory basis. The primary law is Title VI of the Civil Rights Act of 1964. Section 601 of the Act provides that "[n]o person in the United States shall, on the ground 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."[70]

In *Alexander v. Sandoval*,[71] the U.S. Supreme Court held, first, that "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages"[72] and "[s]econd, …that § 601 prohibits only intentional discrimination."[73] Furthermore, the Court held that there is no private right of action to enforce disparate-impact regulations issued pursuant to Section 602 of Title VI.[74] Thus, Section 601 of Title VI may be invoked only in instances of *intentional discrimination*, and there is no private right of action to enforce disparate-impact regulations promulgated pursuant to Section 602, discussed below. As a federal court stated in 2007, the *Sandoval* decision means that "[t]he entity involved must be engaged in intentional discrimination and be the recipient of federal funding."[75]

B. Disparate-Impact Regulations Under Title VI, Section 602

Title VI, Section 602 provides in pertinent part that

> [e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity...is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.[76]

As advised by the FTA at the FTA Region VI Civil Rights Colloquium on March 28, 2006, "[t]he Department of Justice and Department of Transportation Regulations prohibit disparate-impact discrimination as well as intentional discrimination."[77] The FTA's Web site provides the following examples of actions with potentially disparate impacts:

- Installing bus shelters on the basis of their potential to generate advertising revenue;
- Assigning clean-fuel vehicles and facilities to routes that do not serve predominately minority communities;
- Implementing service reductions or fare increases that disproportionately affect minority communities; or
- Planning a fixed guideway project that travels through predominately minority communities but does not include stations in these communities.

As for when recipients of federal funds may take actions that have disparate impacts, the FTA advises that the recipient may do so in the cases when the policy is supported by a substantial legitimate justification; there are no comparably effective alternative practices that would result in less disparate impacts; and the justification for the action is not a pretext for discrimination.[78]

Under Title VI of the Civil Rights Act of 1964,[79] as well as Title VII of the Civil Rights Act of 1968[80] and

[67] FTA § 9 Operating Funds under ISTEA.

[68] P. L. No. 102-240 (1991) (expired in 1997).

[69] *Piras and Williams*, Metropolitan Transportation Commission Response to Environmental Justice Complaints, dated Jan. 5, 2001 (quotation marks omitted in the discussion of MTC's response).

[70] 42 U.S.C. § 2000d.

[71] 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[72] 532 U.S. at 279–80, 121 S. Ct. at 1516, 149 L. Ed. 2d at 524 (citation omitted).

[73] 532 U.S. 275, 280, 121 S. Ct. at 149 L. Ed. 2d at 524 (2001) (citations omitted).

[74] 42 U.S.C. § 2000d-1.

[75] *Committee Concerning Community Improvement,* 2007 U.S. Dist. LEXIS 57551, at *51 (E.D. Cal., July 30, 2007) (citation omitted).

[76] 42 U.S.C. § 2000d-1.

[77] *See* www.fta.dot.gov (civil rights/accessibility).

[78] *Id*. (quotation marks omitted).

[79] 42 U.S.C. §§ 2000d–2000d-4.

[80] 42 U.S.C. §§ 3601–3619, 4601–4655; 23 U.S.C. §§ 109(h), 324.

other statutes and regulations, the USDOT promulgated rules to effectuate Title VI.[81] The regulations issued pursuant to Section 602 of Title VI are implicated when "a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification."[82] However, as noted and as discussed in more detail in the next section, the Supreme Court has held that no private right of action exists to enforce disparate-impact regulations and policies.[83] Nonetheless, transportation officials need to be aware of other civil rights–related laws and regulations that are implicated by their decisions regarding projects and planning.

Part 21 of Title 49 of the Code of Federal Regulations (C.F.R.) gives effect to Title VI in "that no 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 otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Transportation."[84]

USDOT regulations are representative of how departments and agencies of the federal executive branch have given effect to federal law on disparate impact. USDOT regulations provide that participants in such programs

> may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.[85]

The regulations also state that

> [i]n determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.[86]

Although 49 C.F.R. § 21.19 provides for judicial review pursuant to the limitations of Title VI, as discussed in the next section, the Supreme Court has held that disparate-impact regulations promulgated pursuant to Title VI do not give rise to a private right of action. Thus, the sole remedy available to individuals alleging that there has been a disparate impact exists under the regulations and procedures described in subsection C hereafter.

C. Requirements Under Executive Order 12898 (1994)

As discussed, Section 601[87] of Title VI prohibits intentional discrimination and Section 602[88] of Title VI authorizes regulations to effectuate the provisions of Section 601 with respect to programs or actions involving federal financial assistance.[89] In *Save Our Valley*, *supra*, the Ninth Circuit recognized that disparate-impact regulations may go further than the statute they implement, "proscribing activities that have disparate effects on racial groups, even though such activities are permissible under § 601."[90]

On February 11, 1994, President Clinton, in an effort to identify and address "disproportionately high and adverse human health or environmental effects of [federal agency] programs, policies, and activities on minority populations and low-income populations," issued Executive Order 12898 entitled, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.[91] (The FTA's Title VI Circular discussed in the next subsection specifically incorporates the principles of Executive Order 12898.[92])

The Executive Order created an interagency working group that includes the head of the USDOT.[93] The Executive Order, moreover, required each federal agency to implement an agency strategy that at a minimum would:

1. Promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations;
2. Ensure greater public participation;
3. Improve research and data collection relating to the health of and environment of minority populations and low-income populations; and
4. Identify differential patterns of consumption of natural resources among minority populations and low-income populations.[94]

The effect of the Executive Order is to require federal agencies to approach and combat directly disproportionate and adverse effects to human health by their

[81] 49 C.F.R. pt. 21.

[82] *See* U.S. Dep't of Transp., *Complaints Investigations Reference Notebook for Civil Rights Personnel,* available at http://www.fhwa.dot.gov/download/module3.pdf.

[83] Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[84] 49 C.F.R. § 21.1 (*quoting* 42 U.S.C. § 2000d (Title VI)).

[85] *Id.* § 21.5(b)(2).

[86] *Id.* § 21.5(b)(3) (emphasis added).

[87] 42 U.S.C. § 2000d.

[88] *Id.* § 2000d-1.

[89] See Alexander v. Sandoval, 532 U.S. 275, 278, 288, 121 S. Ct. 1511, 1515, 1521, 149 L. Ed. 2d 517, 523, 530 (2001).

[90] *Save Our Valley*, 335 F.3d at 935, n.2 (but the court held that such a regulation does not create a right enforceable under 42 U.S.C. § 1983.)

[91] Exec. Order No. 12898, Fed. Reg. vol. 59, no. 32 (Feb. 11, 1994), § 1-101.

[92] *See* Tit. VI Circular at II-1, discussed in § V.D, *infra*.

[93] Exec. Order No. 12898, § 1-102.

[94] *Id.* § 1-103.

programs, policies, and activities on minority and low-income populations. The Executive Order results in agency reflection internally that is reviewed by other agencies and the Environmental Protection Agency (EPA).[95] The Executive Order does not create a private right of action and is intended solely to improve the internal management of the executive branch.[96]

Section 2-2 of the Executive Order provides that

> [e]ach Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under[] such[] programs, policies, and activities[] because of their race, [c]olor, or national origin.[97]

Thus, Section 2-2 of the Order uses language similar to that found in Section 601 of Title VI, 42 U.S.C. § 2000d.

D. FTA Title VI Circular (2007)

On April 13, 2007, final notice[98] was given of the issuance of FTA's new Title VI Circular entitled "Title VI and Title VI-Dependent Guidelines for Federal Transit Administration Recipients."[99] The Circular supersedes one dated May 26, 1988. The objectives of the Circular are to assist FTA recipients and subrecipients to:

> 1. Ensure that the level and quality of transportation service is provided without regard to race, color, or national origin;
>
> 2. Identify and address, as appropriate, disproportionately high and adverse human health and environmental effects, including social and economic effects of programs and activities on minority populations and low-income populations;
>
> 3. Promote the full and fair participation of all affected populations in transportation decision making;
>
> 4. Prevent the denial, reduction, or delay in benefits related to programs and activities that benefit minority populations or low-income populations; [and]
>
> 5. Ensure meaningful access to programs and activities by persons with limited English proficiency.[100]

The Circular notes that 49 C.F.R. § 21.9(b) requires that recipients record and retain certain information that is to be submitted to the FTA and that recipients of FTA funding submit a compliance report to the responsible FTA regional office every 3 years or, in the case of metropolitan planning organizations, every 4 years.[101] The Circular states that in accordance with 49 C.F.R. § 21.7, "every application for financial assistance from FTA must be accompanied by an assurance that the applicant will carry out the program in compliance with Title VI of the Civil Rights Act of 1964."[102]

The Circular sets forth the general requirements and guidelines for FTA recipients and subrecipients. Among the stated requirements are that applicants submit an annual "Title VI Certification and Assurance"; develop Title VI complaint procedures; maintain a record of Title VI investigations, complaints, and lawsuits; and provide information to the public regarding the recipient's Title VI obligations.[103] The Circular provides further guidance on the contents of notices and the appropriate means of disseminating information on Title VI requirements to the public.

The Circular provides program-specific requirements and guidelines for recipients serving large urbanized areas, defined as geographic areas with a population of 200,000 people or more.[104] Among the stated requirements are that the recipient collect demographic data in accordance with the options described in the Circular, set systemwide service standards and policies, evaluate service and fare changes in accordance with the methods described in the Circular, monitor transit service through at least one of four service monitoring procedures described in the Circular, and prepare and submit a Title VI program, the guidelines for which are set forth in Chapter V of the Circular.[105]

The Circular also contains program-specific requirements and guidelines for state transportation departments or other administering agencies, as well as guidance on statewide transportation planning, program administration, monitoring of subrecipients, assistance to subrecipients, and preparation and submission of a Title VI program.[106] The Circular, moreover, provides program-specific guidance for metropolitan transportation planning organizations, including guidance on conducting planning and reporting requirements.

The Circular's chapter on compliance reviews describes the review process that the FTA will follow when determining if a recipient or subrecipient is deficient or noncompliant after the award of Federal financial assistance and what information and actions are

[95] *See id.* § 1-102.

[96] *Id.* § 6-609.

[97] *Compare* Exec. Order No. 12898 § 2-2 *with* 42 U.S.C. § 2000d (stating that "[no] person in the United States shall, on the ground 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").

[98] Fed. Reg., vol. 72, no. 71, at 18732 (Apr. 13, 2007).

[99] FTA C 4702.1A (May 13, 2007), hereinafter cited as "Title VI Circular," available at: http://www.fta.dot.gov/documents/Title_VI_Circular_2007-04-04_(FINAL)_(3).doc.

[100] Tit. VI Circular at II-1.

[101] *Id.* at II-3-5. Ch. II defines some of the key terms such as the meaning of "adverse effect," "discrimination," "disparate impact," "disparate treatment," and "minority persons."

[102] *Id.* at III-1.

[103] *Id.* at IV-1-2.

[104] *Id.* at V-1.

[105] *Id.* at V-1-9.

