



## Reductions in Transit Service or Increases in Fares: Civil Rights, ADA, Regulatory, and Environmental Justice Implications

### DETAILS

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## TRANSIT COOPERATIVE RESEARCH PROGRAM

Sponsored by the Federal Transit Administration

Responsible Senior Program Officer: Gwen Chisholm Smith

# Legal Research Digest 35

## REDUCTIONS IN TRANSIT SERVICE OR INCREASES IN FARES: CIVIL RIGHTS, ADA, REGULATORY, AND ENVIRONMENTAL JUSTICE IMPLICATIONS

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. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

### The Problem and Its Solution

The nation's 6,000 plus 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 business. Some transit programs involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The *Legal Research Digests* (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

### Applications

State and local governments and other publicly supported agencies are increasingly reviewing their oper-

ations to accommodate budget shortfalls. In this context, transit agencies are reviewing staffing, programs, and the nature and extent of the services they provide. Often, the only option is to reduce services and/or staff. Such restrictions in service or fare increases are likely to adversely affect those who are most dependent on transit. Statutes, regulations, and a Presidential Executive Order demand that those cutbacks don't disproportionately adversely affect minority, disabled, and low-income populations.

*TCRP Legal Research Digest 7: The Impact of Civil Rights Litigation Under Title VI and Related Laws on Transit Decision Making* (1997) identified and analyzed the applicable Title VI and other civil rights requirements when providing transit services. This digest also looks at the Americans with Disabilities Act (ADA) and environmental justice when dealing with reductions in transit service or increases in fares.

"Environmental justice" is a term associated with the elimination of "unfair and inequitable conditions." One modal administration of the U.S. Department of Transportation has described three fundamental environmental justice principles: 1) to avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority and low-income populations; 2) to ensure the full and fair participation by all potentially affected communities in the transportation decision-making process; and 3) to prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations.

This digest considers transit agencies' compliance with constitutional requirements, Title VI of the Civil Rights Act of 1964, and the ADA.

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## REDUCTIONS IN TRANSIT SERVICE OR INCREASES IN FARES: CIVIL RIGHTS, ADA, REGULATORY, AND ENVIRONMENTAL JUSTICE IMPLICATIONS

by Larry W. Thomas, Attorney-at-Law

### I. INTRODUCTION

Congress has concluded that “[r]apid urbanization and continuing dispersal of the population and activities in urban areas have made the ability of all citizens to move quickly and at a reasonable cost an urgent problem of the Government.”<sup>1</sup> However, because of the increase in demands on transit agencies, budget constraints, and other reasons, transit agencies may have to review their services and staffing. Indeed, in the past 10 years, as indicated by responses by 64 transit agencies to a survey conducted for this digest, 62 of the agencies have had to reduce service, increase fares, or both.<sup>2</sup> (The survey form and list of responding agencies are contained in Appendix A and Appendix B, respectively.) Reductions in service or increases in fares may affect adversely those who are the most dependent on mass transit for their transportation needs.

The digest addresses the legal implications of reductions in transit service or increases in fares in the context of environmental justice. Environmental justice is a term associated with the elimination of “unfair and inequitable conditions.”<sup>3</sup> One objective of environmental justice is to assure that transportation policies avoid or mitigate negative effects on “particular communities” and ensure “that disadvantaged groups receive their fair share of benefits.”<sup>4</sup>

According to the United States Environmental Protection Agency (EPA),

[E]nvironmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and

equal access to the decision-making process to have a healthy environment in which to live, learn, and work.<sup>5</sup>

The Federal Highway Administration states that there are three fundamental environmental justice principles:

- To avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations.
- To ensure the full and fair participation by all potentially affected communities in the transportation decision-making process.
- To prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations.<sup>6</sup>

In light of the principles of environmental justice, this digest analyzes constitutional and statutory provisions and regulations in regard to transit agencies’ compliance with Title VI of the Civil Rights Act of 1964 (Title VI) and the Americans with Disabilities Act (ADA). Of course, there is a clear distinction between Title VI, which prohibits discrimination against minorities,<sup>7</sup> and the ADA, which prohibits discrimination against persons with disabilities. Persons with disabilities are not automatically protected by Title VI because of their disability.

As discussed in the digest, individuals may sue under Section 601 of Title VI only for intentional discrimination. In the absence of direct proof of disparate treatment, statistical evidence along with other evidence, such as the factors described by the United States Supreme Court in *Village of Arlington Heights v.*

<sup>5</sup> United States Environmental Protection Agency, Environmental Justice, available at <http://www.epa.gov/environmentaljustice/> (Last visited on Sept. 3, 2010).

<sup>6</sup> United States Department of Transportation, Federal Highway Administration, Federal Transit Administration, available at <http://www.fhwa.dot.gov/environment/ej2000.htm>, last accessed on Sept. 3, 2010.

<sup>7</sup> As explained in the digest, federal policies and activities resulting in disparate impact on low-income populations must be considered and prevented or mitigated in much the same way as disparate impact on minorities. See discussion, *infra*, in pt. I.F of the digest.

<sup>1</sup> 49 U.S.C. § 5301(c) (2009).

<sup>2</sup> Only one agency responded that it had not done so. One agency did not respond to the question.

<sup>3</sup> Sean B. Seymore, *Set the Captives Free!: Transit Inequity in Urban Centers, and the Laws and Policies, which Aggravate the Disparity*, 16 GEO. MASON U. CIV. RTS. L.J. 57, 62 (2005).

<sup>4</sup> *Id.*

*Metropolitan Housing Development Corp.*,<sup>8</sup> may be considered in determining whether there is evidence of intent to discriminate. However, in 2009 in *Darensburg v. Metropolitan Transportation Commission*<sup>9</sup> and in *Committee Concerning Community Improvement v. City of Modesto*,<sup>10</sup> the plaintiffs were unsuccessful in bringing a claim under Section 601 and also were unable to prove disparate impact under California law, which, unlike federal law, permits a private right of action under the California statute and regulations for disparate impact.

Section 602 of Title VI is applicable to discrimination resulting from policies and actions that have disparate impact on minorities. Federal agencies are authorized to implement Title VI's provisions through regulations requiring compliance with Title VI by recipients of federal funding. The regulations issued pursuant to Section 602 are implicated when a recipient of federal funding uses a neutral procedure or practice that has a disparate impact on protected individuals that lacks a substantial legitimate justification. There is no private right of action to enforce federal, disparate-impact regulations issued pursuant to Section 602 of Title VI. As discussed in Section V of the digest, under federal law the sole remedy for a claim of disparate impact is for an aggrieved party to file an administrative complaint pursuant to U.S. Department of Transportation (USDOT) regulations and procedures.

Furthermore, the majority view is that a Section 602 disparate impact claim may not be brought under 42 United States Code (U.S.C.) § 1983. Moreover, the Eleventh Amendment bars § 1983 claims against the states and state agencies. However, the Eleventh Amendment does not bar a Section 601 disparate-treatment, intentional-discrimination claim; the reason is that Congress has conditioned the receipt of federal funds on compliance with Title VI and on a waiver of sovereign immunity from claims arising under Title VI.

Every application for federal financial assistance to carry out a program to which Title VI applies must submit assurances that the recipient will comply with Title VI. A transit agency's reduction in service or increase in fares that disproportionately affects minority and limited-English-proficient (LEP) communities are examples of actions with potentially disparate impact. As discussed in the digest, a recipient may implement a service reduction or a fare increase that would have disproportionately high and adverse effects if the recipient is able to demonstrate that the action meets a substantial need that is in the public interest and that alternatives would have more severe adverse effects than the preferred alternative.

The ADA, Title II, Part B, is applicable to public transportation services and includes essentially all

forms of transportation services that state and local governments provide, such as motor vehicle and intercity or commuter rail services. Not included under Title II, Part B, are transportation services by private entities, which are covered under Title III. The USDOT issued regulations in 1991 that address a wide variety of issues not dealt with directly by the ADA, as well as guidelines interpreting the regulations. The regulations are applicable to entities providing transportation services regardless of whether the entities receive financial assistance from the USDOT.

The entities that must adhere to the USDOT's regulations include 1) a public entity that provides designated public transportation or intercity or commuter rail transportation, 2) any private entity that provides specified public transportation, and 3) any private entity not primarily engaged in transportation but that operates a demand-responsive or fixed-route system. Entities that receive federal financial assistance from the USDOT must comply with regulations relating to transportation services for individuals with disabilities as a condition of their compliance with Section 504 of the Rehabilitation Act of 1973.

Finally, the transit agencies' practices in regard to Title VI and the effect of a reduction in service or an increase in fares on low-income populations, as well as outreach to include LEP persons, appear to embrace many of the practices covered, for example, by the 2007 Federal Transit Administration (FTA) Title VI Circular, entitled *Title VI and Title VI-Dependent Guidelines for Federal Transit Administration Recipients*, and the USDOT's *Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient Persons*, both of which are discussed, *infra*, in Sections II.E and II.G, respectively, of the digest. In any case, only three transit agencies responding to the survey reported Title VI complaints in the past 10 years having been filed with the FTA, two of which were pending at the time of this digest. In the other case reported by a transit agency, the FTA determined there were no Title VI violations. In addition, a Title VI complaint in September 2009 involving the Oakland Airport Connector Project and the FTA's denial in February 2010 of requested funding from federal economic stimulus funds are discussed, *infra*, in Section II.I of the digest. As for the ADA, only four transit agencies reported having had complaints, only one of which was pending at the time of this digest, the others having been resolved.

<sup>8</sup> 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (*superseded by statute as stated in* Chapman v. Nicholson, 579 F. Supp. 1504 (Ala. 1984)).

<sup>9</sup> 611 F. Supp. 2d 994 (N.D. Cal. 2009).

<sup>10</sup> 583 F.3d 690 (9th Cir. 2009).

## II. CIVIL RIGHTS ISSUES ARISING UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 WHEN PUBLIC TRANSPORTATION PROJECTS ALLEGEDLY DISCRIMINATE AGAINST MINORITY OR ETHNIC GROUPS

### A. Prohibition of Intentional Discrimination Caused by Disparate Treatment Under Section 601 of Title VI

Civil rights issues arise when public transportation officials plan highways, transit facilities, and related projects that allegedly affect minority or ethnic groups on a discriminatory basis. The primary law is Title VI of the Civil Rights Act of 1964.<sup>11</sup> Section 601 of Title VI prohibits intentional discrimination caused by *disparate treatment*, whereas Section 602 deals with discrimination resulting from policies and actions that have *disparate impact* on minorities and others protected by Section 602 and the regulations issued pursuant thereto.<sup>12</sup>

Section 601 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.”<sup>13</sup> Regardless of a transit system’s motivation, decisions affecting minority riders must be made in compliance with Title VI. As discussed in Section II.B in this digest, federal agencies are authorized to implement Title VI’s provisions through regulations requiring compliance with Title VI by recipients of federal funding.

As explained in Section II.A, *infra*, by virtue of a decision of the U.S. Supreme Court, individuals may sue under Section 601 of Title VI only for intentional discrimination. Moreover, there is no private right of action to enforce disparate-impact regulations issued pursuant to Section 602 of Title VI.<sup>14</sup>

### B. No Cause of Action Under Disparate-Impact Regulations Promulgated Under Section 602 of Title VI to Effectuate the Provisions of Section 601

Section 602 of Title VI provides in pertinent part that

[E]ach Federal department and agency which is empowered to extend Federal financial assistance to any pro-

<sup>11</sup> Title VI of the Civil Rights Act of 1964; Title VI, § 602, 88 Pub. L. No. 352, 78 Stat. 252 (July 2, 1964), *codified at* 42 U.S.C. § 2000d.

<sup>12</sup> *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 236 F. Supp. 2d 314 (S.D.N.Y. 2002).

<sup>13</sup> 42 U.S.C. § 2000d (2009).

<sup>14</sup> *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

gram 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.<sup>15</sup>

Under Title VI, as well as Title VII of the Civil Rights Act of 1968<sup>16</sup> and other statutes and regulations, the USDOT promulgated regulations to effectuate Title VI.<sup>17</sup> The regulations issued pursuant to Section 602 of Title VI are implicated when a recipient of federal funding uses a neutral procedure or practice that has a disparate impact on protected individuals that lacks a substantial legitimate justification.<sup>18</sup> The Ninth Circuit has recognized that disparate-impact regulations may go further than the statute that they implement and prescribe “activities that have disparate effects on racial groups, even though such activities are permissible under § 601.”<sup>19</sup>

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.”<sup>20</sup> Part 21 effectuates Title VI’s provisions<sup>21</sup> and is applicable “to any program for which Federal financial assistance is authorized under a law administered” by USDOT.<sup>22</sup>

Section 21.5(a) prohibits discrimination, first, in general: “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 to which this part applies.”

Section 21.5(b) identifies specific discriminatory actions that are prohibited, including an action the effect of which is to

- (i) Deny a person any service, financial aid, or other benefit provided under the program;

<sup>15</sup> 42 U.S.C. § 2000d-1 (2009).

<sup>16</sup> *Id.* §§ 3601–3619, 4601–4655 (2009); 23 U.S.C. §§ 109(h), 324 (2009).

<sup>17</sup> 49 C.F.R. pt. 21 (2009).

<sup>18</sup> See Complaints Investigations Reference Notebook for Civil Rights Personnel, U.S. Dep’t of Transp., available at <http://www.fhwa.dot.gov/download/module3.pdf> (Last visited Sept. 9, 2010).

<sup>19</sup> *Save Our Valley v. Sound Transit*, 335 F.3d 932, 935 n.2.

<sup>20</sup> 49 C.F.R. § 21.1 (2009) (quoting 42 U.S.C. § 2000d (Title VI)).

<sup>21</sup> *Id.* § 21.1 (2009).

<sup>22</sup> *Id.*

(ii) Provide any service, financial aid, or other benefit to a person which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject a person to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program; ... [or]

(vi) Deny a person an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program....

A recipient of federal funds may not directly or indirectly take actions that would substantially impair the accomplishment of the objectives of Title VI or the regulations promulgated pursuant thereto.<sup>23</sup> As the FTA has advised, the implementation of reductions in transit services or increases in fares that disproportionately affect minority communities are examples of actions with potentially disparate impact.<sup>24</sup>

As will be seen in Section II.E, *infra*, which discusses the FTA's guidance regarding compliance with Title VI, "[e]very application for Federal financial assistance to carry out a program to which this part applies" must submit assurances that the applicant will comply with Title VI; assurances may be required from subgrantees, contractors, and others identified in the regulation.<sup>25</sup> States and state agencies receiving federal funds must give assurances of compliance with Title VI as well and that all recipients are compliant.<sup>26</sup>

The regulations set forth the type of compliance information required<sup>27</sup> and include procedures regarding Title VI complaints and investigations,<sup>28</sup> a procedure for effecting compliance,<sup>29</sup> hearings,<sup>30</sup> and decisions and notices,<sup>31</sup> as well as judicial review.<sup>32</sup>

Recipients of federal funds may implement policies or take actions that have disparate impacts if the policies or actions have substantial legitimate justification, if there are no comparably effective alternative practices that would result in less disparate impacts, and if the justification for the policy or action is not a pretext for discrimination.<sup>33</sup>

<sup>23</sup> See *id.* § 21.5(b)(2) and (3) (2009).

<sup>24</sup> FTA Region VI Civil Rights Colloquium, Training Materials (Mar. 28, 2006), available at [http://www.fta.dot.gov/civil\\_rights.html](http://www.fta.dot.gov/civil_rights.html) (Last visited Sept. 9, 2010).

<sup>25</sup> 49 C.F.R. § 21.7(a) (2009).

<sup>26</sup> *Id.* § 21.7(b) (2009).

<sup>27</sup> *Id.* § 21.9 (2009).

<sup>28</sup> *Id.* § 21.11 (2009).

<sup>29</sup> *Id.* § 21.13 (2009).

<sup>30</sup> *Id.* § 21.15 (2009).

<sup>31</sup> *Id.* § 21.17 (2009).

<sup>32</sup> *Id.* § 21.19 (2009).

<sup>33</sup> United States Department of Transportation, Federal Highway Administration, [www.fta.dot.gov](http://www.fta.dot.gov).

### C. Executive Order 12898 (1994) Requiring Federal Agencies to Combat Directly Disproportionate and Adverse Effects of Their Programs, Policies, and Activities on Minority and Low-Income Populations

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, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.<sup>34</sup> (The FTA's 2007 Title VI Circular, discussed in Section II.E, *infra*, specifically incorporates the principles of Executive Order 12898.)

Pursuant to ¶ 2-2 of the Executive Order

[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.<sup>35</sup>

The effect of the executive order is to require federal agencies to approach and combat directly disproportionate and adverse effects by federal programs, policies, and activities on minority and low-income populations. The executive order does not create a private right of action and is intended solely to improve the internal management of the executive branch.<sup>36</sup>

### D. USDOT Title VI Order (1997) Incorporating the Principles of Environmental Justice in Decision-Making Practices of All USDOT Programs, Policies, and Activities

On April 15, 1997, the USDOT issued its final order for the purpose of complying with President Clinton's Executive Order 12898.<sup>37</sup> The order incorporates the principles of environmental justice in the decision-making processes of all USDOT programs, policies, and activities but based on existing statutes, including Title

<sup>34</sup> Exec. Order No. 12898, 59 Fed. Reg. 7629 § 1-101 (Feb. 11, 1994).

<sup>35</sup> *Id.* § 2-2. Compare Exec. Order No. 12898 § 2-2 with 42 U.S.C. § 2000d (stating 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").

<sup>36</sup> Exec. Order No. 12898, 59 Fed. Reg. 7629 § 6-609 (Feb. 11, 1994).

<sup>37</sup> United States Department of Transportation, Order to Address Environmental Justice in Minority Populations and Low-Income Populations, 62 Fed. Reg. 18377 (Apr. 15, 1997), hereinafter cited as "DOT Order."

VI.<sup>38</sup> The order provides that “each operating administration shall determine the most effective and efficient way of integrating the processes and objectives” of the USDOT order.<sup>39</sup> The order directs that “[p]lanning and programming activities that have the potential to have a disproportionately high and adverse effect on human health or the environment shall include explicit consideration of the effects on minority populations and low-income populations.”<sup>40</sup> The order requires that all statutes governing USDOT operations must be administered “so as to identify and avoid discrimination and avoid disproportionately high and adverse effects on minority populations and low-income populations,” for example, by proposing measures to avoid, minimize, or mitigate such effects and by considering alternatives.<sup>41</sup> The public is to have access to information concerning the environmental impacts of programs, policies, and actions.<sup>42</sup>

As used in the order, the term “adverse effects” means, in part, “the totality of significant individual or cumulative human health or environmental effects.”<sup>43</sup> The phrase

[D]isproportionately high and adverse effect on minority and low-income populations means an adverse effect that:

(1) is predominately borne by a minority population and/or a low-income population, or

(2) will be suffered by the minority population and/or low-income population and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and/or non-low-income population.<sup>44</sup>

The order requires

Operating Administrators and other responsible DOT officials [to] ensure that any of their respective *programs, policies or activities* that will have a disproportionately high and adverse effect on populations protected by Title VI (“protected populations”) *will only be carried out if:*

(1) *a substantial need for the program, policy or activity exists, based on the overall public interest; and*

(2) *alternatives that would have less adverse effects on protected populations (and that still satisfy the need identified in subparagraph (1) above), either (i) would have other adverse social, economic, environmental or*

*human health impacts that are more severe, or (ii) would involve increased costs of extraordinary magnitude.*<sup>45</sup> (emphasis added)

Furthermore, administrators and officials must [E]nsure that any of their respective programs, policies or activities that will have a disproportionately high and adverse effect on minority populations or low-income populations will only be carried out *if further mitigation measures or alternatives that would avoid or reduce the disproportionately high and adverse effect are not practicable.* In determining whether a mitigation measure or an alternative is “practicable,” the social, economic (including costs) and environmental effects of avoiding or mitigating the adverse effects will be taken into account.<sup>46</sup> (emphasis added)

Thus, the DOT Order does not preclude adverse effects from taking place when “further mitigation measures or alternatives...are not practicable.”<sup>47</sup>

## E. Guidance Provided by FTA Title VI Circular (2007) for Recipients and Subrecipients of FTA Financial Assistance Regarding Compliance with Title VI and Integration of the USDOT Order as Well as Policy Guidance Concerning Limited-English-Proficient Persons

### 1. Purpose of the Circular

On April 13, 2007, final notice<sup>48</sup> was given of FTA’s Title VI Circular entitled “Title VI and Title VI-Dependent Guidelines for Federal Transit Administration Recipients.”<sup>49</sup> The circular supersedes one dated May 26, 1988.

The purpose of the 2007 FTA Title VI Circular is to provide recipients and subrecipients of FTA financial assistance with guidance regarding their compliance with Title VI regulations, 49 C.F.R. Part 21, and on how to integrate into their programs the DOT’s Order on Environmental Justice, Order 5610.2, and the USDOT Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient Persons.<sup>50</sup> Every applicant for FTA financial assistance must certify that it will

<sup>45</sup> *Id.* at 18380 ¶ 8(d).

<sup>46</sup> *Id.* ¶ 8(c).

<sup>47</sup> *Id.*

<sup>48</sup> 72 Fed. Reg. vol. 18732 (Apr. 13, 2007).

<sup>49</sup> See FTA C 4702.1A (May 13, 2007), hereinafter cited as “FTA Title VI Circular,” link is accessible at [http://www.fta.dot.gov/laws/circulars/leg\\_reg\\_5956.html](http://www.fta.dot.gov/laws/circulars/leg_reg_5956.html) (Last visited Sept. 9, 2010).

<sup>50</sup> Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (“LEP”) Persons, 70 Fed. Reg. 74087 (Dec. 14, 2005). Key terms are defined in the 2007 FTA Circular, including discrimination, disparate impact, disparate treatment, and minority persons.

<sup>38</sup> *Id.* at 18379 ¶ 4.

<sup>39</sup> *Id.* ¶ 5(a).

<sup>40</sup> *Id.* ¶ 5(b)(1).

<sup>41</sup> *Id.* at 18380 ¶¶ 7(c)(2) and (3).

<sup>42</sup> *Id.* at 18379 ¶ 5(b)(2). The order provides that the DOT will administer its programs, policies, and activities “so as to identify, early in the development of the program, policy or activity, the risk of discrimination so that positive corrective action can be taken.” *Id.* at 18380 ¶ 7. See also, *id.* 7(b)(1).

<sup>43</sup> *Id.* at 18380–81 (App.) ¶ 1(f).

<sup>44</sup> *Id.* ¶¶ 1(g)(1) and (2).



comply with Title VI.<sup>51</sup> First-time applicants must provide information regarding their history of compliance with Title VI if they have received funding from another federal agency.<sup>52</sup>

## 2. Provisions in the FTA Title VI Circular Regarding Compliance with Title VI When Reducing Service or Increasing Fares

Preliminarily it may be noted that recipients must file a compliance report every 3 years.<sup>53</sup> Metropolitan planning organizations (MPO) that are direct recipients of FTA funds must do so every 4 years.<sup>54</sup> In addition to the recipient, a state department of transportation (DOT) must certify every 3 years its compliance with Title VI.<sup>55</sup> MPOs who are direct recipients of FTA report to the FTA as provided in Chapter II, otherwise to their direct recipient, for example, the state DOT.<sup>56</sup> 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 when FTA determines that a recipient is not in compliance with Title VI.<sup>57</sup>

Several provisions of the circular address the quality or level of service.<sup>58</sup> In the Circular, the term "adverse effect" is defined broadly and includes "destruction or disruption of the availability of public and private facilities and services" and "the denial of, reduction in, or significant delay in the receipt of benefits of DOT programs, policies, or activities."<sup>59</sup>

Chapter IV of the FTA circular sets forth the general requirements and guidelines that recipients must follow to assure that they are Title VI-compliant. Various Title VI assurances are required to be provided as part of a transit agency's annual Certification and Assurance submission to FTA. Assurances must be given regarding the recipient's development of Title VI complaint procedures; the recording of Title VI investigations, complaints, and law suits; the notification by various means of beneficiaries of their protection under Title VI; and the preparation and submission of a Title VI program.<sup>60</sup>

Chapter V of the Circular sets forth the requirements for recipients serving large urbanized areas, i.e., 200,000 people or greater under 49 U.S.C. § 5307.<sup>61</sup> A recipient must collect demographic data "showing the extent to which members of minority groups are beneficiaries of programs receiving Federal financial assistance" and "adopt quantitative system-wide service standards necessary to guard against discriminatory service design or operations decisions."<sup>62</sup> A recipient must "adopt system-wide service policies necessary to guard against service design and operational policies that have disparate impacts."<sup>63</sup> As part of its Title VI compliance, a recipient must "evaluate significant system-wide service and fare changes and proposed improvements at the planning and programming stages to determine whether those changes have a discriminatory impact."<sup>64</sup> "[T]his requirement applies to 'major service changes' only. The recipient should have established guidelines or thresholds for what it considers a 'major' change to be. Often, this is defined as a numerical standard, such as a change that affects 25 percent of service hours of a route."<sup>65</sup>

The FTA encourages the evaluation of the impacts of proposed service and fare changes by assessing their effects on minority and low-income populations.<sup>67</sup> For service "changes that would reduce or expand hours and days of service, the recipient should analyze any available information generated from ridership surveys that indicates whether minority and low-income riders are more likely to use the service during the hours and/or days that would be eliminated."<sup>68</sup>

Second, in regard to the evaluation of service and fare changes, the recipient must "[a]ssess the alternatives available for people affected...."<sup>69</sup> Thus, in regard to service changes "the recipient should analyze what, if any, alternative transit modes, fare payment types, or fare payment media are available for people affected by the fare change. The analysis should compare the fares paid under the change with fares that would be paid through available alternatives."<sup>70</sup> A recipient must "[d]etermine which, if any[,] of the proposals under consideration would have a disproportionately high and

<sup>51</sup> FTA Title VI Circular, link is accessible at [http://www.fta.dot.gov/laws/circulars/leg\\_reg\\_5956.html](http://www.fta.dot.gov/laws/circulars/leg_reg_5956.html), ch. III-1 ¶ 1.

<sup>52</sup> *Id.* ¶ 2.

<sup>53</sup> *Id.* at ch. V-9 ¶ 6.

<sup>54</sup> *Id.* at ch. II-2 ¶ 4.

<sup>55</sup> *Id.* at ch. VI-1, VI-3 ¶ 5. The state DOT must have "an analytic basis in place," such as a demographic profile of the state, a "state-wide transportation planning process that identifies the needs of low-income and minority populations," and a "process that identifies the benefits and burdens of the State's transportation system for different socioeconomic groups...." *Id.* at V-1 ¶ 1(a)-(c).

<sup>56</sup> *See id.* at ch. VII.

<sup>57</sup> *Id.* at ch. VIII, ch. IX, and ch. X.

<sup>58</sup> *See, e.g.*, ch. II-1 ¶ 1(a).

<sup>59</sup> *See id.* at ch. II-3 ¶ 6(a).

<sup>60</sup> *Id.* at ch. IV-1-IV-3.

<sup>61</sup> *Id.* at ch. V-1-V-9.

<sup>62</sup> *Id.* at ch. V-1 ¶ 1. There are three options for doing so: the preparation of demographic and service profile maps and charts, the use of a survey to collect information regarding the recipient's ridership, or the use of a locally developed alternative meeting the "expectations" of 49 U.S.C. § 21.5(b)(2) and (7). *Id.* at ch. V-1-V-3 ¶ 1(a)-(c).

<sup>63</sup> *Id.* at ch. V-3 ¶ 2.

<sup>64</sup> *Id.* at ch. V-4 ¶ 3.

<sup>65</sup> *Id.* at ch. V-5 ¶ 4.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at ch. V-6 ¶ 4(a)(1). The Circular states that recipients may choose to develop their own procedures as well. *See id.* at ch. V-7 ¶ 4(b).

<sup>68</sup> *Id.* at ch. V-6 ¶ 4(a)(4).

<sup>69</sup> *Id.* ¶ 4(a)(2).

<sup>70</sup> *Id.* ¶ 4(a)(2)(a).

adverse effect on minority and low-income riders.<sup>71</sup> A recipient must monitor its transit service in its service area and “compare the level and quality of service provided to predominately minority areas with service provided in other areas to ensure...equitable service.”<sup>72</sup> The circular provides for and describes procedures for monitoring service: a level of service methodology, a quality of service methodology, and a “Title VI Analysis of Customer Surveys.”<sup>73</sup> A recipient also has the option of developing its own alternative to monitor transit service.<sup>74</sup>

A recipient is required to document its compliance with the program-specific requirements in Sections 1 and 2 of Chapter V, as well as those in Sections 1 through 7 of Chapter IV.<sup>75</sup> A recipient must provide a copy of its demographic analysis, system-wide service standards and system-wide service policies, equity evaluation of any significant service changes and fare changes since its last submission, level of service monitoring, quality of service monitoring, demographic analysis of customer surveys, or locally developed monitoring procedures conducted since the last submission.<sup>76</sup> Finally, a recipient may “implement a fare increase or major service reduction that would have disproportionately high and adverse effects” if the recipient is able to demonstrate “that the action meets a substantial need that is in the public interest and that alternatives would have more severe adverse effects than the preferred alternative.”<sup>77</sup>

### 3. Transit Agencies’ Response to the Question of Whether the 2007 FTA Title VI Circular Resolves Any Issues Arising in Connection with Compliance with Title VI

Transit agencies were asked in the survey conducted for this digest whether the FTA Title VI Circular either resolves any questions that have arisen regarding compliance with Title VI in earlier proceedings of which an agency is aware or, alternatively, raises any new issues. Although 54 agencies replied that the circular neither resolved any issues nor raised any new issues, 6 agencies indicated that the circular either did resolve issues or raised new issues.<sup>78</sup>

Only three agencies’ responses were more specific. One agency stated that the circular clarified the low-income population component and notification requirements that are discussed in Section II.G, *infra*, and as a

result the agency had posted notifications in prominent areas and on the agency’s Web site.

A second agency stated in part that the circular helped clarify some questions we had about Title VI implementation, and it made some issues make better sense. Some of the improvements in our Title VI implementation which we adopted post-2007 FTA Circular include placing an electronic copy of our Title VI complaint procedures onto our agency’s webpage; we adopted this improvement after learning about such implementation options from a recent FTA Civil Rights workshop for the 2007 Circular that we attended.

A third response was that the circular “answers some questions[] but does not adequately address changes to fare media types and availability.”

### F. Application of Principles of Environmental Justice to Avoid, Minimize, or Mitigate Disproportionately High and Adverse Human Health and Environmental Effects on Low-Income Populations

The consideration of low-income populations, defined hereafter, in environmental justice is not a new requirement.<sup>79</sup> The principles of environmental justice include seeking to avoid, minimize, or mitigate “disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations,”<sup>80</sup> and to ensure their participation in regard to actions of federal agencies or their recipients affecting minority and low-income populations.<sup>81</sup> The 2007 FTA Circular defines the term environmental justice to “[m]ean an action taken by DOT, FTA, or a recipient or subrecipient of FTA funding to identify and address adverse and disproportionate effects of its policies, programs, or activities on minority and/or low-income populations, consistent with Executive Order 12898 and the DOT Order 5610.2 on Environmental Justice”<sup>82</sup> (emphasis added).

Although there is no specific federal statute applicable to transit agencies regarding disparate impact on

<sup>79</sup> *An Overview of Transportation and Environmental Justice 2*, available at <http://www.fhwa.dot.gov/environment/ej2000.htm> (Last visited Sept. 9, 2010), hereinafter cited as “Overview of Transportation and Environmental Justice.”

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* See also David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 *ECOLOGICAL L.Q.* 443, 444 (2006), hereinafter cited as “Monsma,” [http://www.cerium.ca/IMG/pdf/EQUAL\\_RIGHTS\\_GOVNANCE\\_AND\\_THE\\_ENVIRONMENT.pdf](http://www.cerium.ca/IMG/pdf/EQUAL_RIGHTS_GOVNANCE_AND_THE_ENVIRONMENT.pdf) (Last visited Sept. 9, 2010).

<sup>82</sup> FTA Title VI Circular, [http://www.fta.dot.gov/laws/circulars/leg\\_reg\\_5956.html](http://www.fta.dot.gov/laws/circulars/leg_reg_5956.html), at ch. II-1 ¶ 6(i).

<sup>71</sup> *Id.* ¶ 4(a)(4).

<sup>72</sup> *Id.* at ch. V-7 ¶ 5.

<sup>73</sup> *Id.* at ch. V-7–V-8.

<sup>74</sup> *Id.* at ch. V-8 ¶ 5(d).

<sup>75</sup> *Id.* at ch. V-9 ¶ 6.

<sup>76</sup> *Id.* ¶¶ 6(a)(1)–(4).

<sup>77</sup> *Id.* at ch. V-6 ¶ 4(a)(4).

<sup>78</sup> Four agencies did not respond to the question.

low-income populations,<sup>83</sup> Section 602 of Title VI requires federal agencies and departments to give effect to Section 2000d “by issuing rules, regulations, or orders of general applicability...consistent with [the] achievement of the objectives of the statute....”<sup>84</sup> Thus, the consideration of the effect of federal actions on low-income populations is consistent with Title VI and Section 602.

Although Title VI does not specifically prohibit discrimination against low-income persons or populations, the USDOT order refers to Title VI;<sup>85</sup> affirms that “[i]t is DOT policy to actively administer and monitor its operations and decision making to assure that nondiscrimination is an integral part of its programs, policies, and activities;”<sup>86</sup> and mandates that the “income level” of a population served or affected “in implementing these requirements...should be obtained where relevant, appropriate and practical....”<sup>87</sup>

A low-income person is one “whose median household income is at or below the Department of Health and Human Services poverty guidelines.”<sup>88</sup> A “Low-Income Population” is “any readily identifiable group of low-income persons who live in geographic proximity....”<sup>89</sup>

The term “adverse effects,” *inter alia*,

means the totality of significant individual or cumulative human health or environmental effects, including interrelated social and economic effects, which may include, but are not limited to...[the] exclusion or separation of minority or low-income individuals within a given community or from the broader community; and the denial of, reduction in, or significant delay in the receipt of, benefits of DOT programs, policies, or activities.<sup>90</sup>

Low-income populations are protected from programs, policies, or activities that have a disproportionately high and adverse effect on them as further defined in the FTA circular.<sup>91</sup>

One of the purposes of the FTA circular is to aid recipients in appropriately identifying and addressing “disproportionately high and adverse human health and environmental effects, including social and economic effects of programs and activities on minority popula-

tions and low-income populations....”<sup>92</sup> A recipient’s submission each 3 years must include a summary of “public outreach and involvement...to ensure that minority and low-income people had meaningful access” to FTA activities.<sup>93</sup>

Chapter V of the circular, applicable to large urbanized areas, requires that when evaluating service or making fare changes, recipients must evaluate “the effects of the proposed fare or service change on minority and low-income populations;”<sup>94</sup> “[a]ssess the alternatives available for people affected;”<sup>95</sup> and describe actions proposed to “minimize, mitigate, or offset effects...on minority and low-income populations.”<sup>96</sup> A recipient must “[d]etermine which, if any of the proposals under consideration would have a disproportionately high and adverse effect on minority and low-income riders.”<sup>97</sup> As stated, the circular allows recipients to develop a local evaluation procedure.<sup>98</sup> In Chapter V of the circular, the FTA recommends that if a recipient conducts a survey on customer demographics and travel patterns, information should be collected on riders’ income or income range.<sup>99</sup>

In sum, federal law requires recipients of federal funds such as transit agencies to avoid, minimize, or mitigate the disparate impact of their decisions and activities on low-income populations.<sup>100</sup>

<sup>83</sup> Monsma, at 444, 446–47 (stating that incorporates environmental justice remedies) (*See id.* n.6, citing Daniel Kevin, ‘Environmental Racism’ and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies, 8 VILL. ENVTL. L.J. 121, 130 (1997); *See id.* 447, n.21, citing Richard J. Lazarus, *Civil Rights in the New Decade: Highways and Bi-ways for Environmental Justice*, 31 CUMB. L. REV. 569, 582 (2001)).

<sup>84</sup> 42 U.S.C. § 2000d-1 (2009).

<sup>85</sup> DOT Order, 62 Fed. Reg. at 18439 ¶ 7(a).

<sup>86</sup> *Id.* ¶ 7(b).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 18380 (App.) ¶ 1(b).

<sup>89</sup> *Id.* ¶ 1(d).

<sup>90</sup> *See id.* ¶ 1(f).

<sup>91</sup> *See id.* ¶ (g)(1) and (2).

<sup>92</sup> FTA Title VI Circular, [http://www.fta.dot.gov/laws/circulars/leg\\_reg\\_5956.html](http://www.fta.dot.gov/laws/circulars/leg_reg_5956.html), at ch. II-1 ¶ 1(b).

<sup>93</sup> *Id.* at ch. IV-3 ¶ 7(a)(1).

<sup>94</sup> *Id.* at ch. V-6 ¶ 4(a)(1).

<sup>95</sup> *Id.* ¶ 4(a)(2).

<sup>96</sup> *Id.* ¶ 4(a)(3).

<sup>97</sup> *Id.* ¶ 4(a)(4).

<sup>98</sup> *Id.* ¶ 4(b).

<sup>99</sup> *Id.* at ch. V-2 ¶ (1)(b)(7).

<sup>100</sup> See Executive Order 12898, 59 Fed. Reg. 7629 § 1-101 (Feb. 11, 1994), ¶ 1-101 (stating that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States,” as well as its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands); DOT Order, 62 Fed. Reg. at 18380 ¶ 7(c) (noting the federal requirement to “identify and avoid discrimination and avoid disproportionately high and adverse effects on minority populations and low-income populations”).

## G. Executive Order 13166 (2000), Department of Justice and USDOT Policy Guidance, and the 2007 FTA Title VI Circular Regarding Access to Transit Services for LEP Persons and Compliance with Title VI

### 1. Executive Order 13166 (2000) and Improving Access to Services for LEP Persons

On August 11, 2000, President Clinton signed Executive Order 13166 entitled “Improving Access to Services for Persons with Limited English Proficiency,”<sup>101</sup> which directed every federal agency “to examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency”<sup>102</sup> and “to prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons.”<sup>103</sup>

### 2. Department of Justice Policy Guidance Regarding Enforcement of Title VI of the Civil Rights Act of 1964 Concerning “National Origin Discrimination” Against LEP Persons

Pursuant to Executive Order 13166, on August 16, 2000, the Department of Justice (DOJ) issued a Policy Guidance entitled “Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination against Persons with Limited English Proficiency” (DOJ LEP Guidance).<sup>104</sup> The DOJ LEP Policy Guidance is clear that neither it nor the executive order creates any new obligations but only clarifies existing Title VI responsibilities.<sup>105</sup> The guidance states that “[a] federal aid recipient’s failure to assure that people who are not proficient in English can effectively participate in and benefit from programs and activities may constitute national origin discrimination prohibited by Title VI.”<sup>106</sup> Federal agencies were advised that what constituted meaningful access was to be determined based on a consideration of four factors: “the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come in contact with the program, the importance of the service provided by the program, and the resources available to the recipient.”<sup>107</sup> The Justice Department advised fed-

eral agencies to utilize the guidance “to develop specific criteria...to review the programs and activities for which they offer financial assistance.”<sup>108</sup>

### 3. USDOT Policy Guidance Concerning Recipients’ Responsibilities to LEP Persons

On December 14, 2005, the USDOT issued a revision of its earlier guidance. The legal basis for USDOT’s Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons<sup>109</sup> (DOT LEP Policy Guidance) is the prohibition against national origin discrimination in Title VI as it affects LEP persons.<sup>110</sup> The USDOT LEP Policy Guidance clarifies the responsibilities of recipients of federal financial assistance from USDOT and assists them in fulfilling their responsibilities to LEP persons.<sup>111</sup> As defined in the USDOT’s guidance, the term “limited English proficient” means those “[i]ndividuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English....”<sup>112</sup> As such, they are entitled to language assistance under Title VI with respect to any “service, benefit, or encounter.”<sup>113</sup> The 2007 FTA Title VI Circular defines LEP persons as those persons “for whom English is not their primary language and who have a limited ability to speak, understand, read, or write English,” including “people who reported to the U.S. Census that they do not speak English well or do not speak English at all.”<sup>114</sup>

The USDOT LEP Policy Guidance informed recipients that they must “take reasonable steps to ensure meaningful access to their programs and activities by LEP persons” by making “an individualized assessment that balances four factors,”<sup>115</sup> the language of which differs somewhat from the foregoing DOJ LEP Policy

<sup>108</sup> *Id.* at 50123.

<sup>109</sup> DOT LEP Policy Guidance, 70 Fed. Reg. 74087 (Dec. 14, 2005), available at <http://edocket.access.gpo.gov/2005/05-23972.htm> (Last visited on Sept. 9, 2010). DOT “revised its LEP guidance to insure greater consistency with DOJ’s revised LEP guidance, published June 18, 2002, and other agencies’ revised LEP guidance. 67 Fed. Reg. 117 (June 18, 2002).” *Id.* at 74091.

<sup>110</sup> *Id.* at 74087 (summary).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 74091.

<sup>113</sup> *Id.*

<sup>114</sup> FTA C 4702.1A (May 13, 2007), hereinafter cited as “FTA Title VI Circular,” at ch. II-4-5 ¶ 6(n), link is accessible at [http://www.fta.dot.gov/laws/circulars/leg\\_reg\\_5956.html](http://www.fta.dot.gov/laws/circulars/leg_reg_5956.html) (Last visited Sept. 9, 2010).

<sup>115</sup> DOT LEP Policy Guidance, 70 Fed. Reg. 74087 (Dec. 14, 2005), available at <http://edocket.access.gpo.gov/2005/05-23972.htm>, at 74091. (Last visited on Sept. 9, 2010).

<sup>101</sup> Executive Order 13166, 65 Fed. Reg. 50121 (Aug. 16, 2000), hereinafter cited as “Exec. Order 13166 (2000).”