[106] *Id.* at VI-1-3.

expected from recipients and subrecipients that are subject to these reviews.[107]

Finally, the Circular describes how FTA will respond to Title VI discrimination complaints filed with the FTA against a recipient or subrecipient of FTA funds and sets forth FTA's procedures to be used when FTA determines that a grantee is not in compliance with Title VI.

VI. NO PRIVATE RIGHT OF ACTION UNDER DISPARATE-IMPACT REGULATIONS

Although the Supreme Court on several occasions has addressed the scope of Title VI during the last 20 years,[108] the Court did not decide until 2001 whether there was a private right of action to enforce the disparate-impact regulations promulgated under Title VI.[109] There is no private right of action.

In *Alexander v. Sandoval*,[110] the issue was "whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964." The plaintiff had alleged that Alabama's English-only driver's license examination violated disparate-impact regulations. The Court declared that it was not addressing whether the regulations were "authorized by § 602 [of Title VI], or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin…."[111] Rather, the Court agreed to review "only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation."[112]

First, the Court held that Section 601 proscribes only intentional discrimination.[113] Second, the Court explained that "[i]t 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."[114] Declaring that such a right must come, if at all, from the independent force of Section 602, the Court held that "we assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations" but held also that this section does not confer a private right to enforce the regulations.[115]

The Court stated that Congress, as opposed to executive-branch agencies, must create private rights of action to enforce federal law.[116] A statute that focuses on the person regulated instead of on the individuals to be protected does not imply intent to confer rights on any particular class of persons. In this case, "the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection," because the section "focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating."[117] The Court pointed out that Section 602 authorizes agencies to enforce the regulations by terminating funding or by "any other means authorized by law"[118] but held that a private right of action does not exist to enforce disparate-impact regulations promulgated under Title VI. The authority given to issue regulations indicated not the intent of Congress to sanction a right of action under the regulations but rather the opposite:[119] "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602."[120]

As one article explains,

> [t]he Court has stated that "the reach of Title VI's protection extends no further than the Fourteenth Amendment." To succeed, the plaintiffs must demonstrate that they were the target of purposeful or invidious discrimination. *It is not enough that the law has a disproportionately adverse effect upon a racial minority; rather, to be unconstitutional under the Equal Protection Clause, the disproportionate adverse impact must be traced to a discriminatory purpose….*
>
> "[D]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." In fact, when the disproportionate impact is essentially an unavoidable consequence of a legitimate legislative

[107] *Id.* at VIII-1, *et seq*.

[108] S*ee* Alexander v. Choate, 469 U.S. 287, 293, 105 S. Ct. 712, 716, L. Ed. 2d 661, 667 (1985); Guardians Ass'n v. Civil Service Comm'n of the City of New York, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983); Cannon v. Univ. of Chicago, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

[109] *See, e.g.,* J. Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?,* 27 B.C. ENVTL. AFF. L. REV. 631 (2000); T. Lambert, *The Case Against Private Disparate Impact Suits,* 34 GA. L. REV. 1155 (2000); B. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions,* 73 TUL. L. REV. 787 (1999); and G. Carrasco, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights,* 9 VILL. ENVTL. L.J. 321 (1998).

[110] 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[111] 532 U.S. at 279, 121 S. Ct. at 1516, 149 L. Ed. 2d at 523.

[112] 532 U.S. at 279, 121 S. Ct. at 1516, 149 L. Ed. 2d at 523.

[113] 532 U.S. at 280 (*citing* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978); Guardians Ass'n v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983); and Alexander v. Choate, 469 U.S. 287, 293, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985)).

[114] 532 U.S. at 285–86, 121 S. Ct. at 1519, 149 L. Ed. 2d at 528 (citation omitted).

[115] 532 U.S. at 286, 121 S. Ct. at 1519, 149 L. Ed. 2d at 528.

[116] 532 U.S. at 289, 121 S. Ct. at 1521, 149 L. Ed. 2d at 530.

[117] 532 U.S. at 289, 121 S. Ct. at 1521, 149 L. Ed. 2d at 530 (citation omitted).

[118] 532 U.S. at 289, 121 S. Ct. at 1521, 149 L. Ed. 2d at 530 (*quoting* 42 U.S.C. § 2000d-1).

[119] 532 U.S. at 289, 121 S. Ct. at 1521, 149 L. Ed. 2d at 530.

[120] 532 U.S. at 293, 121 S. Ct. at 1523, 149 L. Ed. 2d at 532–33. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

> policy, the "inference simply fails to ripen into proof." *Thus, allegations of disparate impact alone provide an insufficient basis for relief under either section 601 of Title VI or 1983.*[121]

In 2003, in *Save Our Valley, supra,* discussed in Sections II.C and V.C, a community advocacy group contended that a proposed light-rail line through the community would "cause disproportionate adverse impacts to minority residents"[122] and violate disparate-impact regulations promulgated by USDOT pursuant to Section 602 of Title VI.[123] However, the Ninth Circuit ruled that violations of rights, not violations of laws, gave rise to Section 1983 actions; that plaintiffs suing under Section 1983 must demonstrate that a statute, not a regulation, conferred an individual right; and that the paramount consideration was to determine whether Congress intended to create the particular federal right sought to be enforced.

The Ninth Circuit stated:

> Section 1983 creates a cause of action against any person who, acting under color of state law, abridges "rights, privileges, or immunities secured by the Constitution and laws" of the United States….The Supreme Court has held that only violations of rights, not laws, give rise to § 1983 actions….This makes sense because § 1983 merely provides a mechanism for enforcing individual rights "secured" elsewhere, i.e., rights independently "secured by the Constitution and laws" of the United States. "One cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything…."
>
> The Third, Fourth, and Eleventh Circuits have held that an agency regulation cannot create an individual federal right enforceable through § 1983….[124]
>
> Since only Congress can create implied rights of action (as the Court held in *Sandoval*), the Court's *Gonzaga* holding suggests that only Congress can create rights enforceable through Section 1983.[125]

The court held that a "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 SOV seeks to enforce, the right to be free from racially discriminating effects."[126]

In 2003, in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,[127] a federal district court also stated that "[i]n order to state a claim upon which relief can be granted under either 601 of Title VI or the Equal Protection Clause of the Fourteenth Amendment and § 1983, *a party must allege that he or she was the target of purposeful, invidious discrimination*."[128]

The Supreme Court held in *Alexander v. Choate*,[129] involving Section 504 of the Rehabilitation Act of 1973, that the section only prohibited intentional discrimination, not discrimination of the disparate impact variety. In *Choate*, the state had reduced the number of annual days of inpatient hospital care covered by the state Medicaid program. The petitioners alleged that both the 14-day limitation and in fact any limitation on inpatient coverage would disparately affect the handicapped and constitute a violation of Section 504 of the Rehabilitation Act of 1973.[130] Section 504 provides that "[n]o otherwise qualified handicapped individual…shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[131] Although the reduction had more impact on the handicapped, the Court agreed with the State of Tennessee that Section 504 reaches only purposeful discrimination.

In *Choate*, the Court noted that in *Guardians Association v. Civil Service Commission of New York City*,[132] the Court

> confronted the question whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*., which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless…the Court held that *Title VI itself directly reached only instances of intentional discrimination.*[133]

The Court in *Choate* also said that in the case of discrimination against the handicapped, the discrimination is usually the result "not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[134]

On the other hand, the *Choate* Court, observing that courts of appeals had held under some circumstances that Section 504 reaches disparate-impact legislation, stated that the Court "assume[d] without deciding that Section 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."[135] The Court, however, rejected the respondents' disparate-impact claims, noting that in *Southeastern Com-*

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[121] Amy Luria, *Constitutionally-Based Environmental Justice Suits and Their Likely Negative Environmental and Economic Impact*, 7 U. PA. J. CONST. L. 591, 601–02 (Nov. 2004) (emphasis supplied) (citations omitted).

[122] 335 F.3d at 934.

[123] *Id.* at 935.

[124] *Id.* at 936.

[125] *Id.* at 939 (citations omitted).

[126] *Id.* at 944.

[127] 254 F. Supp. 2d 486, 495 (D. N.J. 2003).

[128] *South Camden Citizens in Action,* 254 F. Supp. 2d at 495 (emphasis supplied).

[129] 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985).

[130] 29 U.S.C. § 794.

[131] *See Choate*, 469 U.S. at 290, 105 S. Ct. at 714, 83 L. Ed. 2d at 665 (*citing* 29 U.S.C. § 794).

[132] 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983).

[133] 469 U.S. at 292–93, 105 S. Ct. at 716, 83 L. Ed. 2d at 666–67 (emphasis supplied).

[134] 469 U.S. at 295, 105 S. Ct. at 716, 83 L. Ed. 2d at 668.

[135] 469 U.S. at 299, 105 S. Ct. at 719, 83 L. Ed. 2d at 671.

munity College v. Davis[136] the Court had stated "that § 504 does not impose an 'affirmative-action obligation on all recipients of federal funds.'"[137]

Notwithstanding the *Sandoval* and other decisions discussed herein, there is some authority for the proposition that the *Sandoval* decision does not necessarily preclude the possibility of a remedy for disparate-impact claims. In *Robinson v. Kansas*,[138] a 2002 Tenth Circuit case, the plaintiffs argued that the Kansas State school financing system, through a provision for "low enrollment weighting" and "local option budgets," resulted in less funding per pupil in schools in which were disproportionately enrolled minority students, students who were not of United States origin, and students with disabilities.

According to plaintiffs, there was a *discriminatory disparate impact* on such students in violation of the implementing regulations of the Rehabilitation Act of 1973[139] and Section 602 of Title VI.[140] Consistent with *Sandoval*, the court in *Robinson* held that a private right of action exists under Section 601 in cases involving *intentional discrimination.* However, the *Robinson* court held that *Sandoval* does not bar *all* claims to enforce such regulations but only disparate-impact claims brought by private parties *directly* under Title VI. Furthermore, according to the court, the *Sandoval* decision did not foreclose disparate-impact claims brought against state officials *for prospective injunctive* relief through a Section 1983 action to enforce Section 602 regulations.[141]

In 2007, in *The Committee Concerning Community Improvement v. City of Modesto*,[142] involving a claim arising out of the defendants' Master Tax Sharing Agreement that allegedly discriminated against Latinos, the court discussed the relationship of disparate impact to a claim of invidious discrimination. With respect to the plaintiffs' Section 1983 action alleging violations of the Equal Protection Clause of the Fourteenth Amendment and of Title VI, the court stated that both claims require proof of *intentional discrimination*. Although the court granted the defendants' summary judgment motions with respect to the Title VI claims, the court stated that Section 1983 "creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights.'"[143] To state a viable Equal Protection claim under § 1983, "'a plaintiff must show that the defendants acted with an *intent or purpose to discriminate* against the plaintiff based upon membership in a protected class.'"[144] The court noted that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[145]

The court, however, discussed the significance of evidence of disproportionate impact in a case involving invidious discrimination. "Official action will not be held unconstitutional solely because it results in a racially disproportionate impact. '*Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination*'" claim.[146] Thus, "the impact of the official action whether it 'bears more heavily on one race than another' may provide an important starting point in the analysis."[147] In addition to evidence of disproportionate impact, there are other factors that may be evidence of invidious discrimination, including the historical background of a decision, particularly when a decision reveals a series of official actions taken for invidious purposes, the sequence of events that led to the decision being challenged, any departures from normal procedures, and "the legislative or administrative history" of a decision.[148]

In a later proceeding in *Committee Concerning Community Improvement v. City of Modesto*,[149] the court granted the motions of a county and county sheriff for summary adjudication on the plaintiffs' claims. The plaintiffs had alleged discriminatory practices by the defendants in violation of the Equal Protection Clause of the Fourteenth Amendment, Section 601 of Title VI of the Civil Rights Act,[150] and 42 U.S.C. § 1983. The plaintiffs had alleged that their neighborhoods lacked effective law enforcement, evidenced in part by slower dispatch times, as well as the lack of adequate bilingual services, that proved "a discriminatory custom or policy."[151]

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[136] 469 U.S. at 300, citing to 442 U.S. 397 (1979), 105 S. Ct. at 720, 83 L. Ed. 2d at 672; *see also id*. at 297, 105 S. Ct. at 718, 83 L. Ed. 2d at 669.

[137] 469 U.S. at 300 n.20, 105 S. Ct. at 720 n.20, 83 L. Ed. 2d at 671 n.20 (citation omitted).

[138] 295 F.3d 1183 (10th Cir. 2002) (interlocutory appeal affirming district court's denial of defendants' motion to dismiss), *cert. denied*, 539 U.S. 926, 123 S. Ct. 2574, 156 L. Ed. 2d 603 (2003).

[139] 29 U.S.C. §§ 701 *et seq*.

[140] 42 U.S.C. § 2000d.

[141] Thus, the plaintiffs were allowed to amend their complaint to bring their Tit. VI disparate-impact claims against the named state officials under § 1983.

[142] 2007 U.S. Dist. LEXIS 39099 (E.D. Cal. 2007).

[143] *Committee Concerning Community Improvement,* 2007 U.S. Dist. LEXIS 39099 at *23 (*quoting* Squaw Valley Dev. Co. v. Goldberg*,* 375 F.3d 936, 943 (9th Cir. 2004), *rehearing denied by, rehearing, en banc, denied*, 2005 U.S. App. LEXIS 590 (9th Cir. 2005)).

[144] *Id.* (*quoting* Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001)).

[145] *Id.* (*citing* City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*,* 538 U.S. 188, 194, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003)).

[146] *Id.* (emphasis supplied) (*quoting* Washington v. Davis, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)).

[147] *Id.* at *24 (*quoting* Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 264–65, 266, 97 S. Ct. 555, 50 L. Ed. 2d 4504 (1977) [*superseded by statute as stated in* Chapman v. Nicholson, 579 F. Supp. 1504 (N.D. Ala. 1984)]).

[148] *Id.* at *24–25 (citations omitted).

[149] 2007 U.S. Dist. LEXIS 50258 (E.D. Cal., July 2, 2007).

[150] 42 U.S.C. § 2000d.

[151] 2007 U.S. Dist. LEXIS 50258 at *20.

The court's opinion dealt primarily with the requirement that for an Equal Protection claim under § 1983, "a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class."[152] Although not discussing Title VI specifically, the court stated that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact;" nevertheless, whether "[t]he impact of the official action…bears more heavily on one race than another, may provide an important starting point in the analysis."[153]

Turning later, however, to Title VI, the court held that "[b]ecause the Court finds no evidence of intentional discrimination in the provision of protective services or bilingual services and no invidious denial of these services on the basis of race, Plaintiffs can not sustain a Title VI claim."[154] However, it should be noted that because "[d]irect evidence of discriminatory purpose and intent may be unavailable…the court…must look to the totality of the relevant evidence" to determine whether there was an "invidious discriminatory purpose."[155] One factor considered in the "totality of the relevant evidence" is "the discriminatory effect of the official action…."[156]

In a third decision in 2007 in *Committee Concerning Community Improvement*,[157] the court granted the third of four motions by Stansilaus County dismissing the plaintiffs' claims for violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI. The plaintiffs had challenged the county board of supervisors' adoption of a Priorities List setting forth the county's priority of construction of infrastructure. The plaintiffs' argument was "that the adoption of the Priorities List is the official policy, decision or regulation which resulted in constitutional discriminatory injury."[158] However, the court stated that for the plaintiffs "[t]o state a viable Equal Protection claim under § 1983, 'a plaintiff must show that the defendants acted with the intent or purpose to discriminate against the plaintiff based upon membership in a protected class,'"[159] that "[o]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact."[160] The court, in granting the county's motions, found that the plaintiffs' argument was essentially one based merely on "impact alone" in that "other predominately white neighborhoods are receiving infrastructure ahead of the plaintiff neighborhoods."[161] The court held that there was no evidence of discriminatory motive in the preparation of the Priorities List[162] or evidence that the county's decision was "motivated by racial animus."[163]

> The inference that a governmental entity was merely aware of its demographics/racial statistics does not turn a governmental decision into one motivated by racial animus. This Court is unwilling to accept plaintiffs['] proffered inference. Such inference would open the floodgates of attacks on every unfavorable governmental decision by disgruntled citizens solely because the government "knew" its demographics.[164]

Thus, the county's Priorities List was not a basis for a civil rights claim. Rather,

> [i]n this case, a series of events unconnected to the racial considerations required the Board to make a large number of choices relating to type of infrastructure, method of payment, costs, geographic considerations, among other considerations, in deciding which infrastructures would be prioritized. The parties present a long history and explanation of funding requirements, shortfalls in county budgets, restrictions on funding, infrastructure deficiencies and planning and related problems. State-wide changes in financial resources of local entities impacted funding for infrastructure. The County's actions can be explained by a myriad of community and planning concerns having nothing to do with the ethnicity.[165]

Because the Priorities List was not racially discriminatory, the court reviewed the adoption of the list under the rational basis test, a "highly deferential" standard of review,[166] and held that the record demonstrated a rational basis for the county board's adoption of the Priorities List regarding the building of infrastructure in the county.[167]

The *Committee Concerning Community Improvement* case is discussed again in Section IX.C, *infra*, in connection with the court's explanation that a municipal custom or policy that was the cause of a deprivation of constitutional rights indeed may be the basis of a § 1983 claim.

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[152] *Id.* at *16 (internal quotation marks omitted) (citations omitted).

[153] *Id.* at *17 (internal quotation marks omitted) (citations omitted).

[154] *Id.* at *48.

[155] *Id.* at *29–30.

[156] *Id.* at *30.

[157] 2007 U.S. Dist. LEXIS 57551 (E.D. Cal., July 30, 2007).

[158] *Id.* at *12–13.

[159] *Id.* at *8–9.

[160] *Id.* at *9 ("Indeed, proof of discriminatory intent is required to show that state action having a disparate impact violates the Equal Protection Clause.") (*citing Village of Arlington Heights v. Metro. Housing Dev. Corp.,* 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)).

[161] *Id.* at *24–25.

[162] *See id.* at *32.

[163] *Id.* at *34.

[164] *Id.* at n.10.

[165] *Id.* at *43.

[166] *Id.* at *45.

[167] *Id.* at *48.

VII. ADMINISTRATIVE ENFORCEMENT PROCEDURES FOR TITLE VI COMPLAINTS FOR DISPARATE IMPACT

The regulations list the types of discrimination prohibited by any recipient through any program for which federal financial assistance is provided by USDOT.[168] As a precondition to receiving federal financial assistance, a recipient must provide assurances to USDOT that it will comply with the requirements.[169] The Secretary of USDOT must seek the cooperation of a recipient and provide guidance to it in its attempt to comply voluntarily with the regulations.[170]

The disparate-impact regulations generally identify two ways in which the disparate-impact policies are enforced. First, federal financial assistance may be refused if an applicant "fails or refuses to furnish an assurance required under [49 C.F.R.] § 21.7 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section…."[171] Section 21.13 of the department's regulations identifies the procedures that apply when the department seeks to terminate financial assistance or to refuse to grant or to continue such assistance. A hearing, which occurs before either the Secretary or a hearing examiner, must precede any adverse action taken against an applicant or recipient of federal funds.[172]

In training material disseminated by USDOT, the department has summarized the substance of the procedure.

> In a disparate impact case, the focus of the investigation concerns the consequences of the recipient's practices, rather that the recipient's intent. To establish liability under disparate impact, the investigating agency must first ascertain whether the recipient utilized a facially neutral practice that had a disproportionate impact on a group protected by Title VI. If the evidence establishes a prima facie case, the investigating agency must then determine whether the recipient can articulate a substantial legitimate justification for the challenged practice. To prove a substantial legitimate justification, the recipient must show that the challenged policy was necessary to meeting a goal that was legitimate, important, and integral to the recipient's mission.
>
> If the recipient can make such a showing, the inquiry must focus on whether there are any equally effective alternative practices that would result in less adverse impact or whether the justification proffered by the recipient is actually a pretext for discrimination.
>
> If a substantial legitimate justification is identified, the third stage of the disparate impact analysis is the complainant's demonstration of a less discriminatory alternative.[173]

A decision is issued, followed by recommendations for compliance if a violation of Title VI is found likely to exist.

The second way in which the disparate-impact policies are enforced is when a complainant files a complaint with the funding agency, alleging a violation.[174] USDOT's regulations provide that "[a]ny person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Secretary [of the Department of Transportation] a written complaint."[175] The Secretary must investigate a complaint by an allegedly injured party or by his or her representative promptly.[176] If the investigation results in a finding of noncompliance, then the Secretary must inform the funds recipient and attempt to resolve the matter informally.[177] "If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means," then the state's noncompliance may result in the cessation of federal financial assistance and a recommendation to the Department of Justice.[178] Not only may there be a hearing,[179] but also judicial review is permitted for action taken pursuant to Title VI, Section 602.[180]

Finally, the Department of Justice may enforce any rights the United States has under any federal law, any applicable proceeding pursuant to any state or local law, and any other means necessary against the recipient.[181]

In summary, although private suits may be brought under Title VI and § 1983 for intentional discrimination, the Supreme Court has eliminated Title VI and its implementing regulations as the means by which private redress may be sought for government action alleged to have a disparate impact on minority groups.

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[168] 49 C.F.R. §§ 21.3, 21.5.

[169] *Id.* at § 21.7.

[170] *Id.* at § 21.9.

[171] *Id.* at § 21.13(b).

[172] *Id.* at § 21.15(d).

[173] U.S. Dep't of Transp., *supra* note 82. According to the FTA, individuals and organizations may file a complaint by going to a link provided on the FTA's Web site and completing a Title VI complaint form that is provided. Complaints should include the complainant's contact information and be signed and thereafter forwarded to the Federal Transit Administration Office of Civil Rights to the attention of the Title VI Program Coordinator, East Building, 5th Floor – TCR, 1200 New Jersey Ave., SE, Washington, DC, 20590. *See* USDOT, FTA, available at http://www.fta.dot.gov/civilrights/title6/civil_rights_5104.html.

[174] 49 C.F.R. § 21.11(b). *See generally* Jan. 19, 1977, DOT Order 1000.12 at V-1-V-10.

[175] *Id.* § 21.11(b).

[176] *Id.* §§ 21.11(a-c).

[177] *Id.* § 21.11(d).

[178] *Id.* § 21.13(a).

[179] *See id.* § 21.15.