<sup>102</sup> *Id.* § 1.

<sup>103</sup> *Id.* § 2.

<sup>104</sup> DOJ LEP Policy Guidance, 65 Fed. Reg. 50123 (Aug. 16, 2000), hereinafter cited as “DOJ LEP Policy Guidance.”

<sup>105</sup> *Id.* (Summary).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 50124.

Guidance.<sup>116</sup> Under the USDOT LEP Policy Guidance, the four factors are:

(1) The number or proportion of LEP persons eligible to be served or likely to be encountered by a program, activity, or service of the recipient or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the recipient to people's lives; and (4) the resources available to the recipient and costs.<sup>117</sup>

Nevertheless, recipients "have considerable flexibility in developing such a plan...."<sup>118</sup>

#### 4. FTA's 2007 Title VI Circular's Application to LEP Persons

The 2007 FTA Title VI Circular makes repeated references to LEP persons. The circular's Chapter IV, General Requirements and Guidelines, applicable to recipients and subrecipients, requires "that FTA recipients take responsible steps to ensure meaningful access to the benefits, services, information, and other important portions of their programs and activities for individuals who are...LEP," including the development of a language implementation plan.<sup>119</sup> The circular includes an exception from the requirement for those recipients and subrecipients "serving very few LEP persons or those with very limited resources [who] may choose not to develop a written LEP plan."<sup>120</sup> Nevertheless, recipients and subrecipients that do not develop a plan must "consider other ways to reasonably provide meaningful access" to LEP persons.<sup>121</sup> Recipients and subrecipients must provide information to the public regarding a recipient's Title VI obligations and "apprise members of the public of the protections against discrimination afforded to them by Title VI."<sup>122</sup> For LEP persons, notices detailing a recipient's or subrecipient's Title VI obligations and complaint procedures must be translated into other languages "as needed and consistent with DOT LEP Guidance."<sup>123</sup>

Also, in Chapter IV, as part of a recipient's required 3-year submission showing compliance with Title VI, the recipient must include a copy of the agency's plan for providing language assistance for LEP persons.<sup>124</sup>

<sup>116</sup> *Id.* n.107, and accompanying text.

<sup>117</sup> *Id.* at 74091.

<sup>118</sup> *Id.* at 74096 (pt. VII).

<sup>119</sup> FTA C 4702.1A (May 13, 2007), hereinafter cited as "FTA Title VI Circular," at ch. IV-1 ¶ 4. (Link is accessible at [http://www.fta.dot.gov/laws/circulars/leg\\_reg\\_5956.html](http://www.fta.dot.gov/laws/circulars/leg_reg_5956.html) (Last visited Sept. 9, 2010).

<sup>120</sup> *Id.* ¶ 4(a).

<sup>121</sup> *Id.* at ch. IV-2 ¶ 4(a).

<sup>122</sup> *Id.* ¶ 5.

<sup>123</sup> *Id.* ¶ 5(b)(3).

<sup>124</sup> *Id.* at ch. IV-4 ¶ 9.

## H. Recipients' and Subrecipients' Obligation to Promote Inclusive Public Participation

Recipients and subrecipients have obligations to promote "inclusive public participation"<sup>125</sup> and seek out the viewpoints not only of minority and low-income groups but also of LEP populations,<sup>126</sup> such as by "offer[ing] early and continuous opportunities for the public to be involved in the identification of social, economic, and environmental impacts of proposed transportation decisions."<sup>127</sup> Recipients must implement USDOT's policy guidance regarding their responsibility to LEP persons to overcome barriers to public participation.<sup>128</sup> Effective practices include "[u]sing locations, facilities, and meeting times that are convenient and accessible to low-income and minority communities"<sup>129</sup> or "different meeting sizes or formats, or varying the type and number of news media used to announce public participation opportunities, so that communications are tailored to the particular community or population."<sup>130</sup> Nevertheless, recipients have "wide latitude" regarding what measures are appropriate.<sup>131</sup>

Although there is no specific guidance regarding whether or how to conduct a public hearing, the guidance does suggest that among the documents that should be translated by a recipient are notices of public hearings regarding changes in services or benefits.<sup>132</sup> A prior notification should be given by appropriate means in the language or languages of the LEP persons being served<sup>133</sup> and should advise that qualified interpreters<sup>134</sup> will be provided or be available at any hearing.<sup>135</sup> Rele-

<sup>125</sup> *Id.* at ch. IV-5 ¶ 9(a)(1-5).

<sup>126</sup> *Id.* at ch. IV-4 ¶ 9.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at ch. IV ¶ 9(a)(5).

<sup>129</sup> *Id.* ¶ 9(a)(3).

<sup>130</sup> *Id.* ¶ 9(a)(4).

<sup>131</sup> *Id.* ¶ 9(a).

<sup>132</sup> DOT LEP Policy Guidance, 70 Fed. Reg. 74087, at 74094 (pt. VI(B)). (Dec. 14, 2005), available at <http://edocket.access.gpo.gov/2005/05-23972.htm>. (Last visited Sept. 9, 2010).

<sup>133</sup> For example, the DOT LEP Policy Guidance states that "[n]otifications should be delivered in advance of scheduled meetings or events to allow time for persons to request accommodation and participate." *Id.*, 70 Fed. Reg. at 74098 (pt. IX N 14).

<sup>134</sup> The DOT LEP Policy Guidance states that "[w]here interpretation is needed and is reasonable, recipients should consider some or all of the options below for providing competent interpreters in a timely manner"; that "when interpretation is needed and is reasonable, it should be provided in a timely manner in order to be effective"; and that "[c]ontract interpreters may be a cost-effective option when there is no regular need for a particular language skill." *Id.* at 74093 (pt. VI(A)).

<sup>135</sup> For example, the DOT LEP Policy Guidance states that "[o]nce an agency has decided, based on the four factors, that it will provide language services, it is important that the recipient notify LEP persons of services available free of charge. Recipients should provide this notice in languages LEP persons would understand," such as by "[i]ncluding notices in local

vant documents should be translated and made available to LEP persons before and/or at a hearing.<sup>136</sup>

### I. Applicability of Title VI and the ADA to the American Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (ARRA), signed into law by President Barack Obama on February 17, 2009, includes \$8.4 billion for transit capital improvements.<sup>137</sup> On March 5, 2009, FTA published a Notice in the *Federal Register* to implement the ARRA.<sup>138</sup> The FTA's Policy Guidance and Procedures for ARRA Grants states that existing regulations and guidance pertaining to Title VI and the ADA, as well as the requirements of the Equal Employment Opportunity and Disadvantaged Business Enterprise laws, apply to ARRA funds.<sup>139</sup>

In September 2009, three parties filed a complaint alleging noncompliance with Title VI when funding was being sought under the ARRA by the San Francisco Bay Area Rapid Transit (BART) in connection with the proposed Oakland Airport Connector Project (OAC Project).<sup>140</sup> The complainants were the Urban Habitat Program, a nonprofit, environmental justice organization based in Oakland, California;<sup>141</sup> Transform, a public transit advocacy and policy organization;<sup>142</sup> and Genesis, a regional faith- and values-based organization in the San Francisco Bay Area.<sup>143</sup> The complaint alleged that

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newspapers other than in English." *Id.* at 7409674097 (pt. VII(4)).

<sup>136</sup> The DOT LEP Policy Guidance addresses the translation of documents: After applying the four-factor analysis, a recipient may determine that an effective LEP plan for its particular program or activity includes the translation of vital written materials into the language of each frequently encountered LEP group eligible to be served and/or likely to be affected by the recipient's program. DOT LEP Policy Guidance, 70 Fed. Reg. at 74094 (Part VI(B)).

<sup>137</sup> 111 Pub. L. No. 5, 123 Stat. 115.

<sup>138</sup> "American Recovery and Reinvestment Act of 2009 Public Transportation Apportionments, Allocations and Grant Program Information," United States Department of Transportation, Federal Transit Administration, 74 Fed. Reg. 9656 (Mar. 5, 2009).

<sup>139</sup> FTA Policy Guidance and Procedures for ARRA Grants, available at [http://www.fta.dot.gov/civilrights/civil\\_rights\\_9903.html](http://www.fta.dot.gov/civilrights/civil_rights_9903.html) (Last visited on Sept. 9, 2010).

<sup>140</sup> *Urban Habitat Program v. Bay Area Rapid Transit Dist.*, Complaint before the United States Department of Transportation and Federal Transit Administration under Title VI of the Civil Rights Act of 1964 and Executive Order 12898, dated Sept. 1, 2009, hereinafter cited as "OAC Title VI Complaint," available at [http://issuu.com/transform/docs/fta\\_title\\_vi\\_complaint\\_09-1-09\\_final](http://issuu.com/transform/docs/fta_title_vi_complaint_09-1-09_final) (Last visited on Sept. 9, 2010).

<sup>141</sup> OAC Title VI Complaint, at 14.

<sup>142</sup> *Id.* at 15.

<sup>143</sup> *Id.*

BART failed to comply with Title VI in connection with the OAC Project. For example, the complaint alleged that BART failed to prepare a required service and fare equity analysis<sup>144</sup> and failed to evaluate whether the project would have a disproportionate impact on minority and low-income populations.<sup>145</sup> The complaint argued that BART's 2002 Final Environmental Impact Review/Environmental Impact Statement and its 2007 Title VI Triennial Report did not include the required evaluations. It was further alleged that BART's failure

to conduct the required analyses of disproportionate adverse impacts on minority and low-income populations has resulted in an even more significant failure, as it has not taken the necessary action to "minimize, mitigate, or offset any adverse effects of proposed fare and service changes on minority and low-income populations." Nor has BART weighed the costs and benefits of the alternatives, and determined whether a less-discriminatory alternative can provide the needed benefits at the same or lesser cost.<sup>146</sup>

In the FTA's letter of January 15, 2010, addressing Title VI issues and the OAC Project, the FTA noted that during a compliance review conducted after the above complaint, "BART's staff acknowledged it failed to integrate Title VI into BART's service planning and monitoring activities for the Project. BART also admitted that it did not conduct an equity evaluation of its service changes other than the one conducted on the 2009 reduction in service headways."<sup>147</sup> The FTA observed also that "BART's non-compliance with Title VI will be addressed through the Office of Civil Rights' compliance review process...."<sup>148</sup>

Meanwhile, however, the FTA advised that BART's "Title VI, Environmental Justice, and Limited English Proficiency Analysis of Proposed Service and Fare Changes," dated January 14, 2010, was "insufficient to meet the [FTA] Circular's requirements on many fronts."<sup>149</sup> That is,

[T]he equity analysis fails to analyze whether the Project's improvement and the service reductions would have a discriminatory impact. In addition, your analysis still does not address: (1) a policy for what constitutes a "major service change;" (2) the impacts of the major service changes according to a specified procedure, including route changes and span of service; (3) an analysis of what alternative modes of transit are available for people af-

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<sup>144</sup> *Id.* at 20.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 21.

<sup>147</sup> Letter from the FTA to the Metropolitan Transportation Commission and San Francisco Bay Area Rapid Transit District 1 (Jan. 15, 2010), available at <http://www.scribd.com/doc/26217928/FTA-Letter-to-MTC-and-BART-on-Oakland-Airport-Connector>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 2.

ected by the service expansion and reductions, including the travel time and cost of the current route compared to the cost to the rider of the alternative; and (4) documented evidence of steps taken to seek out and consider the viewpoints of minority and low-income populations in the course of developing the policy on major service changes.<sup>150</sup>

The letter pointed out that, even if BART performed an equity evaluation addressing FTA's concerns, it was likely that BART still would miss FTA's deadline of March 5, 2010, for obligating the funds available under ARRA.

On February 12, 2010, the FTA notified BART that FTA had rejected BART's "corrective action plan" for meeting BART's Title VI obligations, because "there is no way the agency can come into full compliance with Title VI" by FTA's deadline of September 30, 2010, under the ARRA.<sup>151</sup> (The FTA's letter explained that funds not disbursed by the deadline would "lapse" and not be available for use in the Bay area).<sup>152</sup> According to the FTA, BART was "being realistic in admitting that the process of coming into full compliance will take considerably longer than the 8+ months that remain before the September 30 deadline."<sup>153</sup> The letter concluded:

Given the fact that the initial Title VI complaint against BART was well founded, I am not in a position to award the ARRA funds to BART while the agency remains out of compliance. Moreover, it is clear that, if FTA were to pursue such a course, the likelihood of protracted litigation with the parties that made the initial complaint is extremely high.

According to press reports, BART still will receive \$17 million of the \$70 million in stimulus funds but for other uses.<sup>154</sup>

### III. JUDICIAL INTERPRETATION OF SECTIONS 601 AND 602 OF TITLE VI

#### A. Section 601 Proscribes Only Intentional Discrimination

In *Alexander v. Sandoval*,<sup>155</sup> a case involving Alabama's English-only driver's license examination, the issue was "whether private individuals may sue to enforce disparate impact regulations promulgated under

Title VI of the Civil Rights Act of 1964."<sup>156</sup> The U.S. Supreme Court held that Section 601 of Title VI, 42 U.S.C. § 2000d, proscribes only intentional discrimination.<sup>157</sup>

The *Sandoval* decision is consistent with prior decisions of the Court. In *Alexander v. Choate*,<sup>158</sup> involving Section 504 of the Rehabilitation Act of 1973,<sup>159</sup> the Court held that Section 601 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.<sup>160</sup> Although the reduction had more impact on the handicapped, the Court agreed with the State of Tennessee that Section 504 reaches only purposeful discrimination.

The *Choate* Court cited its decision in *Guardians Association v. Civil Service Commission of New York City*,<sup>161</sup> in which the Court "confronted the question whether Title VI...reaches both intentional and disparate-impact discrimination."<sup>162</sup> Although "[n]o opinion commanded a majority...the Court held that *Title VI itself directly reached only instances of intentional discrimination*"<sup>163</sup> (emphasis added).

Post-*Sandoval*, in 2003 in *South Camden Citizens in Action v. New Jersey Department of Environmental Pro-*

<sup>156</sup> *Sandoval*, 532 U.S. at 278, 121 S. Ct. at 1515, 149 L. Ed. 2d at 523.

<sup>157</sup> *Id.*, 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 N.Y. 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)). In addition, the Court has held that punitive damages may not be awarded in private suits brought under Title VI of the 1964 Act. *Barnes v. Gorman*, 536 U.S. 181, 188, 122 S. Ct. 2097, 2102, 153 L. Ed. 2d 230, 238 (2002) (stating that "Title VI funding recipients have not, merely by accepting funds, implicitly consented to liability for punitive damages").

<sup>158</sup> 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985).

<sup>159</sup> 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." *Choate*, 469 U.S. at 290, 105 S. Ct. at 714, 83 L. Ed. 2d at 665, (quoting 29 U.S.C. § 794).

<sup>160</sup> 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 § 504 (citing 29 U.S.C. § 794).

<sup>161</sup> 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983).

<sup>162</sup> *Choate*, 469 U.S. at 292–93, 105 S. Ct. at 716, 83 L. Ed. 2d at 666–67.

<sup>163</sup> *Id.* On the other hand, the *Choate* Court, observing that courts of appeals had held under some circumstances that § 504 reaches disparate impact legislation, stated that the Court "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." *Id.* at 299. The Court, however, rejected the respondents' disparate impact claims, because "§ 504 does not impose an 'affirmative-action obligation on all recipients of federal funds.'" *Id.* at 300 n.20 (citation omitted).

<sup>150</sup> *Id.*

<sup>151</sup> Letter from the FTA, to the Metropolitan Transportation Commission and San Francisco Bay Area Rapid Transit District 1–2 (Feb. 12, 2010), available at <http://www.thestrategycenter.org/flyer/fta-letter-bart>, last accessed on Sept. 9, 2010.

<sup>152</sup> *Id.* at 2.

<sup>153</sup> *Id.*

<sup>154</sup> *BART's Loss of \$70 Million is Muni's Gain*, S.F. EXAMINER, Feb. 16, 2010, available at <http://www.sfexaminer.com/local/BARTs-loss-of-70-million-is-Munis-gain-84535707.html>, last accessed on Sept. 9, 2010.

<sup>155</sup> 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

tection,<sup>164</sup> a federal district court in New Jersey held that “a party must allege that he or she was the target of purposeful, invidious discrimination” to state a claim under either Section 601 of Title VI or the Equal Protection Clause of the Fourteenth Amendment and § 1983.<sup>165</sup> The Ninth Circuit also stated in a 2003 case that Section 601 does not create a right “to be free from racially discriminating effects.”<sup>166</sup>

In sum, Section 601 only targets intentional discrimination. In Section IV.A, *infra*, the digest discusses how intentional discrimination, nevertheless, may be proved in the absence of direct evidence of discriminatory intent by the use of statistical and other evidence.

## B. No Private Right to Enforce Regulations Promulgated Under Section 602 of Title VI to Effectuate Section 601 of Title VI

In *Sandoval*, the Court did not address whether the courts below were correct to hold that Alabama’s English-only policy had the effect of discriminating on the basis of national origin....<sup>167</sup> Rather, the Court held that there simply is no private cause of action to enforce the Section 602 regulations.<sup>168</sup>

Prior to the *Sandoval* decision, in 1998 in *South Bronx Coalition for Clean Air, Inc. v. Conroy*,<sup>169</sup> an environmental group alleging disparate impact on minority residents had 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.

The *Sandoval* Court explained, however, 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.”<sup>170</sup> Declaring that such a right must come, if at all, from the independent force of Section 602, the Court held that it as-

sumed for the purpose of its decision that Section 602 confers the authority to promulgate disparate-impact regulations but held that Section 602 does not confer a private right to enforce the regulations.<sup>171</sup> The Court stated that Congress, as opposed to agencies of the executive branch, must create private rights of action to enforce federal law.<sup>172</sup>

The Court emphasized that Section 602 authorizes agencies to enforce the regulations by terminating funding or by “any other means authorized by law,”<sup>173</sup> authority vested in the agencies that indicates that Congress did not intend to sanction an individual’s right of action under the regulations.<sup>174</sup> “Neither 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.”<sup>175</sup>

Post-*Sandoval*, in 2003 in *Save Our Valley v. Sound Transit (Central Puget Sound Regional Transit Authority)*,<sup>176</sup> a community advocacy group opposed a proposed light-rail line through its community. The group argued that the project would have disproportionate adverse effects on minority residents<sup>177</sup> in violation of disparate-impact regulations issued pursuant to Section 602 of Title VI.<sup>178</sup> However, the Ninth Circuit held that a “disparate-impact regulation cannot create a new right; it can only ‘effectuate’ a right already created by § 601.”<sup>179</sup>

## IV. PROOF OF DISPARATE TREATMENT AND DISPARATE IMPACT

### A. Proof of Disparate Treatment: The *Arlington Heights* Factors

As one article notes, “[t]he courts recognize two methods of proving intentional discrimination: the direct method and the indirect method, with a mixed motive defense available in some cases.”<sup>180</sup> The indirect method<sup>181</sup> is used mostly in employment discrimination

<sup>164</sup> 254 F. Supp. 2d 486, 495 (D. N.J. 2003).

<sup>165</sup> *Id.* at 495.

<sup>166</sup> *Save Our Valley v. Sound Transit (Central Puget Sound Reg. Transit Auth.)*, 335 F.3d 932, 944 (9th Cir. 2003).

<sup>167</sup> *Id.*, *Sandoval*, 532 U.S. at 279.

<sup>168</sup> *Id.* See also Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631 (2000), available at [http://www.bc.edu/bc\\_org/avp/law/lwsch/journals/bcealr/27\\_4/02\\_TXT.htm](http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcealr/27_4/02_TXT.htm) (Last visited Sept. 9, 2010); Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155 (2000); and Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787 (1999).

<sup>169</sup> 20 F. Supp. 2d 565 (S.D.N.Y. 1998).

<sup>170</sup> *Sandoval*, at 285–86 (citation omitted).

<sup>171</sup> *Id.* at 286.

<sup>172</sup> *Id.* at 289.

<sup>173</sup> *Id.* (quoting 42 U.S.C. § 2000d-1).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 293 (footnote omitted).

<sup>176</sup> 335 F.3d 932 (9th Cir. 2003).

<sup>177</sup> *Id.* at 934.

<sup>178</sup> *Id.* at 935.

<sup>179</sup> *Id.* at 944 (citation omitted).

<sup>180</sup> Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 87–88 (2008) (footnote omitted), hereinafter cited as “Bodensteiner.”