[180] *Id.* § 21.19; *see* Tit. VI § 603 (outlining judicial review available for actions taken pursuant to § 602).

[181] *See* 49 C.F.R. § 21.13(a).

The sole remedy for a claim of disparate impact caused by a project is as provided under the above regulations.

VIII. CLAIMS AGAINST GOVERNMENT TRANSIT AGENCIES FOR DISPARATE IMPACT UNDER 42 U.S.C. § 1983

A. Constitutional and Statutory Framework of § 1983

Section 1983 is based on the constitutional authority of Congress to enforce the Fourteenth Amendment. The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

Section 1983 is a powerful attraction for potential plaintiffs because, in addition to injunctive and declaratory relief, the courts may award money damages and attorney's fees.[182] As discussed in this section, states have immunity under the Eleventh Amendment; thus, states and their agencies are not amenable to suit under § 1983, with two well-recognized exceptions. The first exception is when a state consents to the suit, and the second exception is when Congress legislatively creates an exception.[183] State personnel may be sued only when not acting in their official capacity.[184] Moreover, not all state personnel may be sued, because § 1983 only applies to persons acting under color of state law.[185] An individual state defendant may be held "liable" for injunctive relief.[186]

Section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere;[187] thus, § 1983 does not create a cause of action in and of itself.[188] Rather, the plaintiff must prove that he or she was deprived of a right secured by the U.S. Constitution or the laws of the United States and that the deprivation of his or her right was caused by someone acting under color of state law.[189] As discussed later, not all federal statutes, however, may be enforced through § 1983 actions. One of the exceptions is that there must be an underlying private right.[190]

B. Section 1983 Claims for Disparate Impact

As stated in Section VI, the Supreme Court held in *Alexander v. Sandoval* that "§ 601 only prohibits intentional discrimination"[191] and that Section 602 and disparate-impact regulations issued pursuant thereto do not create a private right of action to sue for disparate impact.[192] Similarly, with respect to 42 U.S.C. § 1981,[193] "[t]he Supreme Court has held that claims under 42 U.S.C. § 1981 require a showing of intent rather than

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[182] *See* discussion in § VIII.H and § VIII.I, *infra*.

[183] Coger v. Connecticut, 309 F. Supp. 2d 274, 281 (D. Conn. 2004), *aff'd*, Coger v. State Dep't of Pub. Safety, 2005 U.S. App. LEXIS 15802 (2d Cir. 2005); Cummings v. Vernon, 89 F.3d 844 (9th Cir. 1996); Fidtler v. Pa. Dep't of Corr., 55 Fed. Appx. 33 (3d Cir. 2002).

[184] Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) (dismissing a suit where an action was brought against a state official in his official capacity); Printz v. United States, 521 U.S. 898, 930–31, 117 S. Ct. 2365, 2382, 138 L. Ed. 2d 914, 942 (1997) (stating that a suit against a state official in his or her official capacity is a suit against the state); Hafer v. Melo, 502 U.S. 21, 22, 112 S. Ct. 358, 360, 116 L. Ed. 2d 301 (1991) (stating that a suit against an official in his or her official capacity is outside the class of persons subject to liability under § 1983).

[185] *See* West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (holding that state employees act under color of state law when acting in their official capacities or when they exercise their responsibilities pursuant to state law).

[186] *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 2312 n.10, 105 L. Ed. 2d 45, 58 n.10 (1989) (stating that a state official sued in his or her official capacity for injunctive relief is a person under § 1983 because such actions for prospective relief are not treated as actions against the state) (*citing* Kentucky v. Graham, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106 n.14, 87 L. Ed. 2d 114, 1985); *Ex parte Young*, 209 U.S. 123, 159–60 (1908) [*superseded by statute* as stated in Presbyterian (U.S.A.) v. United States, 870 F.2d 518 (9th Cir. 1989)]); *but see* Nat'l Private Truck Council v. Okla. Tax Comm'n, 515 U.S. 582, 588 n.5, 115 S. Ct. 2351, 2355 n.5, 132 L. Ed. 2d 509, 517 n.5 (1995) (noting that injunctive or declaratory relief is not authorized under a § 1983 claim dealing with taxes where there is an adequate remedy at law).

[187] Mosely v. Yaletsko, 275 F. Supp. 2d 608, 612 (E.D. Pa. 2003) (§ 1983 itself does not create a cause of action but rather provides redress for violations of constitutional provisions and federal laws.)

[188] *See* Comm. Concerning Cmty. Improvement, 2007 U.S. Dist. LEXIS 57551 (E.D. Cal., July 30, 2007) (stating that "Section 1983 'creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights'") (*citing* Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 943 (9th Cir. 2004)).

[189] Hale v. Vance, 267 F. Supp.2d 725 (S.D. Ohio 2003); Davis v. Olin, 886 F. Supp. 804 (D. Kan. 1995). *See also* Maine v. Thiboutot, 448 U.S. 1, 5, 100 S. Ct. 2502, 2503, 65 L. Ed. 2d 555, 559 (1980).

[190] Gonzaga v. Doe, 536 U.S. 273 (2002).

[191] 532 U.S. at 280, 121 S. Ct. at 1516, 149 L. Ed. 2d at 524.

[192] 532 U.S. at 286, 121 S. Ct. at 1519, 149 L. Ed. 2d at 528.

[193] 42 U.S.C. 1981(a) provides:

> Statement of equal rights
>
> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

disparate impact."[194] The Court in *Gratz v. Bollinger*[195] stated that "*purposeful discrimination* that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981."

With respect to the disparate-impact regulations and § 1983, there has been no Supreme Court decision directly deciding this issue. As stated, § 1983 is not an independent basis for a claim, and, under the *Sandoval* decision, the private right to enforce Section 601 does not include a private right to enforce Section 602 regulations. The Third Circuit, however, has held explicitly that disparate-impact regulations "cannot create a federal right enforceable through section 1983."[196] In 2002, in *Gonzaga University v. Doe,*[197] a case involving the improper or unauthorized release of personal information under the Family Educational Rights and Privacy Act of 1974 (FERPA),[198] the Supreme Court held that "the relevant provisions of FERPA create no personal rights to enforce under 42 U.S.C. § 1983."[199] Under FERPA, federal funds to a university "may be terminated only if the Secretary determines that a recipient institution 'is failing to comply substantially with any requirement of [FERPA]….'"[200] According to the Court, however, the statutory regime does not "confer[] upon any student enrolled at a covered school or institution a federal right, enforceable in suits for damages under § 1983, not to have 'education records' disclosed to unauthorized persons without the student's express written consent."[201] The Court stated it had "never" held "that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights."[202]

The Court continued and stated emphatically that it "now reject[ed] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."[203] The statute, not the regulations, must have "rights-creating language" before a claim may be pursued under § 1983, which "'by itself does not protect anyone against anything.'"[204] The Court emphasized that under FERPA, the Congress authorized the Secretary of Education to handle violations of the Act.[205]

In *South Camden Citizens in Action*, *supra,* the Third Circuit held that "a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute."[206] The court rejected the contrary view of the Sixth Circuit in *Loschiavo v. City of Dearborn*[207] and held that "the EPA's disparate impact regulations cannot create a federal right enforceable through section 1983."[208]

It may be noted that Justice O'Connor, on behalf of four Justices in *Wright v. City of Roanoke Redevelopment and Housing Authority*, had stated that the question of "whether administrative regulations alone could create such a right" is "a troubling issue."[209] Thus, § 1983 does not itself create any substantive rights but provides a civil remedy for the deprivation of federal statutory or constitutional rights found elsewhere. Admittedly, "[t]here is virtually no limit on the types of

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[194] Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 622 n.43 (2004) (*citing* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391, 102 S. Ct. 3141, 3150, 73 L. Ed. 2d 835, 849 (1982)). As the Court explained in *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 389–90, 102 S. Ct. 3141, 3149–50, 73 L. Ed. 2d 835, 849–50,

> [t]he 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself….
>
> With respect to the latter, official action will not be held unconstitutional solely because it results in a racially disproportionate impact, …"[Even] if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose…." See Washington v. Davis, 426 U.S. 229 (1976)….
>
> We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination.

(some citations omitted).

[195] 539 U.S. 244, 276, n.23, 123 S. Ct. 2411, 2431 n.23, 156 L. Ed. 2d 257, 285 n.23 (2003) (emphasis supplied).

[196] *South Camden Citizens in Action*, 274 F.3d 771, 788.

[197] 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

[198] 20 U.S.C. § 1232(g).

[199] *Gonzaga Univ.,* 536 U.S. at 276, 122 S. Ct. at 2271–72, 153 L. Ed. 2d at 316–17.

[200] 536 U.S. at 279, 122 S. Ct. at 2273, 153 L. Ed. 2d at 319 (*quoting* 20 U.S.C. §§ 1234c(a), 1232g(f)).

[201] 536 U.S. at 279, 122 S. Ct. at 2273, 153 L. Ed. 2d at 319.

[202] 536 U.S. at 279, 122 S. Ct. at 2273, 153 L. Ed. 2d at 319.

[203] 536 U.S. at 283, 121 S. Ct. at 2275, 153 L. Ed. 2d at 321.

[204] 536 U.S. at 285, 121 S. Ct. at 2276, 153 L. Ed. 2d at 322 (*quoting* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979)).

[205] *Gonzaga Univ.,* 536 U.S. at 289, 121 S. Ct. at 2278, 153 L. Ed. 2d at 325.

[206] 274 F.3d 771, 790 (2001).

[207] 33 F.3d 548, 551 (6th Cir. 1994).

[208] *South Camden Citizens in Action*, 274 F.3d at 788.