<sup>181</sup> As summarized in the article,

[T]he indirect method, referred to as the McDonnell-Douglas proof scheme, and used most often in employment discrimina-



cases,<sup>182</sup> and the mixed motive approach in both Title VII employment cases and in some Age Discrimination in Employment Act (ADEA) cases.<sup>183</sup> However, although the “direct method” describes the usual or conventional way of proving a case,<sup>184</sup> the Supreme Court has “explicitly approved the use of circumstantial evidence under the direct method of proving intentional discrimination”<sup>185</sup> and, furthermore, has held that a “plaintiff need only show that a ‘discriminatory purpose was a motivating factor,’ not the sole factor.”<sup>186</sup> Thus, just as there is “burden-shifting” with the indirect method, likewise there is burden-shifting with the direct method.<sup>187</sup>

If a plaintiff utilizing the direct method of proof provides evidence sufficient to support a finding that a prohibited factor was a motivating factor in the challenged decision, this shifts the burden to the defendant to establish “that the same decision would have resulted even had the impermissible purpose not been considered.”...In short, this defense recognizes that a decisionmaker may be motivated by both legitimate and illegitimate factors in making a challenged decision.<sup>188</sup>

The matter of burden-shifting is relevant to other federal statutes that “require the plaintiff to prove disparate treatment,”<sup>189</sup> such as the ADA prohibiting discrimination based on a disability in employment as well as in public accommodations and government services,<sup>190</sup> the Rehabilitation Act’s Section 504,<sup>191</sup> and the ADEA.<sup>192</sup>

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tion cases, establishes a three-step burden-shifting framework. First, the plaintiff must establish a prima facie case. For example, an applicant for a position claiming her application was rejected because of sex can establish a prima facie case by showing (i) she is a member of a protected group, (ii) applied for an open position, (iii) she was qualified for the position, and (iv) her application was rejected and the employer hired a male, or the position remained open and the employer continued to seek applications from persons with qualifications similar to the plaintiffs. This creates a presumption of discrimination. Second, the burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged action. Third, assuming the employer meets this minimal burden, the plaintiff, who retains the ultimate burden of persuasion, can establish intentional discrimination either directly by showing “that a discriminatory reason more likely motivated the employer or indirectly by showing that the proffered explanation is unworthy of credence [pretext].”

*Id.* at 88 (footnotes omitted).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 95–96.

<sup>184</sup> *Id.* at 91.

<sup>185</sup> *Id.* at 92–93 (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)).

<sup>186</sup> *Id.* at 94 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102–66, 105 Stat. 1074).

<sup>187</sup> *Id.* at 88. See text in note 181, *supra*.

<sup>188</sup> *Id.* at 94 (footnotes omitted).

<sup>189</sup> *Id.* at 83 n.1.

<sup>190</sup> 42 U.S.C. §§ 12101–12213.

<sup>191</sup> 29 U.S.C. § 794.

<sup>192</sup> *Id.* §§ 621–34.

Although the Supreme Court held in *Sandoval* that Section 601 proscribes only intentional discrimination, such discriminatory animus may be difficult if not impossible to prove by direct evidence. Proof of discriminatory impact is insufficient to prove discriminatory intent. “[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.’”<sup>193</sup> Nevertheless, as the Supreme Court held in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>194</sup> in the absence of direct proof, indirect, circumstantial proof, if sufficient, may establish discriminatory intent.

In *Arlington Heights*, the Supreme Court explained that the application of a variety of factors may prove discriminatory intent. The *Arlington Heights* case concerned the review of a denial of a petition by the Metropolitan Housing Development Corp. (MHDC) for a rezoning of a 15-acre parcel in the Village of Arlington Heights from a single-family zoning classification to a multiple-housing classification to permit MHDC to build low- to moderate-income housing.<sup>195</sup> After Arlington Heights denied the request, the MHDC alleged that the denial was racially discriminatory and violated, *inter alia*, the Fourteenth Amendment and the Fair Housing Act of 1968.

The Supreme Court held that, although the *Arlington Heights* decision “does arguably bear more heavily on racial minorities,”<sup>196</sup> the MHDC and individual respondents “simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village’s decision.”<sup>197</sup> The Court held that the respondents had failed to prove discrimination based on what courts would refer to later as the *Arlington Heights* factors.

In *Arlington Heights*, the Court held that when a discriminatory policy or action is alleged in a Section 601 case, the courts must conduct an inquiry into the circumstances to ascertain whether discrimination was the purpose of an official action or decision.

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it “bears more heavily on one race than another”—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. ...The evidentiary inquiry is then relatively easy. ...[I]mpact

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<sup>193</sup> *Village of Arlington Heights*, 429 U.S. at 264–65, 97 S. Ct. at 563, 50 L. Ed. 2d at 464 (citation omitted).

<sup>194</sup> *Id.* at 252.

<sup>195</sup> *Id.* at 254.

<sup>196</sup> *Id.* at 269.

<sup>197</sup> *Id.* at 270.

alone is not determinative, and the Court must look to other evidence.<sup>198</sup>

The Court identified a nonexhaustive list of factors to evaluate in determining whether a decision was the result of discriminatory animus.

- “The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.”<sup>199</sup>
- “The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.”<sup>200</sup>
- “Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.”<sup>201</sup>
- “The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”<sup>202</sup>

In *Western States Paving Co., Inc. v. Washington State Dep’t of Transportation*,<sup>203</sup> although the district court held that the disadvantaged business enterprise (DBE) program at issue was intentionally race-conscious, the court addressed what evidence may be considered when a facially neutral, yet allegedly discriminatory, policy is at issue. The court held that to establish discriminatory intent under Section 601, the plaintiff must show that “it has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”<sup>204</sup> The court stated that “[d]iscriminatory purpose...implies more than intent as volition or intent as awareness of consequences. It implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group.”<sup>205</sup>

When a policy is facially neutral, “a plaintiff must show that the relevant decision maker (e.g., state legislature) adopted the policy at issue ‘because of not merely in spite of, its adverse effects upon an identi-

able group.”<sup>206</sup> In making a determination of whether invidious discrimination was a motivating factor concerning a policy, program, or action, the court must make “a sensitive inquiry into such circumstantial and direct evidence as may be available.”<sup>207</sup> The court may consider evidence such as “the historical background of the decision, the specific sequence of events leading up to the challenged decision, legislative or administrative history of the decisionmaking body, and any other evidence relevant to a showing of discriminatory purpose.”<sup>208</sup>

In *Western States Paving Co.*, the court, in a decision on remand from the Ninth Circuit, held that the plaintiff’s Section 601 claim for damages could proceed against the Washington State DOT,<sup>209</sup> because its DBE program was not a facially neutral one; rather, “it was specifically race conscious. Any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial.”<sup>210</sup> The court held that the Department’s DBE program, which was subject to judicial review based on a standard of strict scrutiny, “was not sufficiently narrowly tailored to withstand such scrutiny.”<sup>211</sup> As explained below, statistical and other evidence, such as the *Arlington Heights* factors, may be used by a court in deciding whether a policy, program, or action was motivated by a discriminatory purpose.

Although the next subsection discusses Title VI and recent judicial decisions, Section V of the digest explains that financial assistance may be refused to an applicant that fails or refuses to assure its compliance with Title VI and that an aggrieved party may file an administrative complaint with the FTA regarding alleged violations of Title VI.

## B. Title VI and Recent Cases

In *Darensburg v. Metropolitan Transportation Commission*<sup>212</sup> and in *Committee Concerning Community Improvement v. City of Modesto*,<sup>213</sup> the courts decided whether the plaintiffs’ evidence proved intentional dis-

<sup>206</sup> *Id.* at \*35–36 (quoting *Pryor v. NCAA*, 288 F.3d 548 (3d Cir. 2002) (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) (some internal quotation marks omitted)).

<sup>207</sup> *Id.* at \*36 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)).

<sup>208</sup> *Id.* (citation omitted).

<sup>209</sup> *Id.* at \*3.

<sup>210</sup> *Id.* at \*37 (citation omitted).

<sup>211</sup> *Id.* at \*9–10. On the other hand, the plaintiffs’ did not have claims against the city and county because their involvement had been “involuntary and required no independent activity”; therefore, the city and county were held not to have intentionally discriminated against the plaintiff. *Id.* at \*16.

<sup>212</sup> 611 F. Supp. 2d 994 (N.D. Cal. 2009).

<sup>213</sup> 583 F.3d 690 (9th Cir. 2009).

<sup>198</sup> *Id.* at 266 (citations omitted) (footnotes omitted).

<sup>199</sup> *Id.* at 267 (citations omitted).

<sup>200</sup> *Id.* at 267 (citations omitted).

<sup>201</sup> *Id.* at 267 (footnote omitted).

<sup>202</sup> *Id.*, 429 U.S. at 268, 97 S. Ct. at 565, 50 L. Ed. 2d at 466.

<sup>203</sup> 2006 U.S. Dist. LEXIS 43058, at \*1 (W.D. Wash. 2006).

<sup>204</sup> *Id.* at \*17 (quoting *SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002) and citing *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996)).

<sup>205</sup> *Id.* (internal quotations omitted) (citations omitted).

crimination based on statistical evidence and/or the *Arlington Heights* factors. In both cases, the plaintiffs were unable to prove violations of Title VI. In *Darensburg*, the plaintiffs also failed to establish disparate impact under state law. In *Committee Concerning Community Improvement v. City of Modesto*, the plaintiffs were unsuccessful in proving discrimination regarding the defendants' provision of municipal infrastructure and services to the plaintiffs' neighborhoods.

### 1. *Darensburg v. Metropolitan Transportation Commission*

*a. Denial of Plaintiffs' Title VI Disparate Treatment Claim.*—In *Darensburg*, in 2008<sup>214</sup> and 2009,<sup>215</sup> a federal district court in California considered the plaintiffs' claims of intentional discrimination against the Metropolitan Transportation Commission (MTC) in which the plaintiffs sought injunctive and declaratory relief pursuant to the Fourteenth Amendment of the Constitution and 42 U.S.C. § 1983 and Title VI, as well as California Government Code Section 11135.<sup>216</sup> As discussed below, in 2008, the court dismissed the plaintiffs' claim of intentional discrimination. Although the court permitted a claim to proceed for disparate impact based on state law, in 2009 the court dismissed the claim.

The plaintiffs filed a class action alleging that the MTC, which programs and allocates funding from various sources to San Francisco Bay Area transit and highway projects, had channeled funds to projects that disproportionately benefited white suburban riders of BART and Caltrain at the expense of projects that would have benefited minority bus patrons of AC Transit.<sup>217</sup> The MTC is responsible for updating the Regional Transportation Plan (RTP) for the nine-county San Francisco Bay Area.<sup>218</sup> The RTP is the region's long-range transportation plan for a 25-year period and is a prerequisite for the Bay Area's transportation projects to qualify for federal funds.<sup>219</sup> Among its various mandates, the MTC must “emphasize the preservation of the existing transportation system.”<sup>220</sup>

The plaintiffs alleged intentional discrimination based on “a longstanding pattern of race discrimination” by the MTC in the funding of public transit services in the San Francisco 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.”<sup>221</sup> The plaintiffs on behalf of themselves and others alleged that MTC historically had 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. The plaintiffs sought to enjoin MTC permanently “from making any funding decision that has an unjustified disproportionately adverse impact on AC Transit riders of color”<sup>222</sup> and “from supporting the funding of...any improvement or expansion in service that detracts from the equitable funding of services that benefit AC Transit riders.”<sup>223</sup>

In a 2008 opinion, the court granted the defendant's motion for summary judgment on the plaintiff's claim of intentional discrimination but denied the defendant's motion to dismiss and allowed the case to proceed to trial on the disparate-impact claim on the basis of California Government Code Section 11135,<sup>224</sup> discussed later.<sup>225</sup>

The court rejected the plaintiffs' Title VI claim, finding that the plaintiffs had no evidence of direct discriminatory intent and that even applying the *Arlington Heights* factors, the “totality of the circumstances shown by Plaintiffs' indirect evidence” did not evince intentional discriminatory intent.<sup>226</sup> The court observed, for example, that the defendant produced evidence that it has no authority to redirect earmarked federal funds and “has provided preventative maintenance funding to AC Transit to use for operating expenses whenever AC Transit sought such funding.”<sup>227</sup>

The court held that “[t]he circumstances include too many strong contraindications of discriminatory motive that preclude drawing any reasonable inference of discriminatory intent.”<sup>228</sup> As one example, the court discussed the MTC's

treatment of the whitest of the seven major carriers, Golden Gate Transit, almost two-thirds of whose passengers are white in a transit area that is majority minority. Facing steep operating shortfalls in three RTPs in 1994, 1998 and 2005..., which MTC did not cover, Golden Gate

<sup>221</sup> *Darensburg*, 2008 U.S. Dist. LEXIS 63991, at \*3.

<sup>222</sup> *Id.* at \*30.

<sup>223</sup> *Id.*

<sup>224</sup> CAL. GOV'T CODE § 11135(a) provides:

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

Notwithstanding § 11000, this section applies to the California State University.

<sup>225</sup> *Darensburg*, 2008 U.S. Dist. LEXIS 63991, at \*79.

<sup>226</sup> *Id.* at \*72, 76.

<sup>227</sup> *Id.* at \*72.

<sup>228</sup> *Id.* at \*76–77.

<sup>214</sup> 2008 U.S. Dist. LEXIS 63991, at \*1 (N.D. Cal. 2008).

<sup>215</sup> 611 F. Supp. 2d 994 (N.D. Cal. 2009).

<sup>216</sup> On September 19, 2005, the court granted MTC's motion to dismiss the complaint with leave to amend; the plaintiffs filed an amended complaint on October 11, 2005.

<sup>217</sup> The plaintiffs were individuals of color and organizations with minority members who ride buses of the Alameda–Contra Costa Transit District (“AC Transit”), which operates California's largest bus-only transit system. *Darensburg*, 611 F. Supp. 2d at 997.

<sup>218</sup> *Id.* at 998, 1000.

<sup>219</sup> *Id.* at 1006.

<sup>220</sup> *Id.* at 1006 (citing 23 U.S.C. § 134(h)(1)(H)).

Transit cut its service by 35% and lost 21% of its ridership.<sup>229</sup>

The court stated that “it would strain credulity to infer that Defendant is motivated by racial discrimination to harm AC Transit’s minority riders by not covering operating shortfalls [when MTC] allows Golden Gate Transit’s largely white riders to suffer steep cuts in service instead of covering its operating shortfalls.”<sup>230</sup>

*b. Denial of Plaintiffs’ Disparate-Impact Claim.*—In the 2008 opinion, the court had observed that, unlike Title VI, California’s “statutory scheme expressly provides for a private right of action”<sup>231</sup> by stating in Section 11139 that “[t]his article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief.”<sup>232</sup> The court held that on the state disparate-impact claim, there were triable issues of fact regarding, for example, whether Congestion Mitigation and Air Quality “funds can be allocated to operating shortfalls in the RTP”;<sup>233</sup> whether Surface Transportation Program “funds can be used for operating expenses”;<sup>234</sup> and whether State Transportation Improvement Program “funds could be allocated to cover operating shortfalls in the RTP.”<sup>235</sup> There was also a triable issue of fact concerning causation and the plaintiffs’ claims for disparate impact.<sup>236</sup>

In its 2009 decision, the court considered in detail and rejected the plaintiffs’ disparate-impact claim under the California statute. As stated, in contrast to Title VI, under the California statute there is a private right of action to enforce the statute and the regulations.<sup>237</sup> However, “[A]s under Title VI, a *prima facie* case of disparate impact discrimination under section 11135 requires a plaintiff to show: (1) the occurrence of certain outwardly neutral practices; and (2) a significantly adverse or disproportionate impact on minorities produced by the defendant’s facially neutral acts or practices.”<sup>238</sup>

Although the court observed later in its opinion that “comparing transit service is more ‘an art than a science,’”<sup>239</sup> the court disposed of the plaintiffs’ Section 11135 disparate-impact claim. The court began by stating that it recognized that “AC Transit bus riders would

benefit from additional service and that many of them are burdened by fare hikes and service cuts....”<sup>240</sup>

However, the court stated it had come “to appreciate the difficult challenge faced by MTC’s public servants of meeting a wide array of complex transportation needs and competing priorities of multiple operators throughout the Bay Area with limited and often highly restricted funds.”<sup>241</sup> For example, there are committed funds and discretionary funds;<sup>242</sup> some of the committed funds are federal funds administered by the FTA (Sections 5307 and 5309 funds),<sup>243</sup> which may be eligible for capital expenditures or preventive maintenance;<sup>244</sup> there are ADA set-aside funds and other funds that may be allocated by the MTC.<sup>245</sup> There are state committed funds based on state statutes and statewide voter-approved propositions, as well as regional measures passed by voters in the Bay Area.<sup>246</sup> There are other uncommitted funds that may be available to the MTC.<sup>247</sup>

Although the court found that the plaintiffs had demonstrated some instances of disparate impact,<sup>248</sup> “on balance, Plaintiffs have not met their burden of showing that MTC’s funding practices regarding committed funds have a significantly disproportionate adverse impact on the Plaintiff Class.”<sup>249</sup> Furthermore, the “Plaintiffs have not met their burden of showing a *prima facie* case of showing a significant disparate impact with respect to uncommitted funds.”<sup>250</sup>

The plaintiffs did establish a *prima facie* case regarding Resolution 3434,<sup>251</sup> a strategic long-range plan for transit expansion projects.<sup>252</sup> Because the plaintiffs

<sup>240</sup> *Id.* at 999.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 1019.

<sup>244</sup> *Id.* at 1019–22.

<sup>245</sup> *Id.* at 1022–24.

<sup>246</sup> *Id.* at 1024–28.

<sup>247</sup> *Id.* at 1030–36.

<sup>248</sup> *Id.* at 1044. For example, the court stated that “[o]n balance, Plaintiffs have shown that MTC’s practice with respect to Resolution 3434 caused disparate impact” and that the “Plaintiffs have shown that MTC’s projections, particularly those in the near future, constitute a substantial factor contributing to service reductions by AC Transit.” *Id.* at 1050.

<sup>249</sup> *Id.* at 1051.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 1044. Thus, the court stated:

On balance, Plaintiffs have shown that MTC’s practice with respect to Resolution 3434 caused disparate impact. As described above, MTC allocates more funding to rail projects than to bus projects, resulting in bus projects proposed by AC Transit being excluded from projects listed in Resolution 3434. Although Plaintiffs’ challenge to MTC’s initial decisions on which projects to include under Resolution 3434 appear to be barred by the statute of limitations, those decisions constitute relevant context

<sup>229</sup> *Id.* at \*77–78 (citation omitted) (footnote omitted).

<sup>230</sup> *Id.* at \*78 (footnotes omitted).

<sup>231</sup> *Id.* at \*44.

<sup>232</sup> *Id.* (citation omitted).

<sup>233</sup> *Id.* at \*60.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at \*63.

<sup>236</sup> *Id.* at \*68, 71.

<sup>237</sup> *Darensburg*, 611 F. Supp. 2d at 1041–42 (citing CAL. GOV’T CODE § 11139).

<sup>238</sup> *Id.* at 1042.

<sup>239</sup> *Id.* at 1048.

had established a *prima facie* case of disparate impact, the defendant had to “demonstrate a substantial legitimate justification for its action.”<sup>253</sup> The court rejected the plaintiffs’ argument that the “MTC must demonstrate a *strict transportation necessity* through empirical validation studies, citing landmark cases that arose in the employment context”<sup>254</sup> (emphasis added). The court distinguished the cases on which the plaintiffs relied on the basis that the cases involved a discrete test or screening device, which was wholly different from the complex situation with which the MTC had to deal. The “MTC’s practices...are subject to a complex array of statutory, regulatory and administrative constraints, not to mention numerous, and sometimes competing policy goals, which require making difficult trade-offs.”<sup>255</sup> The court held that it could not “say that MTC has failed to show a substantial legitimate justification for Resolution 3434....”<sup>256</sup>

When a plaintiff in a disparate-impact case makes a *prima facie* case, but the defendant responds by demonstrating a substantial legitimate justification for its actions, the plaintiff “must then show an equally effective alternate practice that results in less racial disproportionality.”<sup>257</sup> However, in *Darensburg*, the court ruled that the plaintiffs did not show that their alleged less discriminatory alternative “would be equally effective while causing less racial disparity.”<sup>258</sup>

## 2. Committee Concerning Community Improvement v. City of Modesto and Title VI Claims

Although not involving transit, another case of interest is *Committee Concerning Community Improvement v. City of Modesto*,<sup>259</sup> an action against the city, Stanislaus County, and the county sheriff, in which a district court rejected the plaintiffs’ Title VI and Fourteenth Amendment Equal Protection and § 1983 claims based on alleged discrimination in the defendants’ provision of municipal infrastructure and services to the affected neighborhoods. As discussed below, the Ninth Circuit affirmed the district court in part and reversed and remanded in part.

The plaintiffs/appellants were residents of four predominately Latino neighborhoods, as well as community groups representing the neighborhoods.<sup>260</sup> The neighborhoods are outside of the city and not incorporated in the city but within the city’s “sphere of influ-

ence.”<sup>261</sup> Twenty-six unincorporated neighborhoods, referred to as “islands,” are within the city’s sphere of influence.<sup>262</sup> The plaintiffs alleged that certain actions and inaction of the city and Stanislaus County constituted intentional discrimination in violation of the Federal Constitution and statutes, as well as of California statutes.<sup>263</sup> Essentially, the claim was that the defendants discriminated against the plaintiffs in the delivery of municipal services.