[209] *Id.* at 781 (*quoting* Wright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 437–38, 107 S. Ct. 766, 777–78, 93 L. Ed. 2d 781, 797 (1987) (O'Connor, J., dissenting) (emphasis in original) [*Wright superseded by statute* as stated in McDowell v. Philadelphia Hous. Auth., 2005 U.S. App. LEXIS 19711 (3d Cir. 2005)]). *See also* Bonano v. East Caribbean Airline Corp., 365 F.3d 81, 83–84 (1st Cir. 2004) (holding that the Federal Aviation Act and regulations thereunder (14 C.F.R. §§ 380.12, 380.32(f) & (k), 380.34), in particular 14 C.F.R. § 380.4) conferred no private right of action as the Act was regulatory in nature and that private rights of action are rarely implied if a statute's core function is to furnish directives to a federal agency).

causes of action allowable under the Act";[210] however, to seek such relief, "a plaintiff must assert the violation of a federal right, not merely a violation of federal law."[211] Furthermore, "[t]he fact that Congress included in section 602 so detailed an enforcement scheme strongly suggests that it did not intend to permit, in the alternative, private lawsuits to enforce section 602."[212] Finally, the Supreme Court held in *Seminole Tribe of Florida v. Florida*[213] that no relief under § 1983 was available under the *Ex parte Young* doctrine "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right…."[214] Those cases decided since *Alexander v. Sandoval* suggest that it is debatable whether a § 1983 suit alleging a violation of disparate-impact regulations would succeed.[215] As one commentator has stated:

> [W]hile private suits may be brought under Title VI and § 1983 for intentional discrimination, the Supreme Court has eliminated Title VI and its implementing regulations as the means by which private redress may be sought for government action alleged to have a disparate impact on minority groups. Section 1983 remains an option for private parties seeking relief from such action, but the future viability of these suits is questionable, given the current composition of the Supreme Court.[216]

The foregoing author agrees that previous Supreme Court decisions foreclose the potential for private suits relying solely on a violation of Section 602. However, the inability to bring a private action based on Section 602 does not foreclose using disparate impact to help meet the burden of proof required for showing a violation of a constitutionally-protected right asserted in a § 1983 action.[217]

IX. WHETHER STATE OR MUNICIPAL TRANSIT AGENCIES HAVE IMMUNITY FROM CLAIMS UNDER § 1983

A. State Transit Agencies' Immunity Under the Eleventh Amendment

As seen, Section 601 of Title VI proscribes only intentional discrimination; neither Section 602 nor the regulations promulgated thereunder create a private right of action for disparate impact. Section 1983, moreover, is not an independent basis for an action to enforce a federal statute that does not have rights-creating language.[218] In any case, states and their agencies have immunity under the Eleventh Amendment and, thus, are not amenable to suit under § 1983.[219] As explained in *Beach v. Minnesota*,[220] the Supreme Court has interpreted the Eleventh Amendment as barring individual citizens from suing states in federal court, including their own state.[221]

Under § 1983, "[e]very person" is potentially liable. Although municipalities, as explained herein, are persons within the meaning of § 1983,[222] a state or state agency is not a person under § 1983[223] and may not be sued under § 1983 in a state or federal court;[224] nor is a state official sued in his or her official capacity a person

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[210] 14A C.J.S. *Civil Rights*, § 228 (*citing* Rossiter v. Benoit, 162 Cal. Rptr. 65, 88 Cal. 3d 706 (1979) (claimant sued for mental distress for an arrest for public drunkenness)).

[211] Blessing v. Freestone, 520 U.S. 329, 340, 117 S. Ct. 1353, 1359, 137 L. Ed. 2d 569, 582 (1997) (emphasis in original) (citation omitted).

[212] Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1246 (2000).

[213] 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

[214] 517 U.S. at 74, 116 S. Ct. at 1132, 134 L. Ed. 2d at 278. Moreover, "[e]ven before *Seminole*, it was clear that no § 1983 claim (based on a federal constitutional violation or an "and laws" claim based on violation of a federal statute) lies in any forum against a state in its own name." HAROLD S. LEWIS & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE (2d ed. 2004), § 10.35, at 630 (*citing* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989)).

[215] Of course as noted earlier (see pp. 18–24 herein), disparate impact may provide evidence to support a claim of intentional discrimination.

[216] BAIDA, *supra* note 5, at 18.

[217] *See* discussion, *infra*, in § VIII.B of Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002), *cert. denied*, 539 U.S. 926, 123 S. Ct. 2574, 156 L. Ed. 2d 603 (2003) and The Comm. Concerning Cmty. Improvement v. City of Modesto, 2007 U.S. Dist. LEXIS 39000 (E.D. Cal. 2007, *later proceedings* at 2007 U.S. Dist. LEXIS 50258 (E.D. Cal., July 2, 2007) and 2007 U.S. Dist. LEXIS 57551 (E.D. Cal., July 30, 2007), *summary judgment granted, claim dismissed* 2007 U.S. Dist. LEXIS 61195 (E.D. Cal. Aug. 20, 2007).

[218] *See*, however, discussion in § IX.D, *infra*, of a municipal transit agency's official policy or custom as a basis for liability under § 1983.

[219] *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); Toledo, Peoria & Western R. Co., v. State of Ill., Dep't of Transp., 744 F.2d 1296 (7th Cir. 1984), *cert. denied,* 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985); Manning v. S.C. Dep't of Highway and Pub. Transp., 914 F.2d 44 (4th Cir. 1990); Vickroy v. Wis. Dep't of Transp., 2003 U.S. App. LEXIS 15448; Coger v. Connecticut, 309 F. Supp. 2d 274, 281 (D. Conn. 2004), *aff'd,* Coger v. State Dep't of Pub. Safety, 2005 U.S. App. LEXIS 15802 (2d Cir. 2005); Fidtler v. Pa. Dep't of Corr., 55 Fed. Appx. 33 (3d Cir. 2002).

[220] 2003 U.S. Dist. LEXIS 10856 (D. Minn. 2003).

[221] 2003 U.S. Dist. LEXIS 10856 at *6–7 (*citing* Hans v. Louisiana, 134 U.S. 1, 10, 10 S. Ct. 504, 505, 33 L. Ed. 842 (1890); Murphy v. State of Arkansas, 127 F.3d 750, 754 (8th Cir. 1997)).

[222] Monell v. N.Y. City Dep't of Social Services, 436 U.S. 658, 688–90, 98 S. Ct. 2018, 2034–35, 56 L. Ed. 2d 611, 634–35 (1978).

[223] A state transportation department is not a person subject to suit under § 1983. Vickroy v. Wis. Dep't of Transp., 73 Fed. Appx. 172, 173 (7th Cir. 2003); Jimenez v. New Jersey, 245 F. Supp. 2d 584, 586 n.2 (D. N.J. 2003); Manning v. S.C. Dep't of Highways and Pub. Transp., 914 F.2d 44, 48 (4th Cir. 1990); Will v. Mich. Dep't of State Police, 491 U.S. 58, 65–66, 109 S. Ct. 2304, 2309, 105 L. Ed. 2d 45 (1989).

[224] Nichols v. Domley, 266 F. Supp. 2d 1310, 1313 (D. N.M. 2003).

under § 1983.[225] Although § 1983 does not restrict a state's Eleventh Amendment immunity,[226] there are two exceptions. First, a state may be sued where Congress enacts legislation pursuant to Section 5 of the Fourteenth Amendment unequivocally expressing its intent to abrogate the states' Eleventh Amendment immunity.[227] Second, a state may consent to suit in federal court.[228]

Thus, the enactment of § 1983 creating a cause of action for deprivation of civil rights under color of state law did not abrogate the states' sovereign immunity under the Eleventh Amendment to the U.S. Constitution.[229] The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The amendment protects an unconsenting state and state agencies but not units of local government from claims for damages and actions brought by private parties in federal courts.[230]

In *Alden v. Maine*,[231] the Supreme Court held in a case involving the Fair Labor Standards Act[232] that Congress did not have the power to subject a nonconsenting state to private suits for damages in the state's own courts. In regard to § 1983, the Supreme Court in *Will v. Michigan Department of State Police*[233] also held that states are not within the statute's category of possible defendants and are not subject to suit.

> Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. *The Eleventh Amendment bars such suits unless the State has waived its immunity*, *Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 472–473 (1987) (plurality opinion), *or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity*. That Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal–state balance in that respect was made clear in our decision in *Quern*. Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, *we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983*.[234]

Although state officials may be sued in their individual capacities for damages under § 1983 for depriving citizens of their federal constitutional and federal statutory rights, a state transportation department is not subject to suit under § 1983.[235] For example, in *Manning v. South Carolina Department of Highway and Public Transportation*,[236] the plaintiff alleged that the department and certain officials thereof in the course of condemning the plaintiff's property violated the plaintiff's constitutional rights of due process.[237] The court held that neither the department nor its officials acting in their official capacities were persons amenable to suit under § 1983.[238] Similarly, in *Vickroy v. Wisconsin Department of Transportation*, the plaintiffs, who were injured in an automobile accident, argued "that the Department violated their constitutional rights to travel…by causing or permitting road designs that lead

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[225] Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997). *See* BAIDA, *supra* note 6.

[226] Beach v. Minnesota, 2003 U.S. Dist. LEXIS 10856 at *8 (*citing* Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979)); *see* Williams v. State of Missouri, 973 F.2d 599, 600 (8th Cir. 1992).

[227] *Beach*, 2003 U.S. Dist. LEXIS 10856 at *7 (*citing* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 907, 79 L. Ed. 2d 67, 77–78 (1984) [*superseded by statute* as stated in Raygor v. Univ. of Minn., 604 N.W.2d 128 (Minn. Ct. App. 2000)]; Egerdahl v. Hibbing Cmty. College, 72 F.3d 615, 619 (8th Cir. 1995)).

[228] *Beach,* 2003 U.S. Dist. LEXIS 10856 at *8 (*citing* Clark v. Barnard, 108 U.S. 436, 2 S. Ct. 878, 27 L. Ed. 780 (1883)).

[229] Quern v. Jordan*,* 440 U.S. 332, 345, 99 S. Ct. 1139, 1147, 59 L. Ed. 2d 358, 369 (1979); *In re* Secretary of Dep't of Crime Control and Pub. Safety*,* 7 F.3d 1140, 1145 (4th Cir. 1993), *cert. denied*, 511 U.S. 1109, 114 S. Ct. 2106, 128 L. Ed. 2d 667 (1994).

[230] 440 U.S. at 338, 99 S. Ct. at 1143–44, 59 L. Ed. 2d at 365 (1979) ("This suit is brought by Illinois citizens against Illinois officials. In that circumstance, Illinois may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States." *Id.* at 349, 99 S. Ct. at 1149, 59 L. Ed. 2d at 372 (Justice Brennan, concurring opinion).

[231] 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). The Court explained that

> [t]he Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. 11. We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for *the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.…*

Id. at 712–713, 119 S. Ct. at 2246, 144 L. Ed. 2d at 652 (emphasis supplied).

[232] 29 U.S.C. § 201, *et seq*.

[233] 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

[234] 491 U.S. 58, 66, 109 S. Ct. 2304, 2311, 105 L. Ed. 2d 45, 50 (1989) (emphasis supplied).

[235] Vickroy v. Wis. Dep't of Transp., 73 Fed. Appx. 172 (7th Cir. 2003) (Unreported), *cert. denied,* 540 U.S. 1107, 124 S. Ct. 1061, 157 L. Ed. 2d 892 (2004).

[236] 914 F.2d 44 (4th Cir. 1990).

[237] 914 F.2d at 46–47.

[238] *Id.* at 46–48 (emphasis supplied).

to accidents."[239] The court, while also agreeing that the plaintiffs' claim was frivolous, held that there was an "antecedent" problem in that the department was a unit of state government and thus not a person amenable to suit under § 1983.[240]

As explained in *Toledo, Peoria & Western Railroad Co. v. State of Illinois, Department of Transportation*,[241] such an action lacks federal jurisdiction. In the *Toledo, Peoria & Western Railroad Co.* case, the transportation department and its officials appealed a mandatory injunction that had directed them to restore to the company "all possessory rights as the fee simple owner of a plot of land…."[242] The action was dismissed against the department because a state agency is not a 'person' within the meaning of the Civil Rights Act.[243]

It does not appear that recently there have been many attempted § 1983 actions against transportation agencies and their officials. As stated, such actions have been dismissed because of the states' immunity under the Eleventh Amendment. For instance, in *Gregory v. South Carolina Department of Transportation*,[244] the plaintiff and property owner "claim[ed] that the state defendants targeted him and his neighborhood for a systematic undervaluation appraisal because of his race" in connection with the state's use of eminent domain to acquire property for a specific bridge project.[245] The court ruled that the claim was barred by the Eleventh Amendment.