One of plaintiffs’ specific complaints concerned the lack of infrastructure, such as curbs, sidewalks, and drains.<sup>264</sup> Another complaint concerned the city’s failure to annex the neighborhoods. Annexation would have meant additional city services, as well as resulted in the residents being able to vote in city elections.<sup>265</sup> One of the barriers to annexation was the exclusion of the plaintiff neighborhoods from a Master Tax Sharing Agreement (MTSA) between the city and the county. Under the MTSA the governments had agreed to a division of tax revenue if and when the city annexed a community covered by the agreement.<sup>266</sup> If a community is not covered by the MTSA, the city and county must enter into a separate tax sharing agreement for the community.<sup>267</sup>

The plaintiffs argued that the MTSA was a disincentive to the county’s building of infrastructure because there was no assurance that in a future annexation the city would not require financial concessions from the county.<sup>268</sup> The MTSA issue allegedly also deterred the neighborhoods from seeking annexation, a “burdensome” and possibly “futile” process in the absence of a covering MTSA.<sup>269</sup>

A lack of sewerage facilities was also at issue. Because of the passage of a measure by city voters, the extension of sewerage facilities to any annexed neighborhoods had been rendered more difficult.<sup>270</sup> Moreover, the county allegedly had given priority to the building of other infrastructure projects in predominately white communities.<sup>271</sup>

Another issue concerned law enforcement and emergency response times, services that were the responsibility of the county for the plaintiff neighborhoods.<sup>272</sup> The plaintiffs alleged that the response times for the predominately Latino neighborhoods are longer than for predominately white neighborhoods.<sup>273</sup>

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 696–97.

<sup>265</sup> *Id.* at 697.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 698.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 699.

<sup>273</sup> *Id.*

for MTC’s further reductions in 2006 of the scope of the few AC Transit bus projects that had initially been included. *Id.*

<sup>253</sup> *Id.* at 1042.

<sup>254</sup> *Id.* at 1051.

<sup>255</sup> *Id.* at 1052.

<sup>256</sup> *Id.* at 1057.

<sup>257</sup> *Id.* at 1042 (citing Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).

<sup>258</sup> *Id.* at 1060.

<sup>259</sup> 583 F.3d 690 (9th Cir. 2009).

<sup>260</sup> *Id.* at 696.

The District Court in a series of decisions granted summary judgment to the defendants and dismissed the plaintiffs' claims, including those for violation of Title VI.<sup>274</sup> As stated, the Ninth Circuit affirmed the District Court in part and reversed and remanded in part.

First, the appellate court ruled that the plaintiffs' claim based on the 2004 MTSA was not time-barred and that the plaintiffs could use time-barred 1983 or 1996 MTSA "as evidence to establish motive and to put [their] timely-filed claims in context."<sup>275</sup> Second, the court held that evidence of "gross statistical disparities" may be used to satisfy the intent requirement of Title VI when the evidence "tends to show that some invidious or discriminatory purpose underlies the policy."<sup>276</sup> Statistical evidence of discriminatory *impact* does not relieve the plaintiffs of their burden of showing a defendant's *intent* to discriminate.<sup>277</sup> However, statistical evidence along with the *Arlington Heights* factors may be "considered in determining whether there is evidence of intent or purpose to discriminate..."<sup>278</sup>

Although the court earlier stated that "it is the rare case where impact alone will be sufficient to invalidate a challenged government action,"<sup>279</sup> the court held that the statistical evidence and other factors were "evidence of discriminatory impact which, in turn, has created a sufficient inference of discriminatory intent to permit [the plaintiffs] to present their MTSA claim to a factfinder."<sup>280</sup>

Thus, on the plaintiffs' claim based on the MTSA, the court reversed the district court and remanded. However, on the plaintiffs' claim regarding the lack of sewerage services, the court found that the "statistical evidence is insufficient to give rise to an inference of discriminatory intent" and affirmed the district court's grant of summary judgment to the city.<sup>281</sup>

On the issue of law-enforcement and emergency response times, the court found that the difference between the response times for the predominately Latino communities and the predominately white communities to be "statistically significant" and remanded to the district court to determine whether the difference is

material and, if so, whether the difference is the result of the plaintiffs' ethnicity.<sup>282</sup>

The plaintiffs' claim regarding the lack of infrastructure concerned in part a "Priorities List" that the county had adopted in 2004. The court affirmed the district court's grant of a summary judgment to the county, holding that "in the context of many County-wide infrastructure needs...and limited funding..., there is not sufficient evidence to give rise to an inference of discriminatory intent."<sup>283</sup>

The plaintiffs' Fair Housing Act and other claims are not addressed here, but it may be noted that the appellate court invited the lower court to reconsider its dismissal of the state law claims, e.g., California Government Code Section 11135, which occurred in the context of the dismissal of the federal claims. However, the court indicated that the district court would not necessarily be reversed if it once more did not address the state claims.<sup>284</sup>

Although the district court's decision on remand is unknown at this writing, based on the Ninth Circuit's decision in *Modesto*, it is possible to raise a triable issue of fact for a Section 601 claim based on statistical and other evidence in the absence of direct evidence of discriminatory intent.

### C. Pre-*Sandoval* Disparate-Impact Cases

Although they were decided prior to the Supreme Court's rulings in *Sandoval*, several other cases located for the digest are of interest regarding Title VI claims.

In *New York Urban League v. New York*,<sup>285</sup> the plaintiffs challenged the State of New York's and the Metropolitan Transportation Authority's (MTA) allocation of funds for mass transit. The plaintiffs alleged that riders of the New York City Transit Authority (NYCTA) subway and bus system, "the majority of whom are members of protected minority groups, pay a higher share of the cost of operating that system than commuter line passengers, who are predominantly white...."<sup>286</sup> The court recognized that Section 601 "only prohibits intentional discrimination, not actions that have a disparate impact upon minorities";<sup>287</sup> stated that "Title VI delegated to federal agencies the authority to promulgate regulations incorporating a disparate impact standard";<sup>288</sup> and then, pre-*Sandoval*, proceeded to discuss whether a *prima facie* case of disparate impact had

<sup>274</sup> *Comm. Concerning Cmty. Improvement v. City of Modesto*, 2007 U.S. Dist. LEXIS 39099, at \*1 (E.D. Cal., May 16, 2007); 2007 U.S. Dist. LEXIS 50258, at \*1 (E.D. Cal., July 2, 2007); 2007 U.S. Dist. LEXIS 57551, at \*1 (E.D. Cal., July 30, 2007); 2007 U.S. Dist. LEXIS 61195, at \*1 (E.D. Cal., July 30, 2007).

<sup>275</sup> *Comm. Concerning Cmty. Improvement*, 583 F.3d at 702 (citation omitted).

<sup>276</sup> *Id.* at 703 (citations omitted).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 705.

<sup>281</sup> *Id.* at 707.

<sup>282</sup> *Id.* at 709.

<sup>283</sup> *Id.* at 710.

<sup>284</sup> *Id.* at 715.

<sup>285</sup> 71 F.3d 1031 (2d Cir. 1995).

<sup>286</sup> *Id.* at 1033.

<sup>287</sup> *Id.* at 1036 (citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983)).

<sup>288</sup> *Id.*

been made and whether the defendant had established a substantial legitimate justification for its actions.<sup>289</sup>

The appeals court reversed the district court's grant of an injunction barring the implementation of a proposed 20 percent fare increase for subway and bus riders.<sup>290</sup> The Second Circuit held that the lower court "focused on the proposed NYCTA fare increase without examining the broader financial and administrative context in which this fare increase was adopted."<sup>291</sup> The court noted that New York law required the MTA to "be self-sustaining with respect to the combined operating expenses of the MTA and its subsidiary corporations, including the commuter lines."<sup>292</sup> The court held that the gravamen of the action was that "riders of the New York City subway and bus system, compared to passengers on the commuter lines, bear a disproportionately high share of the cost of operating the transportation system they use."<sup>293</sup>

First, the Second Circuit held that the district court erroneously found that the plaintiffs had made a *prima facie* showing of disparate impact based "upon a comparison of the so-called 'farebox recovery ratios' of the NYCTA and the commuter lines. The farebox recovery ratio measures the percentage of each system's operating cost—adjusted to include certain interest payments, depreciation, and the cost of police services—that is recovered through fare revenues."<sup>294</sup>

The court held that "[b]ecause the underlying claim challenges the total allocation of subsidies to the NYCTA and the commuter lines, the district court should have first assessed whether any measure or combination of measures could adequately capture the impact of these subsidies upon NYCTA and commuter line passengers."<sup>295</sup> The Second Circuit concluded that the farebox recovery ratio was not a sufficient basis for a finding of disparate impact, in part because the ratio "does not reveal the extent to which one system might have higher costs associated with its operations—costs stemming from different maintenance requirements, schedules of operation, labor contracts, and so on."<sup>296</sup>

The court further concluded that there was no reason to assume that each system's expenses had a "proportionate relationship," because the systems were "fundamentally different" in how they carry passengers and in their frequency of stops and operating sched-

ules.<sup>297</sup> The systems' different costs could "obscure the level of subsidies provided to each."<sup>298</sup> The court stated that the "farebox recovery ratio thus says very little about the overall allocation of funds to the two systems...."<sup>299</sup>

Second, the court ruled that the district court made insufficient findings on whether the defendants had shown a substantial legitimate justification for a fare increase<sup>300</sup> and failed to analyze "whether the defendants had shown a substantial legitimate justification for [the] allocation."<sup>301</sup> The court observed that the MTA and the state identified several factors favoring a higher subsidization of the commuter lines.<sup>302</sup>

Finally, the court held that enjoining the NYCTA fare increase was not an appropriate remedy with respect to the alleged disparate impact in subsidies.<sup>303</sup>

Another case of interest, decided in 2001, is *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*,<sup>304</sup> in which a group of bus passengers challenged decisions by the Los Angeles County Metropolitan Transportation Authority (LACMTA) to spend "several hundred million dollars" on a new rail line, to increase bus fares, and to eliminate monthly discount passes.<sup>305</sup> LACMTA allegedly was 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."<sup>306</sup>

The 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.<sup>307</sup> Ultimately, the district court entered an order that included a requirement that the MTA immediately acquire 248 additional buses to reduce passenger overcrowding.<sup>308</sup> The appeals court agreed that the consent decree imposed an "obligation" on the LACMTA "to meet the scheduled load factor targets...."<sup>309</sup>

A third pre-*Sandoval* case, *Committee for a Better North Philadelphia v. Southeastern Pennsylvania*

<sup>289</sup> *Id.* (stating that courts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance) (citing *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 N14 (11th Cir. 1993); *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969, 982 NN 9, 10 (9th Cir. 1984).

<sup>290</sup> *N.Y. Urban League*, 71 F.3d at 1033.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 1034.

<sup>293</sup> *Id.* at 1035.

<sup>294</sup> *Id.* at 1037.

<sup>295</sup> *Id.* at 1038.

<sup>296</sup> *Id.* at 1037.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 1039.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 1039–40.

<sup>304</sup> 263 F.3d 1041 (9th Cir. 2001).

<sup>305</sup> *Id.* at 1043.

<sup>306</sup> *Id.*

<sup>307</sup> To reduce bus overcrowding, the Consent Decree set forth specific "load factor targets" or "LTFs" that the MTA had to meet by specific dates and established a Joint Working Group of representatives from the plaintiffs' class and the MTA. See *id.* at 1044.

<sup>308</sup> *Id.* at 1043.

<sup>309</sup> *Id.* at 1049.

*Transportation Authority*,<sup>310</sup> involved a claim of disparate impact on the black community of Philadelphia.<sup>311</sup> The plaintiffs argued that the Southeastern Pennsylvania Transportation Authority (SEPTA) used an unfair portion of its federal subsidy dollars for Regional Rail at the expense of City Transit,<sup>312</sup> which had a higher percentage of black riders than Regional Rail.<sup>313</sup> Plaintiffs argued that City Transit riders were paying “through their fares a higher percentage of the division’s operating expenses than...the riders of Regional Rail.”<sup>314</sup>

The court rejected the plaintiff’s arguments that SEPTA should raise Regional Rail fares and reallocate subsidies to City Transit or reduce Regional Rail Service to reduce its share of operating expenses.<sup>315</sup> The court agreed with SEPTA that the agency had a responsibility to maintain a balanced budget that included the need to increase ridership on Regional Rail that would not be accomplished if the court required SEPTA to decrease service and raise fares for Regional Rail.<sup>316</sup> The court held that none of the alternatives offered by the Committee would accomplish SEPTA’s legitimate goals and granted a summary judgment in favor of SEPTA because the plaintiff did not sustain its burden of proving the existence of other devices without a similarly undesirable effect.<sup>317</sup>

## D. Other Issues Relating to Title VI Claims

### 1. Sovereign Immunity

The Eleventh Amendment bars § 1981 and § 1983 claims against the states and state agencies.<sup>318</sup> However, the Eleventh Amendment does not bar a Section 601 disparate-treatment, intentional-discrimination claim.<sup>319</sup> The reason is that “Congress has clearly condi-

<sup>310</sup> 1990 U.S. Dist. LEXIS 10895, at \*1 (E.D. Pa. 1990).

<sup>311</sup> *Comm. for a Better North Phila.*, 1990 U.S. Dist. LEXIS 10895, at \*8 (court stating that “[i]n Title VI discriminatory impact cases, as in cases brought under Title VII, the burden of proof has three distinct stages) (citations omitted).

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at \*9.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at \*11.

<sup>316</sup> *Id.* at \*13.

<sup>317</sup> *Id.* (quotation marks omitted) (citations omitted).

<sup>318</sup> *W. States Paving Co.*, 2006 U.S. Dist. LEXIS 43058, at \*29 (citing *Peters v. Lieuallen*, 693 F.2d 966, 970 (9th Cir. 1982); *Pennhurst State Sch. & Hospital v. Halderman*, 465 U.S. 89, 101–3, 104 S. Ct. 900, 908–10, 79 L. Ed. 2d 67, 78–80 (1984) (Eleventh Amendment sovereign immunity extends to state agencies and to damage claims against state officials acting in their official capacity); *Quern v. Jordan*, 440 U.S. 332, 339–40, 99 S. Ct. 1139, 1114, 59 L. Ed. 2d 358, 365–66 (1979).

<sup>319</sup> *W. States Paving Co.*, 2006 U.S. Dist. LEXIS 43058, at \*27.

tioned the receipt of federal highway funds on compliance with Title VI and the waiver of sovereign immunity from claims arising under Title VI.<sup>320</sup> In *Western States Paving Co.*, *supra*, the court held that the state did not have sovereign immunity because the regulations clearly put “the state on notice—as a recipient of federal funds—that it faced private causes of action in the event of noncompliance.”<sup>321</sup>

### 2. Statute of Limitations

In *Darensburg v. Metropolitan Transportation Commission*,<sup>322</sup> the court considered whether some of the plaintiffs’ claims alleging disparate impact were time-barred. In its 2008 opinion, the court dismissed the plaintiffs’ Title VI disparate-treatment case. The only basis for a disparate-impact claim was California Government Code Section 11135. First, the court held that the statute of limitations was 2 years for disparate-impact claims under Section 11135.<sup>323</sup> Second, citing the U.S. Supreme Court’s opinion in *National Railroad Passenger Corp. v. Morgan*,<sup>324</sup> the court held that the “continuing violation doctrine” did not extend the limitations period.<sup>325</sup> The court held that the “Plaintiffs’ challenges to ongoing effects of policies adopted prior to April 19, 2003 are likely time-barred under *Morgan*”;<sup>326</sup> however, the court held that in “disparate impact cases...the court may consider time-barred events as evidence in connection with Plaintiffs’ timely claims.”<sup>327</sup>

## V. WHETHER DISPARATE-IMPACT CLAIMS ARE ACTIONABLE UNDER SECTION 1983

### A. Cases Holding That Disparate-Impact Claims Are Not Actionable Under Section 1983

Under the *Sandoval* decision, a private right of action to enforce Section 601 of Title VI for intentional discrimination does not include a private right of action to enforce Section 602 and the regulations issued thereunder for disparate impact. Section 1983 is not an independent basis for a claim. That is, a 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.”<sup>328</sup>

<sup>320</sup> *Id.* at \*30–31.

<sup>321</sup> *Id.* at \*34.

<sup>322</sup> 611 F. Supp. 2d 994 (N.D. Cal. 2009).

<sup>323</sup> *Id.* at 1039.

<sup>324</sup> 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002).

<sup>325</sup> *Darensburg*, 611 F. Supp. 2d at 1041.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285, 121 S. Ct. 2268, 2276, 153 L. Ed. 2d 309, 322 (2002) (quoting *Chapman v.*



Notwithstanding the *Sandoval* and other decisions discussed herein, in one case located for the digest, the Tenth Circuit held that the *Sandoval* decision does not necessarily preclude the possibility of a judicial remedy for disparate-impact claims. In *Robinson v. Kansas*,<sup>329</sup> the plaintiffs argued that the Kansas state school financing system, through a provision for “low enrollment weighting” and “local option budgets,”<sup>330</sup> resulted in less funding per pupil in schools in which minority students, students who are not of United States origin, and students with disabilities were disproportionately enrolled. The plaintiffs’ original complaint sought a court order requiring the defendants to revise the Kansas school finance law so that it complied with the law. The appellate court noted that the plaintiffs, however, were willing to amend their complaint, as the district court suggested, to request injunctive relief prohibiting the defendants from enforcing the state law.<sup>331</sup> After the district court denied the defendants’ motion to dismiss, the defendants filed an interlocutory appeal.

According to plaintiffs, there was a disparate impact on such students in violation of the implementing regulations of the Rehabilitation Act of 1973<sup>332</sup> and Section 602 of Title VI.<sup>333</sup> Consistent with *Sandoval*, the court in *Robinson* held that a private right of action exists under Section 601 only 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 § 1983 action to enforce Section 602 regulations.<sup>334</sup>

Other courts have not followed the *Robinson* decision. For example, in *Gulino v. Board of Education of the City School District of the City of New York*,<sup>335</sup> a federal district court in New York stated that it disagreed with the Tenth Circuit and several district courts that had allowed Section 602 disparate-impact claims to proceed under § 1983.<sup>336</sup> The court held that “the regulation at issue in this case does not create federal rights

for the purposes of § 1983....”<sup>337</sup> The New York court observed that in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,<sup>338</sup> the Third Circuit had declined to follow the Tenth Circuit and had disallowed § 1983 claims based on Section 602 of Title VI.<sup>339</sup>

Second, in *Gulino*, the district court pointed out that the Second Circuit had decided that Title IX claims may not be brought pursuant to § 1983.<sup>340</sup> Because the Supreme Court “analyzes Title VI and Title IX claims interchangeably...it follows that Title VI claims cannot be brought under § 1983 in this jurisdiction.”<sup>341</sup>

In an analogous situation in *Gonzaga University v. Doe*,<sup>342</sup> a case involving the improper or unauthorized release of personal information under the Family Educational Rights and Privacy Act of 1974 (FERPA),<sup>343</sup> the Supreme Court held that “the relevant provisions of FERPA create no personal rights to enforce under 42 U.S.C. § 1983.”<sup>344</sup> The Court rejected any “notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”<sup>345</sup> The Court emphasized that under FERPA the Congress authorized the Secretary of Education to handle violations of the Act.<sup>346</sup>

In 2003, in *Save Our Valley*, *supra*, the plaintiff, a community advocacy group, argued that the Regional Transit Authority’s plan to build a light-rail line through the community violated USDOT’s disparate-impact regulations in that it would “cause disproportionate adverse impacts to minority residents.”<sup>347</sup> 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.”<sup>348</sup>

## B. Sovereign Immunity and Section 1983

Assuming *arguendo* that a disparate-impact claim could be brought under § 1983 unless the immunity is deemed to have been waived, a state or state agency, such as a transportation department, has immunity

Houston Welfare Rights Org., 441 U.S. 600, 617, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979).

<sup>329</sup> 295 F.3d 1183 (10th Cir. 2002) (interlocutory appeal affirming district court’s denial of defendants’ motion to dismiss).

<sup>330</sup> *Id.* at 1186.

<sup>331</sup> *Id.* N 2.

<sup>332</sup> 29 U.S.C. §§ 701 *et seq.*

<sup>333</sup> 42 U.S.C. § 2000d.

<sup>334</sup> Thus, the plaintiffs were allowed to amend their complaint to bring their Title VI disparate-impact claims against the named state officials under § 1983.

<sup>335</sup> 236 F. Supp. 2d 314 (S.D.N.Y. 2002).

<sup>336</sup> 236 F. Supp. 2d at 338 (citing *Robinson v. State of Kansas*, 295 F.3d 1183 (10th Cir. 2002) (allowing disparate-impact claims to be brought under § 1983)); *Lucero v. Detroit Pub. Schs.*, 160 F. Supp. 2d 767 (E.D. Mich. 2001).

<sup>337</sup> *Id.* at 338–39 (citing *Cesar v. Pataki*, 2002 U.S. Dist. LEXIS 5098 at \*11 (S.D.N.Y. 2002).

<sup>338</sup> 274 F.3d 771 (3d Cir. 2001).

<sup>339</sup> *Gulino*, 236 F. Supp. 2d at 338.

<sup>340</sup> *Id.* at 339 N 30 (citing *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749 (2d Cir. 1998)).

<sup>341</sup> *Id.* (citing *Sandoval*, 532 U.S. at 280, 121 S. Ct. at 1516, 149 L. Ed. 2d at 524; *Gebser v. Lago Vista*, 524 U.S. 274, 286, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998)).