> The practical effect of the Eleventh Amendment in modern Supreme Court jurisprudence is that "nonconsenting States may not be sued by private individuals in federal court." In order for Congress to abrogate the states' sovereign immunity as granted by the Eleventh Amendment, Congress must 1) intend to do so unequivocally and 2) act under a valid grant of constitutional authority….
>
> Plaintiff's suit against the South Carolina Department of Transportation is barred by the Eleventh Amendment. The Fourth Circuit has recognized that the South Carolina State Highway Department ("SCSHD") was protected by the Eleventh Amendment and thus was not amenable to suit unless Congress abrogated its rights under existing law. The South Carolina Department of Transportation ("SCDOT") replaced the SCSHD for all practical purposes as of 1993. *See* S.C. Code Ann. § 57-3-10 (2002) (the notes following state, "The 1993 amendment established the structure of the Department of Transportation, in place of former provisions establishing the Department of Highways and Public Transportation, pursuant to a restructuring of the Department").[246]

The court further noted that "a general jurisdictional grant does not suffice to show [that] Congress abrogated a state's Eleventh Amendment rights…."[247]

As explained also in *Beach v. Minnesota*,[248] the Supreme Court has interpreted the Eleventh Amendment as barring individual citizens from suing states in federal court, including their own state.[249] Although the Eleventh Amendment refers to suits by persons not citizens of the state, the amendment has been interpreted to mean that it applies to suits by all persons against a state in a federal court.[250] As an example, a § 1983 claim brought by a terminated administrative law judge for a state's motor vehicle department against the department was barred by the Eleventh Amendment, because the department was a state agency.[251]

Thus, sovereign immunity will defeat a claim brought under § 1983. States, however, retain no sovereign immunity as against the federal government.[252] A plaintiff may bring a § 1983 action against state officials in their official capacities for prospective, injunctive relief.[253]

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[239] *Vickroy,* 73 Fed. Appx. 172 2003 U.S. App. LEXIS 15448 at *173.

[240] *Id.* at *173–74.

[241] Toledo, Peoria & Western R. Co., v. State of Ill., Dep't of Transp., 744 F.2d 1296 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1751, 84 L. Ed. 2d 815 (1985).

[242] *Id.* at 1297.

[243] *Id.* at 1297. The court observed that

> [t]he Third, Fifth, and Ninth Circuits agree. Ruiz v. Estelle, 679 F.2d 1115, 1137 (5th Cir. 1982) (in enacting section 1983, Congress did not intend to override the traditional immunity of states and state agencies), amended and vacated in part, 688 F.2d 266, cert. denied, 460 U.S. 1042, 103 S. Ct. 1438, 75 L. Ed. 2d 795 (1983); United States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84, 86 & n.2 (3rd Cir. 1969) (rule that local governments are not "persons" (since overruled by Supreme Court) also applies to states), cert. denied, 396 U.S. 1046, 90 S. Ct. 696, 24 L. Ed. 2d 691 (1970); Bennett v. California, 406 F.2d 36, 39 (9th Cir. [1969]) (state's immunity extends to suits under Civil Rights Act), cert. denied, 394 U.S. 966, 22 L. Ed. 2d 568, 89 S. Ct. 1320 (1969). See also Ohio Inns, Inc. v. Nye, 542 F.2d 673, 676, 680–81 (6th Cir. 1976) (state immunity not waived; open question whether state is "person" under section 1983), cert. denied, 430 U.S. 946, 97 S. Ct. 1583, 51 L. Ed. 2d 794 (1977). This section 1983 action against IDOT, a state agency, fails for lack of federal court jurisdiction.
>
> *Id.* at 1298–99.

[244] 289 F. Supp. 2d 721, 723 (2003).

[245] 289 F. Supp. 2d at 723.

[246] *Id.* at 724 (some internal citations omitted).

[247] *Id.* at 725 (*citing* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)). *See also* Paulson v. Carter, 2005 U.S. Dist. LEXIS 10724, at *15–16 (D. Or. 2005), *aff'd*, 134 Appx. 210 (9th Cir. 2005) (affirming the motion and amended motion for preliminary injunction) (holding that the Oregon State Bar and its officials acting in their official capacity were not persons within the meaning of § 1983 (*citing* Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1997)).

[248] 2003 U.S. Dist. LEXIS 10856 (D. Minn. 2003).

[249] *Id.* at *6–7 (*citing* Hans v. Louisiana, 134 U.S. 1, 10, 10 S. Ct. 504, 505, 33 L. Ed. 842 (1890); Murphy v. State of Arkansas, 127 F.3d 750, 754 (8th Cir. 1997)).

[250] *See* Mancuso v. New York State Thruway Auth., 86 F.3d 289, 292 (2d Cir. 1996).

[251] Feingold v. New York, 366 F.3d 138, 149 (2d Cir. 2004).

[252] United States v. Miss. Dep't of Public Safety, 321 F.3d 495, 498 (5th Cir. 2003 (involving the Americans with Disabilities Act)); West Virginia v. United States, 479 U.S. 305, 312 n.4, 107 S. Ct. 702, 707 n.4, 93 L. Ed. 2d 639, 647 n.4 (1987).

[253] Heartland Academic Cmty. Church v. Waddle, 427 F.3d 525, 530 (8th Cir. 2005) (holding that

B. Factors Considered in Determining Whether a Transit Authority Has Immunity Under the Eleventh Amendment

With respect to immunity under the Eleventh Amendment, another issue may be whether a transportation authority, organized as a public corporation, qualifies as a state entity.[254]

In *Mancuso v. New York State Thruway Authority*,[255] the Second Circuit identified six factors for determining a public corporation's status: 1) how the entity is referred to in the documents that created it; 2) how the governing members of the entity are appointed; 3) how the entity is funded; 4) whether the entity's function is traditionally one of local or state government; 5) whether the state has a veto power over the entity's actions; and 6) whether the entity's obligations are binding upon the state.

In weighing these factors, one of the primary imperatives of the sovereign immunity doctrine is to protect the state's fiscal situation and dignity, but the financial liability of the state is the most salient factor.[256] In *Mancuso*, the New York State Thruway Authority did not have sovereign immunity because New York State would not have been affected financially by an award of damages against the defendant.[257]

> [t]he *Ex Parte Young* doctrine describes an exception to Eleventh Amendment immunity for a state official where the relief sought is prospective and not compensatory…. A federal court may therefore issue an injunction to prevent state officials from violating the Constitution without running afoul of the Eleventh Amendment…. ("Although the juvenile officer may have limited immunity from liability for damages, there is no reason to extend that immunity to liability for equitable relief." (citation omitted))… "An injunction to prevent [a state officer] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Ex Parte Young*, 209 U.S. at 159. We agree with the District Court and hold, as we did summarily in our prior opinion, Heartland I, 335 F.3d at 691, that Eleventh Amendment sovereign immunity is not a bar to suit in this case.)

(some citations omitted).

[254] Esteban & Co. v. Metro. Transp. Auth., 2004 U.S. Dist. LEXIS 3694 (S.D.N.Y. 2004). As seen, the Eleventh Amendment has been interpreted by the Supreme Court as prohibiting suits against any state in federal court unless the state consents to be sued or unless Congress has legislatively overridden state immunity in a valid exercise of its powers. *See United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).

[255] 86 F.3d 289, 293 (2d Cir. 1996). The *Mancuso* court cited Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628, 630–31 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990).

[256] Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002). The Court found that the central purpose of the sovereign immunity doctrine was not to protect states' finances but to "accord the states the respect owed them as joint sovereigns." *Id*. at 765, 122 S. Ct. at 1877, 152 L. Ed. 2d at 981.

[257] Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 296 (2d Cir. 1996) (stating that "the state treasury is not even minimally at risk….").

Based on the analysis in the *Mancuso* decision, the question of whether a transit authority has immunity as an agency of the state depends on the consideration and balancing of various factors, including, for example, whether under state law a transit authority is independent and not within the supervisory authority of the state or one of its agencies;[258] whether state law provides that a transit authority may be held liable in tort for money damages;[259] whether the governor appoints the members of the governing board of a transit authority;[260] whether the state is ultimately responsible for a transit authority's membership;[261] whether a transit authority's mandate is limited to transportation in a single metropolitan area and therefore is essentially regional rather than statewide;[262] whether the state has direct oversight over a transit authority's actions (as opposed to its finances) and may remove its members;[263] whether a finding of liability against a transit authority would affect the state's budget in any way, i.e., whether under state constitutional or statutory provisions the state is liable for obligations incurred by a transit authority established as a public corporation;[264] and whether the state provides a significant percentage of a transit authority's budget.[265]

Finally, in a case in which there was no question that the defendant was a state entity, the U.S. Supreme Court rejected the petitioner's argument that *administrative* proceedings, in contrast to *judicial* proceedings, constitutionally could be initiated against the defendant because administrative proceedings did not present the same fiscal threat to the state.[266]

In sum, a government transit authority may not be entitled to sovereign immunity under the Eleventh Amendment if it is a municipal transit authority or, based on an evaluation of all the relevant factors, if the transit authority is not an agency of the state government.

C. Whether a Municipal Transit Agency Is Subject to Suit Under § 1983

The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such violations of constitutional or statutory rights occur.[267] The reach of § 1983 was expanded

[258] *See id.* at 296.

[259] *See id.* at 296.

[260] *See id.* at 295.

[261] *See id.* at 296.

[262] *See id.* at 295.

[263] *See id.* at 296.

[264] *See id.* at 295.

[265] *See id.* at 296.

[266] *See id.* at 295.

[267] Wyatt v. Cole, 504 U.S. 158, 112 S. Ct. 1827, 73 L. Ed. 2d 396 (1992), *after reversal and remand, aff'd by* 994 F.2d 1113 (5th Cir. 1993), *cert. denied*, 510 U.S. 977, 114 S. Ct. 470, 126 L. Ed. 2d 421 (1993).

in 1961 when the U.S. Supreme Court decided *Monroe v. Pape*[268] and was extended again by the Court's decision in *Monell v. New York*.[269] In *Monroe*, the Court held that the phrase "under color of law" included the misuse of power exercised under state law, even though the persons committing the acts that constituted the deprivation of rights were acting beyond the scope of their authority. The Court expanded the meaning of the phrase under color of law in this way because it believed that § 1983 was intended to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."[270]

In 1978, the Supreme Court, in *Monell v. New York*,[271] overruled *Monroe v. Pape* insofar as the *Monroe* Court held that local governments were immune from suit under § 1983.[272] By virtue of the *Monell* decision, municipal corporations are persons amenable to suit under § 1983. The *Monell* Court did uphold the *Monroe* decision insofar as the *Monroe* Court held that the doctrine of *respondeat superior* is not a basis for holding local governments liable under § 1983 for the constitutional torts of their employees.[273] The *Monell* Court held:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, *it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983*. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court…we must reverse the judgment below. In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day.[274]

In ruling that the Eleventh Amendment is not a bar to municipal liability, the *Monell* Court's holding was limited to "local government units which are not considered part of the state for Eleventh Amendment purposes."[275]

Because governments and agencies may act only through their officials and employees, the inapplicability of the *respondeat superior* doctrine in § 1983 actions requires further explanation. The federal court in *Committee Concerning Community Improvement*, *supra*, explained the law in this manner. First, "counties, cities, and local officers sued in their official capacities cannot be held vicariously liable under Section 1983 for the actions of subordinate officers…."[276]

Second, counties, cities, and local officers sued in their official capacity "may be held liable for constitutional violations where 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopting that official policy is responsible for the deprivation of rights protected by the Constitution.'"[277]

Third, there is § 1983 liability when "'a government that, under color of some official policy, 'causes' an employee to violate another's constitutional right.'"[278]

Thus,

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.[279]

Furthermore, a § 1983 plaintiff "must 'identify those officials or government bodies who speak with final policy-making authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'"[280]

As discussed in the next subsection, § 1983 liability, therefore, may be based on the existence of a custom or practice that violates one's constitutional rights.