<sup>342</sup> 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

<sup>343</sup> 20 U.S.C. § 1232(g).

<sup>344</sup> *Gonzaga Univ.*, 536 U.S. at 276.

<sup>345</sup> *Id.* at 283.

<sup>346</sup> *Id.* at 289.

<sup>347</sup> *Save Our Valley*, 335 F.3d at 934, 935.

<sup>348</sup> *Id.* at 944.

under § 1983.<sup>349</sup> (States, however, retain no sovereign immunity as against the federal government.)<sup>350</sup> A plaintiff may bring a § 1983 action against state officials in their official capacities for prospective, injunctive relief.<sup>351</sup>

As for whether a transportation authority organized as a public corporation qualifies as a state entity, in *Mancuso v. New York State Thruway Authority*<sup>352</sup> the Second Circuit held that 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.<sup>353</sup> In reaching its decision that the Authority did not have immunity, the court identified six factors to determine whether a public corporation has sovereign immunity: 1) how the entity is referred to in the documents that created it; 2) how its governing members 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.<sup>354</sup>

As for municipal transit agencies and § 1983 actions, in *Monell v. New York*<sup>355</sup> the Court held that municipal corporations are persons that are amenable to suit under § 1983. 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."<sup>356</sup>

In sum, the majority view appears to be that § 1983 is not a basis for a suit alleging a violation of disparate-impact regulations.<sup>357</sup> In any event, states and state agencies have immunity with respect to § 1983 actions.<sup>358</sup>

## VI. ADMINISTRATIVE ENFORCEMENT OF TITLE VI COMPLAINTS

### A. Procedures Applicable to Complaints

As a condition to receiving federal financial assistance, the recipient and subrecipients must provide assurances to the USDOT of their compliance with Title VI requirements.<sup>359</sup> The regulations list the types of discrimination prohibited by any recipient through any program for which federal financial assistance is provided by the USDOT.<sup>360</sup> The Secretary of the DOT must seek the cooperation of a recipient and provide guidance in an effort to secure voluntary compliance with the regulations.<sup>361</sup>

The disparate-impact regulations 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...."<sup>362</sup> Section 21.13 identifies the procedures that apply when the Department seeks to terminate financial assistance or refuses to grant or continue such assistance. A hearing, which occurs before either the Secretary or a hearing examiner, must

<sup>349</sup> *Vickroy v. Wis. Dep't of Transp.*, 73 Fed. Appx. 172 (7th Cir. 2003); *Gregory v. S.C. Dep't of Transp.*, 289 F. Supp. 2d 721, 723 (2003) (holding that a claim that the state defendants targeted the defendant 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 was barred by the Eleventh Amendment); *Manning v. S.C. Dep't of Highway and Pub. Transp.*, 914 F.2d 44 (4th Cir. 1990); *Toledo, Peoria & W. R. Co. v. State of Ill., Dep't of Transp.*, 744 F.2d 1296 (7th Cir. 1984 (dismissing action against state transportation department because a state agency is not a "person" within the meaning of the Civil Rights Act)).

<sup>350</sup> *United States v. Miss. Dep't of Pub. Safety*, 321 F.3d 495, 498 (5th Cir. 2003 (involving the ADA)); *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).

<sup>351</sup> *Heartland Academic Cmty. Church v. Waddle*, 427 F.3d 525, 530 (8th Cir. 2005).

<sup>352</sup> 86 F.3d 289, 293 (2d Cir. 1996), citing *Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628, 630–31 (2d Cir. 1989).

<sup>353</sup> *Id.* at 296 (stating that "the state treasury is not even minimally at risk").

<sup>354</sup> *Id.* at 293.

<sup>355</sup> *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 694–95, 98 S. Ct. 2018, 2037–38, 56 L. Ed. 2d 611, 638 (1978).

<sup>356</sup> *Id.* at 691, n.54. The Court reaffirmed that the doctrine of respondeat superior is not a basis for holding local governments liable under § 1983 for the constitutional torts of their employees. *See also* *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").

<sup>357</sup> ANDREW H. BAIDA, CIVIL RIGHTS IN TRANSPORTATION PROJECTS 18 (Transportation Research Board, Legal Research Digest No. 48, 2003) ("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.")

<sup>358</sup> The question of whether a § 1983 claim may be brought against a specific agency is beyond the scope of the digest.

<sup>359</sup> 49 C.F.R. § 21.7 (2009).

<sup>360</sup> *Id.* §§ 21.3, 21.5 (2009).

<sup>361</sup> *Id.* § 21.9 (2009).

<sup>362</sup> *Id.* § 21.13(b) (2009).

precede any adverse action taken against an applicant for or a recipient of federal funds.<sup>363</sup>

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.<sup>364</sup> The 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."<sup>365</sup> The Secretary must investigate promptly a complaint by an allegedly injured party or by his or her representative.<sup>366</sup>

In training material disseminated by the 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 than 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.<sup>367</sup> (emphasis added).

If an investigation results in a finding of noncompliance, the Secretary must inform the recipient of the funds and attempt to resolve the matter informally.<sup>368</sup> "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," the noncompliance may result in the cessation of federal financial assistance and a recommendation to the DOJ.<sup>369</sup> Not only may there be a hear-

ing,<sup>370</sup> but also judicial review is permitted for action taken pursuant to Title VI, Section 602.<sup>371</sup>

In addition, the Justice Department 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 a recipient.<sup>372</sup>

In summary, although private actions may be brought under Title VI and § 1983 for intentional discrimination, there is no private right of action to sue under Section 602 of Title VI and its regulations for actions alleged to have a disparate impact on minority groups. The sole remedy for a claim of disparate impact is as provided under the above regulations and procedures.

## B. Title VI Administrative Complaints Based on Reduction in Service or Increase in Fares

In a 2003 statutory report the United States Commission on Civil Rights reported 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.*<sup>373</sup>

The 2008 TCRP Report, entitled *Civil Rights Implications of the Allocation of Funds between Bus and Rail*, discusses eight Title VI complaints processed by the FTA in the preceding 10-year period, some of which involved a reduction in transit service or an increase in fares.<sup>374</sup> Some of the complaints also involved allocation

<sup>370</sup> See *id.* § 21.15 (2009).

<sup>371</sup> *Id.* § 21.19 (2009); see Tit. VI § 603 (outlining judicial review available for actions taken pursuant to § 602).

<sup>372</sup> See 49 C.F.R. § 21.13(a) (2009).

<sup>373</sup> 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> (Last visited Sept. 9, 2010). The United States Commission on Civil Rights was established in 1964 to analyze and report on Civil Rights Laws.

<sup>374</sup> LARRY W. THOMAS, CIVIL RIGHTS IMPLICATIONS OF THE ALLOCATION OF FUNDS BETWEEN BUS AND RAIL 9–10 (Transit Cooperative Research Program, Legal Research Digest 27, 2008), hereinafter cited as "2008 TCRP Report," discussing *Piras and Williams v. Metro. Transp. Comm'n*, FTA No. 2000-0315 (involving alleged discriminatory allocation of funds); *Wash. Street Corridor Coalition v. Mass. Bay Transp. Auth.*, FTA No. 2001-0177 (alleging failure, inter alia, to replace line as promised); *West Harlem Env'tl. Action v. Metro. Transp. Agency*, FTA No. 2001-0062 (alleging discrimination 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 adversely affecting health of African-American and Latino residents); *Metro. Atlanta Transp.*

<sup>363</sup> *Id.* § 21.15(d) (2009).

<sup>364</sup> *Id.* § 21.11(b) (2009).

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* § 21.11(a–c) (2009).

<sup>367</sup> U.S. Dep't of Transp., Complaints Investigations Reference Notebook for Civil Rights Personnel, available at <http://www.fhwa.dot.gov/download/module3.pdf> (Last visited Sept. 9, 2010).

<sup>368</sup> 49 C.F.R. § 21.11(d) (2009).

<sup>369</sup> *Id.* § 21.13(a) (2009).

of funds between bus and rail transit providers that complainants alleged had a disparate impact in violation of Title VI.<sup>375</sup> Although the FTA concluded one case on the basis of a “Title VI Resolution Agreement,” the FTA made a final determination in the other cases that the transit providers had not violated Title VI.

### C. Reported Title VI Complaints in the Past 10 Years Based on Service Reductions or Fare Increases

In connection with the present digest, 62 of 64 transit agencies that responded to a survey conducted for the digest stated that within the past 10 years they had reduced transit service and/or increased fares. As for whether a reduction in service and/or an increase in fares had resulted in any Title VI complaints against an agency, five agencies reported that within the past 10 years they had received such complaints.

As of January 2010, only two agencies reported having pending Title VI complaints. One complaint was for a reduction in transit service; the other complaint concerned fare increases implemented in January 2008 as well as January 2009.

A third agency had received complaints concerning service changes, which caused some patrons in low-income and/or minority neighborhoods to have to walk approximately an additional city block for access to bus service, and concerning a 2009 fare increase. No complaints against the agency were filed with the FTA. The agency’s approach to handling the complaints is discussed in Section IX, *infra*, regarding transit agencies’ Title VI and ADA best practices when having to reduce transit service or increase fares.

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Equity Coalition v. Metro. Atlanta Transit Auth., FTA No. 2001-0084 (alleging, inter alia, disparate treatment by the MARTA in its delivery of services to minority riders, its decision to raise fares, and its delivery of services to disabled riders); Brazen v. Harris County Metro. Transit Authority, FTA No. 2003-0110 (alleging that the civil rights of poor and minority bus riders were violated because of the transit authority’s “callous slashing and gutting” of bus service while “continuing to spend precious taxpayer funds on a tram/trolley system”); Winkelman v. Bi-State Development Agency, FTA No. 2003-0241 (alleging that a Cross-County Metro Link Extension Project discriminated against those who rely on public transit in an effort to benefit Washington University); Payne v. Chicago Transit Auth., FTA No. 04-0194 (alleging that the 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 for racial reasons); and Leese v. Suburban Mobility Auth. for Rapid Transit, FTA No. 2006-0238 (alleging that SMART’s implementation of a proposed service reduction in November 2005 as a result of the decision of the City of Livonia, Mich., to opt out of the Wayne County Transit Authority was discriminatory because state funds were shifted).

<sup>375</sup> *Id.* at 9–10.

A fourth agency’s fare increase in August 2008 did prompt an FTA complaint but on August 14, 2009, the FTA advised the complainants that the FTA had concluded that the agency’s fare changes “did not result in a disproportionate adverse effect on a group protected by Title VI.”

The fifth agency reported a complaint prompted by a reduction in service that allegedly affected minority and/or low-income areas. The agency’s approach and explanations, discussed in Section IX, *infra*, allayed the complainants’ concerns without there being any further action.

Although not identified in the survey, a complaint in September 2009 under Title VI in connection with the OAC Project, which resulted in the FTA’s denial of funding under the ARRA for the project, is discussed, *supra*, in Section II.I of the digest.

### D. Transit Agencies’ Responses to Title VI Complaints

With respect to complaints processed at the FTA, transit providers have responded in a variety of ways to Title VI complaints.<sup>376</sup> Some of the approaches are relevant to complaints alleging disparate impact caused by reductions in transit service and/or increases in fares.<sup>377</sup>

First, some 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 show a causal connection.<sup>378</sup>

Second, if needed, transit providers have explained the basis for the agency’s decision, the adequacy of existing service or of new service, and the provision, where applicable, of alternative service.<sup>379</sup>

Third, other transit providers have emphasized that a decision was made after appropriate deliberations and study, that various options were considered, and/or that there were public hearings and public participation prior to a decision and as part of the decision-making process.<sup>380</sup>

Fourth, some transit providers have used statistics and demographic information to rebut allegations of disparate impact.<sup>381</sup>

Fifth, some transit providers have explained the sources of the transit provider’s funding, any statutory requirements or restrictions that may affect the transit provider’s funding, and why there is a lack of funding,

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<sup>376</sup> *Id.* at 11–13.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at 11.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

including a lack of federal funding or the effect of the loss of any subsidies.<sup>382</sup>

Finally, some transit providers demonstrated that a decision was caused by factors beyond the agency's control.<sup>383</sup>

## VII. TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND TRANSIT SERVICE

### A. Statutory Provisions Applicable to Public Transportation Providers

The ADA<sup>384</sup> provides that any entity that offers transportation services to the general public must not discriminate against any individual who has a disability. In Title II of the ADA, Congress extended the mandate of the Rehabilitation Act to cover all public transportation providers.<sup>385</sup> The ADA ordered local governments to make bus and train systems more accessible to the disabled.<sup>386</sup> Title II of the ADA applies regardless of whether federal funding is received.<sup>387</sup> Part 37 of Title 49 of the C.F.R. implements "the transportation and related provisions of titles II and III" of the ADA.<sup>388</sup> As provided by the regulations, "[n]o entity shall discriminate against an individual with a disability in connection with the provision of transportation service."<sup>389</sup> A public entity includes any state or local government and "[a]ny department, agency, special purpose district, or other instrumentality of one or more state or local governments..."<sup>390</sup> Section VII.A of the digest discusses Title III of the ADA, which applies to public accommodations and services operated or provided by private entities, including private transportation entities, serving the public.

Furthermore, Section 504 of the Rehabilitation Act of 1973, as amended, now provides that

[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> 42 U.S.C. §§ 12101–12213 (2009); 47 U.S.C.A. §§ 225, 611 (2009).

<sup>385</sup> *See* 42 U.S.C. §§ 12132 and 12131(1) (2009).

<sup>386</sup> *Id.* § 12132 (2009) (no disabled person may be excluded from public services); 42 U.S.C. § 12142 (2009) (public transit systems may not purchase or lease a new bus unless it is readily accessible to individuals with disabilities, including individuals who use wheelchairs); 42 U.S.C. § 12143 (such agencies must provide on-demand "paratransit" service to disabled persons unable to use traditional public transit).

<sup>387</sup> *Boose v. Tri-County Metro. Transp. District of Or.*, 2008 U.S. Dist. LEXIS 79438, at \*13 (D. Or. 2008) (citing *O'Guinn v. Lovelock Corr. Ct.*, 502 F.3d 1056, 1060 (9th Cir. 2007) (stating the elements of the causes of action under Tit. II of the ADA and § 504 of the Rehabilitation Act).

<sup>388</sup> 49 C.F.R. § 37.1 (2009).

<sup>389</sup> *Id.* § 37.5(a) (2009).

<sup>390</sup> *Id.* § 37.3 (2009).

from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....<sup>391</sup>

At least one court has stated that an analysis of the rights and obligations created by the ADA and Section 504 of the Rehabilitation Act shows that there is no significant difference between the two laws.<sup>392</sup> "Title II of the ADA expressly provides that the remedies, procedures, and rights set forth in 29 U.S.C. § 794(a) shall be the remedies, procedures, and rights Title II provides to any person alleging discrimination on the basis of disability in violation of 42 U.S.C. § 12132."<sup>393</sup> Indeed, in one case in which the court dismissed the ADA claims on the ground of sovereign immunity, the court resurrected the dismissed claims by deeming them to have been brought under the Rehabilitation Act.<sup>394</sup>

Under the ADA, 42 U.S.C. § 12102(1), as amended in 2008,<sup>395</sup> "[T]he term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment...."<sup>396</sup>

The provisions of the ADA are designed not only to address intentional discrimination against qualified individuals who require transportation services but also to include other types of discrimination, including benign neglect or indifference.<sup>397</sup> As the Supreme Court

<sup>391</sup> 29 U.S.C. § 794(a) (2009) (An amendment in 1992 substituted the term "disability" for the terms "handicaps" and "handicap" in the first sentence of the section.).

It may be noted that § 165(b) of the Federal-Aid Highway Act of 1973 stated that

projects receiving Federal financial assistance...shall be planned, designed, constructed, and operated to allow effective utilization by elderly and handicapped persons who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability...are unable without special facilities or special planning or design to utilize such facilities and services effectively.... The Secretary shall not approve any program or project to which this section applies which does not comply with the provisions of this subsection requiring access to public mass transportation facilities, equipment, and services for elderly or handicapped persons.

<sup>392</sup> *Pruett v. State*, 606 F. Supp. 2d 1065, 1073 (D. Ariz. 2009) (citing *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002); accord, *McGary v. City of Portland*, 386 F.3d 1259, 1269 n.7 (9th Cir. 2004)).

<sup>393</sup> *Pruett*, 606 F. Supp. 2d at 1073.

<sup>394</sup> *See Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9 (D.D.C. 2006).

<sup>395</sup> For a discussion of the 2008 Amendments to the ADA, see Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. Colloquy 217 (2008).

<sup>396</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:s3406enr.txt](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s3406enr.txt), pdf, codified in 29 U.S.C. § 705 and scattered sections of Tit. 42 of the U.S.C.; see also 49 C.F.R. § 609.3 (2009).

<sup>397</sup> *Martin v. Metro. Atlanta Rapid Transit Auth.*, 225 F. Supp. 2d 1362 (N.D. Ga. 2002).

stated in *Choate*, *supra*, 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.”<sup>398</sup>

Requirements under the ADA and the applicable transportation regulations preempt conflicting state or local provisions.<sup>399</sup> The ADA does not invalidate or limit the remedies, rights, and procedures of any other federal law or law of any state or political subdivision or jurisdiction that provides greater or equal protection for individuals with disabilities than are afforded by the ADA.<sup>400</sup>

Title II begins with a general prohibition of disability-based discrimination in § 12132, followed by seven provisions (42 U.S.C. §§ 12142, 12143, 12144, 12146, 12147, 12148, and 12162) that define what “shall be considered discrimination” for purposes of the statute.<sup>401</sup> The legislative history of the ADA reflects a national policy that individuals with disabilities possess an equal right to use public transportation facilities and services.<sup>402</sup> As such, Congress recognized that special efforts must be made to address planning, design,<sup>403</sup> construction, and operation<sup>404</sup> of public transportation facilities and services to provide individuals with disabilities equal access to such services.<sup>405</sup>

Under the ADA, the Secretary of Transportation is authorized to provide grants to state and local governmental authorities for public transportation projects that are planned, designed, and carried out to meet the needs of individuals with disabilities.<sup>406</sup> The Secretary has implemented minimum criteria for recipients that receive federal financial assistance, as well as methods to monitor compliance.<sup>407</sup> Applicants are required to provide satisfactory assurances under the terms and conditions that the Federal Transit Administrator prescribes.<sup>408</sup>

Under the Act, “designated public transportation” is “transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation...) that provides the general public with general or special service (including charter service) on

a regular and continuing basis.”<sup>409</sup> Alterations of an existing facility for a designated public transportation service,<sup>410</sup> including existing rail stations or commuter rail transportation,<sup>411</sup> that affect their ability to serve individuals with disabilities may be considered discrimination. That is, it may be considered discrimination if a public entity or other person<sup>412</sup> fails to make alterations so that a facility is usable by individuals with disabilities.<sup>413</sup>

Subtitle B of Title II of the ADA is applicable to public transportation services and includes essentially all forms of transportation services that state and local governments provide, such as motor vehicle and intercity or commuter rail services.<sup>414</sup> Not included under Subtitle B of Title II are transportation services by private entities, which are covered under Title III.<sup>415</sup> Some of the key provisions of the ADA with respect to public transit are as follows.

- Section 202 provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>416</sup>

- Section 222 provides that any public entity that purchases or leases a new bus, rapid rail vehicle, or light rail vehicle must make the vehicle “readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.”<sup>417</sup>

- Section 223 requires that all government agencies operating fixed route systems provide paratransit service as a “safety net” for disabled individuals incapable of using conventional public transit and that the service must be “sufficient to provide to [disabled] individuals a level of service...comparable to the level of designated public transportation services provided to individuals without disabilities using such system.”<sup>418</sup> (emphasis added).

## B. DOT Regulations Implementing the ADA

The USDOT issued regulations in 1991 that “addressed a wide variety of issues not directly addressed

<sup>398</sup> *Choate*, 469 U.S. at 295.

<sup>399</sup> 49 C.F.R. § 37.11, app. D (2009).

<sup>400</sup> 42 U.S.C. § 12201(b) (2009).

<sup>401</sup> See *Disabled in Action of Pa., Appellant v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 208 (3d Cir. 2008).

<sup>402</sup> 49 U.S.C. § 5301(d) (2009); 23 U.S.C. § 142 (2009).

<sup>403</sup> *Id.*

<sup>404</sup> 23 U.S.C. § 142 (2009).

<sup>405</sup> 49 U.S.C. § 5301(d) (2009); 23 U.S.C. § 142 (2009).

<sup>406</sup> *Id.* § 5310(a) (2009).

<sup>407</sup> *Id.*; 49 C.F.R. pt. 27 (2009).

<sup>408</sup> 49 U.S.C. § 5307 (2009).

<sup>409</sup> 42 U.S.C. § 12141(2) (2009); 49 C.F.R. § 37.3 (2009).

<sup>410</sup> 42 U.S.C. § 12147(a) (2009).

<sup>411</sup> *Id.* § 12162(e)(2)(B)(i).

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* § 12147(a), § 12162(e)(2)(B)(i) (2009); 49 C.F.R. § 37.43(a)(1), (3) (2009).