D. Municipal Transit Agency's Official Policy or Custom as a Basis for Liability Under § 1983

The *Monell* decision requires that before a municipal defendant such as a transit agency may be held liable for deprivations of civil rights, there must be a showing that the deprivation resulted from a government policy

[268] Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), *overruled in* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), insofar as the Court held in *Monroe* that local governments are immune from suit under § 1983. However, the Court upheld *Monroe* insofar as it held that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees.

[269] Monell v. N.Y. City Dep't of Social Servs., 436 U.S. 658, 694–95, 98 S. Ct. 2018, 2037–38, 56 L. Ed. 2d 611, 638 (1978).

[270] 365 U.S. at 172, 81 S. Ct. at 477, 5 L. Ed. 2d at 498.

[271] 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

[272] 436 U.S. at 663, 98 S. Ct. at 2022, 56 L. Ed. 2d at 619.

[273] 436 U.S. at 663 n.7, 98 S. Ct. at 2022 n.7, 56 L. Ed. 2d at 619 n.7.

[274] 436 U.S. at 694–95, 98 S. Ct. at 2037–38, 56 L. Ed. 2d at 638 (emphasis supplied) (citation omitted).

[275] 436 U.S. at 691 n.54, 98 S. Ct. at 2036 n.54, 56 L. Ed. 2d at 636 n.54. Donnelly v. McLellan, 889 F. Supp. 136, 140 (D. Vt. 1995) (noting that the New York City Transit Authority "has been held to be an agency of the City of New York by a variety of courts and for a broad range of statutory purposes").

[276] Comm. Concerning Cmty. Improvement, 2007 U.S. Dist. LEXIS 50258 at *17–18 (*citing* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); City of Canton v. Harris, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)).

[277] *Id*. at *18 (citation omitted).

[278] *Id*. (citation omitted).

[279] *Id*. (citation omitted).

[280] *Id*. at *19 (citations omitted).

or custom.[281] As the Seventh Circuit recently stated in a § 1983 action, the "actions of a state entity's employees are attributed to the state entity itself if those actions are in furtherance of the entity's 'policy or custom.'"[282] In the pending *Darensburg* case, discussed previously, it may be recalled that the plaintiffs allege that the transit authority has engaged in a "longstanding pattern of race discrimination" and "has historically engaged, and continues to engage, in a policy, pattern or practice of actions and omissions that have the purpose and effect of discriminating against poor transit riders of color in favor of white, suburban transit users, on the basis of their race and national origin."[283]

In *Committee Concerning Community Improvement v. City of Modesto*, *supra*, a federal court granted the motions of Stansilaus County dismissing the plaintiffs' § 1983 and Title VI claims because the required discriminatory intent was not shown; moreover, mere "impact alone is not determinative."[284] Nevertheless, the plaintiffs' claims were founded on the county's adoption of a Priorities List for building infrastructure in the county that the plaintiffs argued was the "official policy, decision or regulation which resulted in constitutional discriminatory injury."[285]

To support a claim "based upon the existence of an official custom or policy," the plaintiff must show that:

1) a policy or custom existed; 2) the governmental policy makers actually or constructively knew of its existence; 3) a constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation. To adequately state such a claim, plaintiffs must also specifically describe how the policy or custom relates to the constitutional violation.[286]

For purposes of municipal liability, "a 'policy' may be established by either a policy or decision adopted by the municipality or a single act of a municipal official with final policymaking authority,"[287] but the custom or practice must be "'so well settled and widespread that the policymaking officials of the municipality [may] be said to have actual or constructive knowledge of it, yet did nothing to end the practice.'"[288] An act performed pursuant to a custom that did not have formal approval of the "appropriate decision-maker" may fairly subject a municipality to liability under § 1983 "'on the theory that the relevant practice is so widespread as to have the force of law.'" [289]

In *Valentine v. City of Chicago*,[290] the Seventh Circuit recently stated:

> Under our case law, unconstitutional policies or customs can take three forms: (1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority.[291]

One federal court has noted that "an isolated incident or a meager history of isolated incidents is insufficient to prove the existence of an official policy or custom."[292] One incident of unconstitutional conduct by a city employee cannot be a basis for finding that there was an agency-wide custom for purposes of the imposition of municipal liability under § 1983.[293] In *City of Oklahoma City v. Tuttle*,[294] the Supreme Court held that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."[295] Although it has been held that evidence of a single incident cannot establish the existence of a policy or custom for purposes of a § 1983 claim,[296] in *McClure, supra,* a district court held that in the Fifth Circuit a municipality may be held liable in a § 1983 action "for even a sin-

[281] Monell v. N.Y. City Dep't of Social Servs., 436 U.S. 658, 694–95, 98 S. Ct. 2018, 2037–38, 56 L. Ed. 2d 611, 638 (1978). *See also* McClure v. Biesenbach*,* 402 F. Supp. 2d 753, 760 (W.D. Tex. 2005) (*citing* Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993) (holding that the plaintiff must set forth a "short and plain statement of the § 1983 claim showing that the pleader is entitled to relief")).

[282] Valentine v. City of Chicago, 452 F.3d at 684 (citation omitted). *See generally* Owen v. City of Independence*,* 446 U.S. 993, 100 S. Ct. 2979, 64 L. Ed. 2d 850 (1980).

[283] *Darensburg*, Amended Complaint ¶ 1.

[284] Comm. Concerning Cmty. Improvement v. City of Modesto*,* 2007 U.S. Dist. LEXIS 57551 at *9, 25.

[285] *See id.* at *13.

[286] McClure v. Biesenbach*,* 402 F. Supp. 2d 753, 760*;* 2005 U.S. Dist. LEXIS 3113 at *18 (emphasis in original) (citations omitted).

[287] Faas v. Washington County, 260 F. Supp. 2d 198, 205–06 (D. Me. 2003) (*citing* St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)).

[288] Faas v. Washington County, 260 F. Supp. 2d 198, 206 (D. Me. 2003) (citation omitted).

[289] M.W. ex rel. T.W. v. Madison County Bd. of Educ.*,* 262 F. Supp. 2d 737, 743 (E.D. Ky. 2003) (citation omitted).

[290] 452 F.3d 670 (7th Cir. 2006) (a sexual harassment case in which Valentine was a female truck driver and sweeper for the city's transportation department who alleged sexual harassment by two supervisors and a co-worker and who eventually filed an action under § 1983, as well as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e).

[291] 452 F.3d at 684 (7th Cir. 2006) (*quoting Rasche v. Vill. of Beecher*, 336 F.3d 588, 597 (7th Cir. 2003)). In *Valentine*, the Seventh Circuit, although reversing and remanding the case to the district court, agreed that the plaintiff had failed "to show that it was the City's policy or custom to condone sexual harassment of women." *Id*. at 685.

[292] Gedrich v. Fairfax County Dep't of Family Servs.*,* 282 F. Supp. 2d 439, 472 (E.D. Va. 2003) (citation omitted).

[293] Davis v. City of New York, 228 F. Supp. 2d 327, 346 (S.D.N.Y. 2002), *aff'd*., 75 Fed. Appx. 827 (2d Cir. 2003).

[294] 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985).

[295] 471 U.S. at 823–24, 105 S. Ct. at 2436, 85 L. Ed. 2d at 804.

[296] Fultz v. Whittaker, 261 F. Supp. 2d 767 (W.D. Ky. 2003).

gle decision made by its legislative body, even if the decision is singular and not meant as a continuing policy, 'because even a single decision by such a body unquestionably constitutes an act of official government policy.'"[297] On the other hand, it has been held that statements of individual lawmakers are not binding on a city.[298]

For an official to represent government policy, he or she must have final policymaking authority, authority that is lacking when an official's decisions are subject to meaningful administrative review.[299] Whether a particular official has final policymaking authority for the purposes of § 1983 is a question of state law.[300] The court must determine whether the person or entity that made the policy at issue speaks for the government entity being sued. Such an inquiry seeks to determine whether governmental officials are final policymakers for the local government in a particular area or on a particular issue. As stated, the finding is dependent on an analysis of state law.[301]

Finally, although the case arose under 42 U.S.C. § 1981, in *Pryor v. NCAA*,[302] the defendant, a voluntary collegiate athletic association, adopted a policy that raised academic standards for student athletes in their freshmen year. The policy improved graduation rates among black student athletes, but the complaint alleged that the policy's real goal was to "screen out" more black student athletes from ever receiving athletic scholarships in the first place. The court held that the allegations under Title VI and 42 U.S.C.S. § 1981 (requiring intentional discrimination) were sufficient to withstand a motion to dismiss and that Title VI and § 1981 provide a private cause of action for *intentional* discrimination. Thus, the court reversed and remanded a district court's dismissal of the racial discrimination claims that were based on allegations of purposeful discrimination rather than deliberate indifference.

Individuals who are not protected by immunity may be subject to punitive damages. Punitive damages are available "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[303] The standard applicable to common law tort claims is the same for § 1983 actions. In *City of Newport v. Fact Concerts, Inc.*, the Supreme Court was clear that punitive damages could be awarded "against the offending official, based on his personal financial resources…."[304]

As for injunctive relief, "[c]ivil rights actions under section 1983 are exempt from the usual prohibition on federal court injunctions of state court proceedings."[305] Although the Eleventh Amendment bars claims for damages against state agencies and officials acting in their official capacity, the federal courts may enjoin state officials acting in their official capacity as long as the injunction governs only the officer's future conduct and no retroactive remedy is provided; the rule applies also to declaratory judgments.[306] As has been noted, "[s]tate officials acting in their official capacities are Section 1983 'persons' when sued for prospective relief" such as reinstatement as a state employee.[307]

The requirements for an injunction generally are that the movant must show that he or she will suffer irreparable harm if the injunction is not granted; that the movant would probably prevail on the merits; that the state would not be harmed by the injunction more than the movant would be helped by it; and that the granting of the injunction would be in the public interest. Alternatively, the movant must show either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions have been raised and that the balance of hardships tips sharply in the movant's favor.[308]

X. CONCLUSION

Decisions affecting minority riders must be made in compliance with Title VI of the Civil Rights Act of 1964. Federal programs may not exclude, deny benefits to, or subject any person to discrimination on the ground of race, color, or national origin. Since the 1997 TCRP Report, however, the U.S. Supreme Court has made it clear that in suits predicated on Title VI, individuals may sue *only* for *intentional discrimination* under Section 601 of Title VI.

[297] 2005 U.S. Dist. LEXIS 3113 at *20 (citation omitted).

[298] *Id.* at *25.

[299] Caruso v. City of Cocoa, Fla., 260 F. Supp. 2d 1191, 1203 (M.D. Fla. 2003). *See also* Stewart v. Bd. of Commr's for Shawnee County, Kan., 320 F. Supp. 2d 1143 (D. Kan. 2004) (holding that county department heads did not exercise final policymaking authority); Pino v. City of Miami, 315 F. Supp. 2d 1230 (S.D. Fla. 2004) (holding that § 1983 action failed where city manager had not ratified decision to transfer police officer).

[300] McMillan v. Monroe County, Ala., 520 U.S. 781, 786, 117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1, 8 (1997).

[301] McClure v. Houston County, 306 F. Supp. 2d 1160 (M.D. Ala. 2003) (held that sheriff was not policymaker for county; thus, county had immunity to claims based on sheriff's alleged failure to train or supervise).

[302] 288 F.3d 548 (3d Cir. 2002), *class certification denied*, 2004 U.S. Dist. LEXIS 10214 (E.D. Pa. Mar. 4, 2004).

[303] Smith v. Wade, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632, 652 (1983).

[304] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269, 101 S. Ct. 2748, 2761, 69 L. Ed. 2d 616, 633 (1981).

[305] Schroll v. Plunkett, 760 F. Supp. 1385, 1389 (D. Or. 1991).

[306] Ippolito v. Meisel, 958 F. Supp. 155, 161 (S.D.N.Y. 1997). *See also* Mercer v. Brunt, 272 F. Supp. 2d 181 (D. Conn. 2002).

[307] Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997) (holding that the § 1983 claim of a state employee who alleged that he was wrongfully terminated by the state's Employment Security Department on account of his race and age was not barred because he sought equitable relief, such as reinstatement as a state employee).

[308] Remlinger v. State of Nevada, 896 F. Supp. 1012, 1014–15 (D. Nev. 1995).

Federal agencies empowered to extend financial assistance to transit systems are authorized by Section 602 of Title VI to issue regulations requiring compliance with Title VI by recipients of federal funding. In addition, as of April 13, 2007, the FTA has implemented a new Title VI Circular, one objective of which is to ensure that the level and quality of transportation service is provided without regard to race, color, or national origin. As discussed in the report, because the Supreme Court has held that there is no private right of action to enforce disparate-impact regulations issued pursuant to Section 602 of Title VI, administrative enforcement of Section 602 is the only remedy for disparate-impact violations.

The survey of transit providers conducted for this Report and the files provided by FTA on Title VI complaints relating to issues of allocation of funds between bus and rail show that there have not been many Title VI complaints in the past 10 years. Moreover, since the filing of four challenges in 2001, it appears that there has been a decline in the number of Title VI complaints alleging disparate impact under Section 602 on matters relevant to this report. As discussed in the report, the outcomes of Title VI complaints generally have been favorable to transit providers.

Section 1983 of Title 42 of the U.S.C. is not, standing alone, a basis for a civil rights claim. For there to be a § 1983 action against a transit provider regarding an issue related to the allocation of funds between bus and rail, the plaintiff would have to allege intentional discrimination under Section 601 of the Civil Rights Act of 1964 or a violation of the Equal Protection Clause of the Fourteenth Amendment, or allege a violation of constitutional rights arising out of an official municipal transit agency policy, custom, or practice.[309] As for § 1983 claims against states and their agencies and their officials sued in their official capacity, all have immunity under the Eleventh Amendment and, thus, are not amenable to suit under § 1983. A state official, however, may be sued in his or her individual or personal capacity for damages under § 1983 for depriving a citizen of his or her federal constitutional or statutory rights. An officer or employee of a state also may be subject to prospective injunctive relief.

By virtue of the *Monell* decision, municipal corporations are persons amenable to suit under § 1983. Thus, a municipal transit authority or other transit provider not deemed to be an agency of the state government does not have immunity from § 1983 actions.[310] The doctrine of *respondeat superior* is not a basis for holding a municipal transit provider liable under § 1983 for a constitutional violation by an employee. Rather, it is when the execution of a government's official policy, custom, or practice, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts a constitutional injury that the government as an entity is responsible under § 1983.

Section 1983 liability, thus, may be based on the existence of an official policy, custom, or practice that violates one's constitutional rights. Thus, before a municipal defendant such as a transit agency may be held liable for deprivations of civil rights, there must be a showing that the deprivation resulted from an official policy, custom, or practice. As seen in the discussion of the pending *Darensburg* case, the plaintiffs are alleging that the transit authority in that case has engaged in a longstanding pattern of race discrimination with respect to the allocation of funds between bus and rail transit and has purposefully discriminated against minority groups because of their race and national origin.

[309] Once more, however, one may note that the Tenth Circuit stated that the *Sandoval* decision does not bar all claims to enforce disparate-impact regulations but only disparate-impact claims brought by private parties directly under Title VI. Furthermore, according to the court, the *Sandoval* decision did not foreclose disparate-impact claims brought against state officials for prospective injunctive relief through a § 1983 action to enforce § 602 regulations. *See* Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002) (interlocutory appeal affirming district court's denial of defendants' motion to dismiss), *cert. denied*, 539 U.S. 926, 123 S. Ct. 2574, 156 L. Ed. 2d 603 (2003). Also, as pointed out in the discussion of The Comm. Concerning Cmty. Improvement v. City of Modesto, 2007 U.S. Dist. LEXIS 39099, at *23 (E. D. Cal. 2007) (with later proceedings as discussed in this report), the court stated that "[o]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination'" claim.

[310] The question of whether a transit authority organized as a public corporation has immunity as an agency of the state depends on the consideration and balancing of various factors, as discussed in the report.

APPENDIX A: QUESTIONNAIRE

TCRP J-5, Study Topic 9-04
Civil Rights Implications of the Allocation of Funds
Between Bus and Rail

Questionnaire

The Transportation Research Board has retained a consultant to do a study with the goal of ascertaining the extent to which there have been title VI or other discriminatory charges filed against your agency when the agency allocates funds between Bus and Rail, or seeks bus and/or rail fare increases.

The purpose of this survey is to collect information from transit systems, companies and other institutions involved in the transit industry to catalogue the legal issues presented and the resolution of these issues.

---

1. Please provide the name and address of your agency or firm.

_____
_____
_____

2. Please provide the name, telephone number and email address of an appropriate contact person who is primarily responsible for legal or finance matters for your agency or firm.

Name: _____
Telephone: _____
Email: _____

3. Have any complaints or opposition to fare increase, fees etc, capital outlay been based on discriminatory treatment in the allocation of funds between bus and rail, or based on neighborhood served?

Yes _____ No_____

4. What is the number of Title VI administrative complaints during the period 1997 – 2006 and how many involved fare increases and/or the allocation of fund between bus and rail and between neighborhoods?

1997 ____	1998 ____	1999 ____
2000____	2001____	2002 ____
2003 ____	2004 ____	2005 ____
2006 ____		

5. Please provide the following information for any administrative complaints: the nature of the complaints (2), resolution of the challenges(s), and/or actions(s) taken in response thereto (a copy of the resolution document will suffice).

_____
_____
_____
_____

6. Does the agency have an annual or other report on Title VI complaints? Yes _____ No _____ If so, please provide a copy.

7. What information does the agency make available to the public regarding Title VI administration complaints or challenges?

_____
_____
_____
_____

8. Does the agency have a website where such information is made available? Yes____ No____
If so, please provide the address of the website.

9. Have there been any attempted judicial actions against the agency of a Title VI nature in the past ten years? Yes___ No ___ If so, please provide the name of the case, civil action number and date filed, and, if possible, a copy of relevant pleadings such as the complaint, motions(s), decision, etc. If there is no written decision describing the outcome of the case, please provide information regarding the disposition of the matter(s) identified.

10. What are the defenses your agency has adopted in responding to or in dealing with such Title VI disparate impact challenges? _____

Please mail, fax or email completed surveys no later than November 30, 2006 to:

James B. McDaniel
Counsel for Legal Research Projects
Transportation Research Board
500 5th Street, NW, 4th Floor
Washington, DC 20001
(202) 334-3209; (202) 334-2003 (Fax)
jmcdaniel@nas.edu

APPENDIX B: LIST OF RESPONDENTS

Albuquerque Transit Department
Albuquerque, New Mexico

Ann Arbor Transportation Authority
Ann Arbor, Michigan

Asheville Transit System
Asheville, North Carolina

Bloomington-Normal Public Transit System
Bloomington, Illinois

City of Phoenix Public Transit Department
Phoenix, Arizona

Decatur Public Transit System
Decatur, Illinois

Fort Collins Tranpfort
Fort Collins, Colorado

Gary Public Transportation Corporation
Gary, Indiana

Greater Portland Transit District
Portland, Maine

Knoxville Area Transit
Knoxville, Tennessee

La Crosse Municipal Transit Utility
La Crosse, Wisconsin

Lakeland Area Mass Transit District
Lakeland, Florida

Livermore-Amador Valley Transit Authority
Livermore, California

Metropolitan Atlanta Rapid Transit Authority
Atlanta, Georgia

Metropolitan Transportation Authority
New York, New York

Monterey-Salinas Transit
Monterey, California

Mountain Line
Missoula, Montana

Niagara Frontier Transportation Authority
Buffalo, New York

Ohio Valley Regional Transportation Authority and
Eastern Ohio Regional Transit Authority

Wheeling, West Virginia

Omnitrans
San Bernardino, California

Pine Bluff Transit
Pine Bluff, Arkansas

Regional Transportation District
Denver, Colorado

Santa Clara Valley Transportation Authority
San Jose, California

Southeastern Pennsylvania Transportation Authority
Philadelphia, Pennsylvania

Space Coast Area Transit
Cocoa, Florida

Spokane Transit Authority
Spokane, Washington

StarTran
Lincoln, Nebraska

The Greater Attleboro Taunton Regional Transit Authority
Taunton, Massachusetts

The University of Iowa-Cambus
Iowa City, Iowa

Transit Authority of River City
Louisville, Kentucky

Waukesha Metro Transit
Waukesha, Wisconsin

ACKNOWLEDGMENTS

This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by **Robin M. Reitzes**, San Francisco City Attorney's Office, San Francisco, California. Members are **Rolf G. Asphaug**, Denver Regional Transportation District, Denver, Colorado; **Darrell Brown**, Transit Management of Southeast Louisiana, Inc., RTA New Orleans, New Orleans, Louisiana; **Dorval Ronald Carter, Jr**., Chicago Transit Authority, Chicago, Illinois; **Dennis C. Gardner**, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; **Clark Jordan-Holmes**, Joyner & Jordan-Holmes, P.A., Tampa, Florida; **Sheryl King Benford**, Greater Cleveland Regional Transit Authority, Cleveland, Ohio; and **Alan S. Max**, City of Phoenix Public Transit Department, Phoenix, Arizona. **Rita M. Maristch** provides liaison with the Federal Transit Administration, and **James P. LaRusch** serves as liaison with the American Public Transportation Association. **Gwen Chisholm Smith** represents the TCRP staff.

These digests are issued in order to increase awareness of research results emanating from projects in the Cooperative Research Programs (CRP). Persons wanting to pursue the project subject matter in greater depth should contact the CRP Staff, Transportation Research Board of the National Academies, 500 Fifth Street, NW, Washington, DC 20001.

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