<sup>414</sup> 42 U.S.C. § 12131 (2009), *et seq.*

<sup>415</sup> See, e.g., *id.* § 12184(a) (2009) (regarding prohibition of discrimination in specified public transportation services provided by private entities).

<sup>416</sup> *Id.* § 12132 (2009).

<sup>417</sup> *Id.* § 12142(a) (2009).

<sup>418</sup> *Id.* § 12143(a)(1) (2009).

by the ADA,<sup>419</sup> as well as issued guidelines interpreting the regulations.<sup>420</sup> The regulations are applicable to entities providing transportation services regardless of whether the entities receive financial assistance from the USDOT.<sup>421</sup> The entities that must adhere to the USDOT's regulations include 1) a public entity that provides designated public transportation or intercity or commuter rail transportation; 2) any private entity that provides specified public transportation; and 3) any private entity not primarily engaged in transportation but that operates a demand-responsive or fixed-route system.<sup>422</sup> Entities that receive federal financial assistance from the USDOT must comply with regulations relating to transportation services for individuals with disabilities as a condition of their compliance with Section 504 of the Rehabilitation Act of 1973.<sup>423</sup>

Title II applies to fixed-route systems and paratransit service. A fixed-route system is public motor vehicle transportation with “a prescribed route according to a fixed schedule.”<sup>424</sup> A public entity that operates a fixed-route system is required to prepare, submit, and provide updates regarding any changes to the system to demonstrate how the public entity also will provide paratransit or other special transportation services.<sup>425</sup> Failure to do so or to follow the adopted plan is an act of discrimination.<sup>426</sup>

### C. The Availability of a Private Right of Action Under the ADA

Title II of the ADA provides that the remedies set forth in the Rehabilitation Act govern actions involving discrimination relating to government programs; consequently, a private right of action may be brought under the ADA.<sup>427</sup> As the Supreme Court has held, “[b]oth Title II and Section 504 are enforceable through private causes of action.”<sup>428</sup> As discussed hereafter, injunctive relief is available as a remedy to a private party under Title II and Section 504 of the Rehabilitation Act,<sup>429</sup> as well as compensatory damages in some situations.<sup>430</sup>

<sup>419</sup> Michael Lewyn, “*Thou Shalt Not Put a Stumbling Block Before the Blind*”: *The Americans with Disabilities Act and Public Transit for the Disabled*, 52 HASTINGS L. J. 1037, 1070 (2001); see 49 C.F.R. pts. 37, 38 (2009).

<sup>420</sup> See 49 C.F.R. pt. 37, app. D (2009).

<sup>421</sup> 49 C.F.R. pt. 37 (2009).

<sup>422</sup> *Id.* § 37.21(a)(3) (2009).

<sup>423</sup> 29 U.S.C. § 794 (2009).

<sup>424</sup> 42 U.S.C. § 12141(3) (2009).

<sup>425</sup> *Id.* § 12143(c)(4) (2009).

<sup>426</sup> *Id.* § 12143(c)(C)(6)–(7) (2009).

<sup>427</sup> *Id.* § 12133 (2009).

<sup>428</sup> *Everybody Counts, Inc. v. No. Ind. Reg. Planning Comm'n*, 2006 U.S. Dist. LEXIS 39607, \*47 (N.D. Ind. 2006) (citing *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097, 2100, 153 L. Ed. 2d 230 (2002)).

<sup>429</sup> *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650 (2006).

<sup>430</sup> *Barnes v. Gorman*, 536 U.S. 181, 186–87, 122 S. Ct. 2097, 2100–02, 153 L. Ed. 2d 230 (2002); *Garrett v. Chicago Sch.*

As stated, for a plaintiff to prove a discrimination claim under § 12132, the plaintiff must show:

- (1) [H]e is a “qualified individual with a disability”; (2) he was either excluded from participation in or denied the benefits of a public entity’s services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.<sup>431</sup>

In a nontransit case, a federal court in Arizona explained that § 12132 “prohibits both outright discrimination against individuals with disabilities and forms of discrimination, including facially neutral laws, that deny disabled persons meaningful access to public services.”<sup>432</sup> Furthermore,

[t]he regulations implementing Title II of the ADA require that public entities “shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”<sup>433</sup>

In the *Pruett* case, the court held that the “ADA requires only accommodations that are reasonable.”<sup>434</sup>

The failure to make a reasonable accommodation for the disabled under the ADA may constitute discrimination: “the statute does not provide guidance as to when a particular accommodation is or is not reasonable. The ADA does contain, however, an outer limit on the duty of reasonable accommodation in the concept of ‘undue hardship.’”<sup>435</sup> However, as a district court stated in *Pruett*,

[A] discrimination claim based on a failure to reasonably accommodate is distinct from a discrimination claim based on disparate impact, and a plaintiff is not required to allege either disparate treatment or disparate impact in order to state a reasonable accommodation claim.... “[T]he crux of a reasonable accommodation claim is a facially neutral requirement that is consistently enforced.”... “The purpose of the ADA’s reasonable accommodation requirement is to guard against the facade of ‘equal treatment’ when particular accommodations are necessary to level the playing field.”... “[T]he question of what constitutes a reasonable accommodation under the ADA re-

*Reform Bd. of Trust.*, 1996 U.S. Dist. LEXIS 10194, at \*4 (N.D. Ill. 1996).

<sup>431</sup> *Pruett v. State*, 606 F. Supp. 2d 1065, 1072 (D. Ariz. 2009) (quoting *Weinreich v. L.A. County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997)).

<sup>432</sup> *Id.* at 1072 (citation omitted).

<sup>433</sup> *Id.* at 1072–73 (quoting 28 C.F.R. § 35.130(b)(7)).

<sup>434</sup> *Id.* at 1079 (holding that “permitting *Pruett* to possess the Chimpanzee in her home to assist her with obtaining carbohydrate supplementation is not a reasonable accommodation to the Arizona statutes and regulations that do not permit possession of chimpanzees in these circumstances”).

<sup>435</sup> Kelly Cahill Timmons, *Limiting “Limitations”: The Scope of the Duty of Reasonable Accommodation under the Americans with Disabilities Act*, 57 S.C. L. REV. 313, 321 (2005) (primarily discussing the subject of employment discrimination).

quires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards."<sup>436</sup> (emphasis added).

In *Midgett v. Tri-County Metropolitan Transportation District*,<sup>437</sup> the Ninth Circuit addressed the issue of what relief is available for an ADA plaintiff who alleges, for example, that wheelchair lifts on several buses that the plaintiff attempted to ride all malfunctioned on the same day.<sup>438</sup>

The court held, first, with respect to injunctive relief, that the fact that a plaintiff is able to show sufficient injury to establish standing does not warrant concluding "that the plaintiff necessarily has demonstrated a sufficient fear of immediate and substantial injury to warrant an injunction."<sup>439</sup>

Second, when the defendant is a nonfederal government agency, be it state or local, a federal court will exercise restraint in granting an injunction, for instance, that requires a transit defendant to take specific, affirmative steps to make certain the agency is ADA-compliant.<sup>440</sup> In *Midgett*, the court observed that "TriMet is a 'state public entity,' a fact that cautioned against the court's use of its equitable powers in the absence of a strong factual record demonstrating the threat of future ADA violations."<sup>441</sup>

Third, it is not required, as the district court also held, "that a defendant's intent is an element of a claim for injunctive relief under the ADA."<sup>442</sup> According to the court, it had "never held that a plaintiff must prove an intentional violation of the ADA in order to obtain an injunction mandating compliance with its provisions."<sup>443</sup>

Fourth, a plaintiff must present facts showing a threat of immediate, irreparable harm when seeking an injunction.<sup>444</sup> However, "occasional problems do not, without more, establish a violation of the ADA."<sup>445</sup> The evidence presented did not support an inference of a "real and immediate threat of *continued, future* violations of the ADA in the absence of injunctive relief."<sup>446</sup>

On the issue of compensatory damages, the court held, as did the district court, that "a showing of discriminatory intent [is] a prerequisite to obtaining compensatory damages under the ADA."<sup>447</sup> However, the

court declined to rule on "whether 'deliberate indifference' or 'discriminatory animus' provided the appropriate level of intent."<sup>448</sup>

Examples of ADA cases involving transit with different outcomes include *Cupolo v. Bay Area Rapid Transit*, in which a disabled individual brought an action against the local transit authority because the area's key station for rapid and light rail systems was not readily accessible to individuals with disabilities.<sup>449</sup> A California district court in ordering a preliminary injunction held that the local transit authority's failure to provide accessibility services, such as for individuals who require a wheelchair, violated the ADA. However, more recently, in *Neighborhood Association of the Back Bay, Inc. v. Federal Transit Administration*,<sup>450</sup> a federal district court in Massachusetts held that a preliminary injunction halting a project to bring a subway station into compliance with the ADA would harm the undeniably crucial public interest in ensuring that public transportation was accessible to the disabled.

In *George v. Bay Area Rapid Transit*,<sup>451</sup> the issue was whether the plaintiffs could recover under the ADA when "a public transit service system complies with existing federal design regulations for train station accessibility."<sup>452</sup> The Ninth Circuit observed that the "DOT was required to make 'key stations' readily accessible to and useable by persons with visual impairments."<sup>453</sup> The court held that the DOT had done so, that the DOT regulations were not arbitrary or capricious, and that DOT had "address[ed] the needs of those with visual disabilities, although perhaps not to the level the transit riders would have preferred."<sup>454</sup> Furthermore, "[u]nless DOT regulations are arbitrary and capricious; BART is required to do no more than follow them."<sup>455</sup>

Finally, as held by a federal district court in New York, "[o]nly transit 'entities' can be defendants in ADA Title II cases because that subchapter of the statutes only discusses the obligations of 'entities' to not discriminate, 42 U.S.C. § 12131 and § 12132, not those of 'employers' or 'persons'...."<sup>456</sup>

## D. The ADA and Paratransit Service

A paratransit system does not have a fixed route but instead meets riders' specific needs at requested times.

<sup>436</sup> *Pruett*, 606 F. Supp. 2d at 1079.

<sup>437</sup> 254 F.3d 846 (9th Cir. 2001).

<sup>438</sup> *Id.* at 848.

<sup>439</sup> *Id.* at 850 (citations omitted).

<sup>440</sup> *Id.* at 848, 851.

<sup>441</sup> *Id.* at 849 (citation omitted).

<sup>442</sup> *Id.* at 851.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> *Id.* at 850.

<sup>446</sup> *Id.* (emphasis in original).

<sup>447</sup> *Id.* at 851 (citation omitted).

<sup>448</sup> *Id.* (citation omitted).

<sup>449</sup> *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078 (N.D. Cal. 1997).

<sup>450</sup> 407 F. Supp. 2d 323 (D. Mass. 2005).

<sup>451</sup> 577 F.3d 1005 (9th Cir. 2009).

<sup>452</sup> *Id.* at 1007.

<sup>453</sup> *Id.* at 1009.

<sup>454</sup> *Id.*

<sup>455</sup> *Id.* at 1011.

<sup>456</sup> *Stewart v. N.Y. City Transit Auth.*, 2006 U.S. Dist. LEXIS 4279, at \*17 (S.D. N.Y. 2006).



A disabled individual qualifies for paratransit service under Title II if the disabled person 1) is not able without assistance “to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities”; 2) requires boarding assistance devices; or 3) does not have access to travel to needed locations through any fixed-route systems.<sup>457</sup>

In *Anderson v. Rochester-Genesee Regional Transportation Authority*,<sup>458</sup> the court stated, first, that § 12143 “requires that the ‘level of [paratransit] service’ be ‘comparable to the level of designated public transportation services provided to individuals without disabilities,’ and that response time be ‘comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities.’”<sup>459</sup>

As the Supreme Court of the State of Washington has observed, “[t]he ADA addresses discrimination in public transportation by requiring public transit agencies operating fixed route systems to provide paratransit and other special service transportation to disabled persons on a comparable level to the service provided for nondisabled users.”<sup>460</sup> Thus, paratransit services must be comparable to those provided by a state or local government’s fixed-route services.<sup>461</sup>

A public entity, however, does not have to provide paratransit services if doing so would cause undue financial hardship.<sup>462</sup> For example, in one case involving the Spokane Transit Authority (STA), a public transit agency, the court held that if the plaintiff were to make a *prima facie* case of discrimination, thereby shifting the burden to the STA to show a nondiscriminatory reason for its actions, “[c]ompliance by STA with the ADA and the DOT regulations adopted thereunder...could constitute a legitimate, nondiscriminatory reason for STA’s actions, sufficient to shift the burden to the plaintiffs to demonstrate that STA’s actions were a mere pretext for discrimination.”<sup>463</sup> (Burden-shifting in Title VI and ADA cases is discussed, *supra*, in the text of the digest at footnotes 187 to 192.) Moreover, “a defendant may advance financial unfeasibility as a legitimate nondiscriminatory reason for its action.”<sup>464</sup>

<sup>457</sup> 42 U.S.C. § 12143(c)(1) (2009).

<sup>458</sup> 337 F.3d 201 (2d Cir. 2003).

<sup>459</sup> *Id.* at 208–9 (citing 42 U.S.C. § 12143(a)).

<sup>460</sup> *Fell v. Spokane Transit Auth.*, 128 Wash. 2d 618, 638, 911 P.2d 1319, 1324 (Wash. 1996) (citing 42 U.S.C.A. § 12143(a) (1995)).

<sup>461</sup> 42 U.S.C. § 12143(a).

<sup>462</sup> *Fell*, 911 P.2d at 1314 (citing 42 U.S.C. § 12143(c)(4)); see 49 C.F.R. § 37.155 (setting forth the factors that the FTA Administrator will consider in making an undue financial burden determination).

<sup>463</sup> *Id.* at 1331 (footnote omitted) (stating also that on remand the plaintiffs would have an opportunity to show that “STA’s reliance on the ADA was a mere pretext for discrimination.”).

<sup>464</sup> *Id.* at 1331 (footnote omitted).

The exception for undue financial burden is consistent with the application of the ADA to employers. As stated in *West v. Russell Corp.*,<sup>465</sup> “[g]enerally, ...federal courts have applied the settled principles of employment discrimination law to the ADA.” The Supreme Court observed in *Board of Trustees of the University of Alabama v. Garrett*<sup>466</sup> that the ADA “requires employers to ‘make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer’s] business.’”<sup>467</sup>

In *Anderson, supra*, the court stated that, in regard to the ADA claims, even a “well conceived” and funded paratransit service occasionally may experience trip denials.<sup>468</sup> However, “‘substantial numbers’ of trip denials can establish that a paratransit service...is inadequate as a matter of actual operation.”<sup>469</sup> The court, in answer to its own question of what level of service would make a paratransit system “comparable” to a public transportation system used by individuals without disabilities, stated that “[c]omparability seems impossible to achieve because, as one district judge has observed, ‘a constraint on a fixed route system never results in a patron being denied a ride altogether, absent an uncontrollable force.’”<sup>470</sup>

Nevertheless, the court held that, although an insubstantial number of trip denials is permissible, paratransit service providers must “plan to meet 100% of the demand for next-day ride requests.”<sup>471</sup> In affirming the lower court’s grant of a summary judgment in favor of the plaintiffs on their first claim, the appellate court held that based on the record, “the defendants violated [49 C.F.R.] § 37.131(b) by failing to design and implement a system to schedule all next-day ride requests from eligible riders.”<sup>472</sup>

In the *Anderson* case, there was also an issue of whether the “defendants violated 49 C.F.R. § 37.131(f)(3) by engaging in an ‘operational pattern or practice’ that significantly limited the availability of paratransit service.”<sup>473</sup> Based on the record and “unrefuted” statistics, the Second Circuit again affirmed the district court’s grant of a summary judgment in favor of the plaintiffs on their claim that the defendants “maintain[ed] a pattern or practice that significantly limits

<sup>465</sup> 868 F. Supp. 313, 315 (N.D. Ala. 1994).

<sup>466</sup> 531 U.S. 356, 361, 121 S. Ct. 955, 960, 148 L. Ed. 2d 866, 876 (2001).

<sup>467</sup> *Id.* (quoting 42 U.S.C. § 12112(b)(5)(A)).

<sup>468</sup> *Anderson*, 337 F.3d at 210.

<sup>469</sup> *Id.* (citation omitted).

<sup>470</sup> *Id.* at 209 (citation omitted).

<sup>471</sup> *Id.* at 212 (citation omitted).

<sup>472</sup> *Id.* at 213.

<sup>473</sup> *Id.*

the availability of paratransit service for eligible riders.<sup>474</sup>

The comparability-of-service requirement was addressed in *Boose v. Tri-County Metropolitan Transportation District of Oregon*.<sup>475</sup> The issue was whether Tri-County Metropolitan Transportation District of Oregon (TriMet), Portland, Oregon, a public entity providing mass transportation services, was required to provide the plaintiff with her requested mode (i.e., vehicle) of paratransit service based on a DOJ regulation.

Boose used TriMet's paratransit service, the LIFT Paratransit Program (LIFT). In 2006 Boose requested that TriMet accommodate her disability by scheduling her rides only in sedans or taxis to alleviate the dizziness and nausea she experienced on LIFT buses.<sup>476</sup> Boose alleged in her complaint that TriMet's refusal violated the ADA and the Rehabilitation Act of 1973.<sup>477</sup> At issue was whether a Justice Department regulation was applicable. The Justice Department regulation required "public entities to 'make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.'"<sup>478</sup> On several grounds, the court rejected the plaintiff's argument that the DOJ regulation applied to a public entity such as TriMet.

First, Title II, Part A, of the ADA, which prohibits discrimination against the disabled by public entities, "prohibits the DOJ from making rules that 'include any matter within the scope of the authority of the Secretary of Transportation under section 12143.'"<sup>479</sup>

Second, the court explained that the USDOT has not promulgated a rule requiring a public entity to provide paratransit service by "vehicle type."<sup>480</sup> Paratransit and other special transportation services must be provided to persons with disabilities so as to provide a level of service "comparable" to the level of service provided to persons without disabilities.<sup>481</sup> For paratransit service, the ADA or the USDOT ADA regulations do not require that public entities make "reasonable modifications in policies, practices, or procedures" as does the DOJ regulation.<sup>482</sup> However, the court noted that the rule was

different in regard to private entities. "With respect to *private entities*, the DOT has promulgated a regulation requiring their 'compliance with the requirements of the rules of the Department of Justice concerning eligibility requirements, making *reasonable modifications*, providing auxiliary aids and services, and removing barriers....'"<sup>483</sup> (emphasis added).

The court held that the DOJ regulation did not apply independently to TriMet; nor had the USDOT incorporated the DOJ regulation so as to make it applicable to public entities' paratransit service.<sup>484</sup>

## E. ADA Administrative Compliance and Enforcement

Public and private<sup>485</sup> recipients of financial assistance from the USDOT<sup>486</sup> are subject to the administrative enforcement provisions<sup>487</sup> of USDOT regulations issued under Section 504 of the Rehabilitation Act.<sup>488</sup> The USDOT investigates any complaints that are filed. Although the Department will attempt conciliation among the parties, if conciliation is not possible, the Department may take further action under Section 504 of the Rehabilitation Act of 1973<sup>489</sup> or refer the matter to the Justice Department for possible action.<sup>490</sup> The focus of USDOT's enforcement concerns failures to comply with the basic ADA requirements indicated by a series of problems rather than an occasional error.<sup>491</sup>

In July 2007, the Transportation Research Board published *The Americans with Disabilities Act: The Federal Transit Administration's Letters of Findings and Compliance Assessments as Legal Research Digest* 23. The FTA's interpretations of the ADA may be found in letter-findings, decisions on complaints, and compliance assessments, all referenced in the digest. The digest includes a CD and indexes of all FTA's letter-findings on ADA complaints, including findings relating to fare increases at pages I-77-78 and service cuts at pages I-99-100. The materials collected and indexed demonstrate how FTA typically addresses such complaints.

Of the 64 agencies responding to the survey for this digest, 4 agencies reported receiving complaints based

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transportation entities [providing] paratransit service[ ] must make reasonable modifications to their policies and practices to ensure program accessibility," (quoting 71 Fed. Reg. at 9762), but that the DOT had not finalized the proposed rule.

<sup>483</sup> *Id.* at 1004 (quoting 28 C.F.R. §§ 36.301-306).

<sup>484</sup> *Id.* at 1003-04.

<sup>485</sup> 49 C.F.R. § 37.11, app. D (2009).

<sup>486</sup> *Id.* § 37.11(a) (2009).

<sup>487</sup> *Id.* §§ 27.121-27.129 (2009).

<sup>488</sup> *Id.* § 37.11(a) (2009); 29 U.S.C. § 794 (2009).

<sup>489</sup> 29 U.S.C. § 794 (2009).

<sup>490</sup> 49 C.F.R. § 37.11, app. D (2009).

<sup>491</sup> *Id.*

<sup>474</sup> *Id.* at 215.

<sup>475</sup> 587 F.3d 997 (9th Cir. 2009).

<sup>476</sup> *Id.* at 1000.

<sup>477</sup> 29 U.S.C. § 701, *et seq.*

<sup>478</sup> *Boose*, 587 F.3d at 1000 (quoting 28 C.F.R. § 35.130(b)(7)).

<sup>479</sup> *Id.* at 1001.

<sup>480</sup> *Id.* at 1002.

<sup>481</sup> *Id.* at 1001.

<sup>482</sup> *See id.* at 1004 (stating that in a 2006 notice of proposed rulemaking that the DOT purported to "clarify that...public

on alleged violations of the ADA. One agency had received a complaint regarding a reduction in transit service that still was being processed at the time of this digest. A second agency reported that a USDOT “inquiry” had been resolved. A third agency received complaints from the elderly and the disabled regarding service reductions and fare increases that were resolved in the manner described in Section IX, *infra*, discussing transit agencies’ best practices.

Lastly, one agency stated that it had had one fare increase in the last 10 years and received ADA complaints that focused on the elimination of deeply discounted fare media. A majority of the complaints had to do with the elimination of the most heavily discounted fare media of all, an Annual \$52 Disabled Pass. According to the agency, its revenue department researched the ADA claims and concluded that the new fare structure was not discriminatory in its implementation or intent. No complaints were lodged at the FTA against the agency.

## F. Judicial Claims Under the ADA for Reduction in Transit Service or Increase in Fares

One of the few cases having to do with the ADA and a reduction in transit service is *Hassan v. Slater*,<sup>492</sup> in which a *pro se* plaintiff contested the decisions by the Long Island Railroad (LIRR) and the MTA to close a train station that was more convenient to the plaintiff than alternative stations. The court held that the plaintiff’s complaint failed as a matter of law to state a claim.

First, the court held that “[t]he blind, visually impaired and otherwise disabled can still avail themselves of train service at other LIRR stations” and that, although there was inconvenience to the plaintiff, the extra inconvenience did not rise “to the level of irreparable harm such that the LIRR must be stopped from implementing its plan.”<sup>493</sup>

Hassan is not prevented from using any of the other LIRR stations by reason of a disability. Nor has he adequately alleged that he was discriminated against or prevented from participating in any mode of transportation because of his disability. The fact that Hassan lives four and a half miles away from the next closest train station, and that closure of the Center Moriches Station makes it more difficult for him to travel to Manhattan, is not tantamount to stating a claim of exclusion or discrimination. The plaintiff’s conclusory allegations that his rights under the ADA were violated are thus insufficient to state a claim under the statute.<sup>494</sup>

Second, as the court noted, under the ADA, stations that are designated as key stations must be made accessible to individuals with disabilities.<sup>495</sup> (For train stations constructed prior to the ADA, the Act requires only that designated key stations be made accessible to

individuals with disabilities.)<sup>496</sup> However, the station that was closed was not a “key station.” The court held that it could not conclude,

[B]ased on the record currently before it, ...that the selection of the key stations, or the exclusion of Center Moriches from designation as a key station, was violative of the ADA. It does not appear that the ADA requires the MTA defendants to keep all of its stations open, or even to make all of its stations fully accessible to people with disabilities. Rather, the ADA only requires that they make new stations and its designated key stations readily accessible to and usable by people with disabilities.<sup>497</sup>

As seen in the *Hassan* case, the touchstone is evenhandedness whereby transit service is reduced for all commuters, including the disabled. “Hassan has not shown, or even adequately alleged, that the MTA defendants excluded him, or any other disabled person, from the benefit of services on the basis of disability. *On this record, it appears that the Station closing affects all potential users, not merely disabled users.*”<sup>498</sup>

With respect to fares, in *Weinreich v. Los Angeles County Metropolitan Transportation Authority*,<sup>499</sup> the Ninth Circuit held that a public transit system was not required under the ADA or the Rehabilitation Act to make reasonable modifications to its reduced fare program’s eligibility requirements for a disabled participant or to reasonably accommodate a participant’s financial inability to provide recertification of his disability as required by a transit system policy. The court held that “[a] plaintiff proceeding under Title II of the ADA must, similar to a Section 504 plaintiff, prove that the exclusion from participation in the program was ‘solely by reason of disability.’”<sup>500</sup> The court affirmed the district court’s ruling that the agency had no obligation under the ADA or the Rehabilitation Act to reasonably accommodate plaintiff’s financial inability to provide updated recertification of his disability.

## G. Whether State Transit Agencies Have Sovereign Immunity

Under the ADA the issue has arisen whether a state agency such as a transportation department has sovereign immunity. In *Everybody Counts, Inc. v. Northern Indiana Regional Planning Commission*,<sup>501</sup> a federal district court in Indiana held that Congress had not properly abrogated Indiana’s Eleventh Amendment immunity in a Title II ADA action that included the Indiana Department of Transportation (INDOT) as a defendant. The court held that, based on an analysis of the U.S. Supreme Court’s decision in *Tennessee v. Lane*,<sup>502</sup> INDOT had sovereign immunity. The district

<sup>496</sup> *Id.* at 350 (citing 42 U.S.C. § 12147(b)).

<sup>497</sup> *Id.* at 351 (citation omitted).

<sup>498</sup> *Id.* (emphasis supplied).

<sup>499</sup> 114 F.3d 976 (9th Cir. 1997).

<sup>500</sup> *Id.* at 978–79 (citations omitted).

<sup>501</sup> 2006 U.S. Dist. LEXIS 39607, at \*1, 3–4 (N.D. Ind. 2006).

<sup>502</sup> 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

<sup>492</sup> 41 F. Supp. 2d 343 (E.D. N.Y. 1999).

<sup>493</sup> *Id.* at 348 (quoting *Molloy v. Metro. Trans. Auth.*, 94 F.3d 808, 811 (2d Cir. 1996)).

<sup>494</sup> *Id.* at 350–51 (emphasis supplied) (citation omitted).

<sup>495</sup> *Id.* at 345 (citing 49 C.F.R. § 37.47(a), (c)(1)).

court held, *inter alia*, that, unlike the access-to-justice issue in the *Lane* case, “there is no fundamental right to public transportation.”<sup>503</sup> Furthermore, “Title II is not a congruent and proportional response to the history of disability discrimination in the provision of public transportation to the disabled, a public accommodation to which they have no fundamental right.”<sup>504</sup>

On the other hand, the court held that the plaintiffs’ claim under the Rehabilitation Act could proceed because INDOT had waived its Eleventh Amendment immunity when it accepted federal funds.<sup>505</sup> The court observed that 42 U.S.C. § 2000d-7 “conditions a state’s receipt of federal money on its waiver of Eleventh Amendment immunity to actions under 504.”<sup>506</sup> Whatever INDOT actually knew or believed when it accepted federal funds was irrelevant.<sup>507</sup>

In an action against the Washington Metropolitan Area Transit Authority (WMATA), the court dismissed ADA claims against WMATA on the basis of sovereign immunity. As a quasi-public entity, WMATA partakes of the state sovereign immunity conferred by the Eleventh Amendment on Virginia and Maryland. However, the court treated the dismissed ADA claims as if they had been brought under the Rehabilitation Act.<sup>508</sup>

## H. Statute of Limitations in ADA Cases

Finally, it should be noted that a recent development in ADA litigation has concerned when the statute of limitations commences. Federal courts usually borrow the statute of limitations for personal injury actions in the state where a Title II claim arose.<sup>509</sup> (It may be noted that following the *Goodman* decision cited in the preceding footnote, Congress enacted a catchall 4-year

statute of limitations for actions arising under federal statutes enacted after December 1, 1990.)<sup>510</sup>

In *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transportation Authority*,<sup>511</sup> the plaintiff Disabled in Action of Pennsylvania argued that “under the plain language of the statute, its claims accrued ‘upon the completion’ of alterations to two Philadelphia subway stations,”<sup>512</sup> the statute in question being 42 U.S.C. § 12147(a).<sup>513</sup> First, the court noted that neither Title II of the ADA nor Section 504 of the Rehabilitation Act included an express statute of limitations; the court borrowed Pennsylvania’s 2-year statute of limitations for personal injury claims.<sup>514</sup> Second, the court held that “it is only when renovations are completed that individuals with disabilities will be excluded from accessing and using such facilities while others will not. This is the time at which disabled individuals are subjected to the disparate treatment that § 12147(a) was enacted to prevent.”<sup>515</sup> Thus, the discriminatory acts defined by § 12147(a) occurred and the statute of limitations began to run upon the completion of the alterations to the public transportation facilities.<sup>516</sup>

## VIII. TITLE III OF THE AMERICANS WITH DISABILITIES ACT AND PRIVATE TRANSPORTATION ENTITIES

### A. Prohibition of Discrimination in Public Accommodations

Title III of the ADA applies to public accommodations and services operated or provided by private entities, including private transportation entities serving

<sup>503</sup> *Everybody Counts, Inc.*, 2006 U.S. Dist. LEXIS 39607 at \*29.

<sup>504</sup> *Id.* at \*40.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.* at \*42. Section 2000d-7 provides:

*A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.* (Emphasis supplied).

<sup>507</sup> *Everybody Counts, Inc.*, 2006 U.S. Dist. LEXIS 39607 at \*46.

<sup>508</sup> *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9 (D.D.C. 2006).

<sup>509</sup> *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (1987), superseded by statute as stated in *Panariello v. Nassau County*, 2009 U.S. Dist. LEXIS 27045 (E.D.N.Y. Mar. 31, 2009); *Okure v. Owens*, 816 F.2d 45, 49 (2d Cir. 1987).

<sup>510</sup> 28 U.S.C. § 1658. Subsection (a) provides: “Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.”

<sup>511</sup> 539 F.3d 199 (3d Cir. 2008).

<sup>512</sup> *Id.* at 201.

<sup>513</sup> 42 U.S.C. § 12147(a) (2009) provides:

With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.

<sup>514</sup> *Disabled in Action of Pa.*, 539 F.3d at 208.

<sup>515</sup> *Id.* at 211.

<sup>516</sup> *Id.* at 213.

the public.<sup>517</sup> However, as discussed in more detail in Part VIII.E, *infra*, unlike other titles of the ADA, there has been relatively little litigation under Title III, in part because of Title III's "limited avenue for relief," i.e., injunctive relief.<sup>518</sup>

Four sections of Title III deal specifically with transportation facilities and services.<sup>519</sup> Section 12182 prohibits discrimination in public accommodations. Section 12183, not discussed herein with respect to reductions in transit service and increases in fares, applies to new construction and alterations in public accommodations and commercial facilities. Section 12184 prohibits discrimination in specified public transportation services provided by private entities. Section 12188 is the enforcement section that specifies the remedies and procedures that are available under Title III.

Section 12182(a) of Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Although other sections apply to public transportation services provided by private entities, under § 12181 of Title III, a public accommodation also includes "a terminal, depot, or other station used for specified public transportation."<sup>520</sup> The phrase "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.<sup>521</sup>

Section 12182's provisions could be potentially relevant to an ADA claim based on a reduction in service or an increase in fares. The section prohibits the "denial of

the opportunity" to the disabled "to participate in or benefit from the...services, facilities, ...or accommodations of an entity"; of making available to the disabled a "service, facility, ...or accommodation that is not equal to that afforded to other individuals"; or providing "a ...service, facility, ...or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide" the disabled "with a...service, facility, ...or accommodation...that is as effective as that provided to others."<sup>522</sup>

Section 12182 also provides that an "entity shall not...utilize standards or criteria or methods of administration—(i) that have the effect of discriminating on the basis of disability; or (ii) that perpetuate the discrimination of others who are subject to common administrative control."<sup>523</sup>

Section 12182 prohibits the use of "eligibility criteria" to screen or that have the tendency to screen the disabled "from fully and equally enjoying any...services, facilities, ...or accommodations, unless such criteria can be shown to be necessary for the provision of the...services, facilities, ...or accommodations being offered...."<sup>524</sup> It is discriminatory under the Act for a private transportation entity to fail "to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such...services, facilities, ...or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations...."<sup>525</sup>

Also, under § 12182, a transportation entity's services must be accessible to persons with disabilities. For example, it is discriminatory for an operator of a fixed-route system that "is not subject to section 12184 of this title to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system...that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."<sup>526</sup> It is discriminatory for a private entity subject to the section not to operate a system "so that, when viewed in its entirety, [the] system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, [that is] equivalent to the level of service provided to individuals without disabilities."<sup>527</sup>

## B. Public Transportation Services Provided by Private Entities

Section 12184 of Title III prohibits discrimination in specified public transportation services provided by

<sup>517</sup> See generally New York State Comm'n on Quality of Care & Advocacy for Persons with Disabilities, available at <http://www.cqcapd.state.ny.us/> (Last visited Sept. 9, 2010).

<sup>518</sup> Ruth Colker, *Symposium Article: ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 379 (2000), hereinafter cited as "Colker." Colker writes that as of the time of her research, "the courts of appeals had issued decisions in 475 cases under ADA Title I (the employment title) from June 1992 to July 1998" but only "25 ADA Title III appellate decisions for the same time period." *Id.* at 400 (footnote omitted). Colker's research of verdict data "confirm[ed] that plaintiffs are unlikely to sue under ADA Title III." *Id.* at 401. Moreover, Colker notes that "few have used the passage of ADA Title III as impetus for expanding their state antidiscrimination remedies in the area of disability discrimination." *Id.* at 380. A more recent article found that between 1998 and 2004 there were only an additional 57 Title III appellate cases. Courtney Abbott Hill, *Note: Enabling the ADA: Why Monetary Damages Should be a Remedy under Title III of the Americans with Disabilities Act*, 59 SYRACUSE L. REV. 101, 109–10 (2008).

<sup>519</sup> 42 U.S.C. § 12186 (2009) specifies when regulations are to be issued in regard to the transportation provisions of Title III.

<sup>520</sup> *Id.* § 12181(7)(G) (2009).

<sup>521</sup> *Id.* § 12181(10) (2009).

<sup>522</sup> *Id.* § 12182(b)(1)(A)(i-ii) (2009).

<sup>523</sup> *Id.* § 12182(b)(1)(D) (2009).

<sup>524</sup> *Id.* § 12182(b)(2)(A)(i) (2009).

<sup>525</sup> *Id.* § 12182(b)(2)(A)(ii) (2009).

<sup>526</sup> *Id.* § 12182(b)(2)(B) (2009).

<sup>527</sup> *Id.* § 12182(b)(2)(B)(i) (2009).

private entities. The statute provides: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.”<sup>528</sup>

It is discriminatory to impose or apply

eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered....<sup>529</sup>

Private entities must

(A) make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title;

(B) provide auxiliary aids and services consistent with the requirements of section 12182(b)(2)(A)(iii) of this title; and

(C) remove barriers consistent with the requirements of section 12182(b)(2)(A) of this title and with the requirements of section 12183(a)(2) of this title....<sup>530</sup>

The Act also imposes requirements regarding the purchase or lease of new vehicles.<sup>531</sup>

### C. ADA Title III Regulations

Regulations promulgated pursuant to Title III include 28 C.F.R. Part 36 and 49 C.F.R. Part 37, of which only one or two regulations appear to be relevant to service reductions or fare increases. Section 37.105 of Title 49 addresses equivalent service standards. The section provides that for purposes of §§ 37.101 and 37.103,<sup>532</sup>

[A] fixed route system or demand responsive system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including individuals who use wheelchairs, is provided in the most integrated setting appropriate to the needs of the individual and is equivalent to the service provided other individuals with respect to [certain] service characteristics [that include, for example, schedules, response time, fares, geographic area of service, and hours and days of service].<sup>533</sup>

<sup>528</sup> *Id.* § 12184(a) (2009).

<sup>529</sup> *Id.* § 12184(b)(1) (2009).

<sup>530</sup> *Id.* § 12184(b)(2) (2009).

<sup>531</sup> *Id.* § 12184(b)(3) (2009).

<sup>532</sup> The two sections referenced in 49 C.F.R. § 37.105, § 37.101 and § 37.103 apply, respectively, to the purchase or lease of vehicles by private entities not primarily engaged in the business of transporting people and the purchase or lease of new nonrail vehicles by private entities primarily engaged in the business of transporting people.

<sup>533</sup> 49 C.F.R. §§ 37.105(a)(1) and (2), (b), (c), and (d) (2009).

Section 37.161 provides in part that “[p]ublic and private entities providing transportation services shall maintain in operative condition those features of facilities and vehicles that are required to make the vehicles and facilities readily accessible to and usable by individuals with disabilities.”<sup>534</sup>

### D. Administrative Action and Enforcement

The USDOT does not authorize any administrative enforcement authority under Title III of the ADA,<sup>535</sup> the public accommodations title of the Act.<sup>536</sup> However, public<sup>537</sup> and private entities,<sup>538</sup> regardless of whether they receive federal financial assistance, are subject to enforcement action as provided under the Justice Department’s regulations<sup>539</sup> implementing Title III<sup>540</sup> of the ADA.<sup>541</sup> The USDOT forwards any complaints of regulatory violations caused by private entities to the Justice Department.<sup>542</sup> The Justice Department has issued regulations under Title III<sup>543</sup> regarding its enforcement responsibility for Title III matters.<sup>544</sup>

As provided in § 12188 of Title III, “[t]he remedies and procedures set forth in section 2000-3(a) of this title are the remedies and procedures this subchapter provides....”<sup>545</sup>

Section 12188(b) provides for enforcement by the Attorney General,<sup>546</sup> which “has leverage that is not available to private plaintiffs—it has the statutory authority to seek civil damages if it brings suit.”<sup>547</sup> Thus, in Title III cases it has been held that the statutory scheme permits monetary relief to be granted only in a civil

<sup>534</sup> *Id.* § 37.161 (2009).

<sup>535</sup> 42 U.S.C. §§ 12181–12189 (2009).

<sup>536</sup> 49 C.F.R. pt. 37 (2009).

<sup>537</sup> *Id.* § 37.11(b) (2009).

<sup>538</sup> *Id.* § 37.11(c) (2009).

<sup>539</sup> 28 C.F.R. pt. 36 (2009).

<sup>540</sup> 42 U.S.C. §§ 12181–12189 (2009).

<sup>541</sup> 49 C.F.R. § 37.11(b), (c) (2009).

<sup>542</sup> *Id.* § 37.11, app. D (2009).

<sup>543</sup> 28 C.F.R. pt. 36 (2009).

<sup>544</sup> 49 C.F.R. § 37.11, app. D (2009).

<sup>545</sup> 42 U.S.C. § 12188(a) (2009). 42 U.S.C. § 2000a-3(a) (2009) provides:

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved....

<sup>546</sup> *Id.* § 12188(b) (2009).

<sup>547</sup> Colker, *supra* note 518, at 377, 403 (citing 42 U.S.C. § 12188(b)(2)(C)(i)–(ii) (1994) (providing for a civil penalty of \$50,000 for a first violation and \$100,000 for any subsequent violation).

action brought by the Attorney General.<sup>548</sup> Thus, the USDOT could not require by regulation “that bus companies pay ‘compensation’ to disabled passengers when [the bus companies] fail to provide them with accessible service.”<sup>549</sup>

Although a successful private plaintiff may recover reasonable attorney’s fees,<sup>550</sup> only injunctive relief is available under Title III to a private party.<sup>551</sup> Furthermore, some courts have held “that they lacked jurisdiction to hear ADA Title III cases, because the plaintiffs’ individual instances of discrimination did not create standing to seek injunctive relief.”<sup>552</sup> It may be noted that one commentator argues that the laws of 20 states and the District of Columbia “provide for reasonably effective relief beyond what ADA Title III requires.”<sup>553</sup>

One case has addressed the issue of whether a Title III private transit entity may be held liable under Title II of the ADA, discussed in Section VI, *supra*. In *O’Connor v. Metro Ride, Inc.*,<sup>554</sup> the defendant Metropolitan Council was the successor to the former Regional Transit Board (RTB) and the former Metropolitan Transit Commission (MTC). Metro Ride was a “private, for profit company that was under contract with the RTB to provide Metro Mobility service, administered by the MTC.”<sup>555</sup> The plaintiffs’ complaint alleged that they were disabled and that they sustained injuries in connection with their use of the Metro Mobility’s paratransit van service.<sup>556</sup>

The plaintiffs argued that Metro Ride, even though a private party, was also liable under Title II of the ADA and thus subject to a claim for money damages not available under Title III. The plaintiffs argued that, because Metro Ride provided public transportation services and was subject to the ADA, they stood “in the shoes of the public entities with which they contract.”<sup>557</sup> However, the court held that nothing under the regulations “provide[d] that a private entity may be liable to

pay money damages to a private plaintiff under Title II.”<sup>558</sup> Thus, the court held that Metro Ride was not “liable for money damages under Title II of the ADA, even though it may be bound by ADA requirements.”<sup>559</sup>

## E. Transit Cases Arising Under Title III

No cases were located involving Title III and private transportation entities providing regular service to the public that related to reduced service or increased fares.<sup>560</sup> There is one recent case involving a private transportation company that failed to provide a bus with a wheelchair lift for customers with disabilities in which the company entered into a consent decree with the Justice Department.<sup>561</sup>

## IX. DISCUSSION OF PRACTICES WHEN REDUCING SERVICE OR INCREASING FARES

As stated, 64 agencies (see Appendix B) responded to a survey conducted for the digest. Some of the agencies’ responses are discussed elsewhere in the digest.<sup>562</sup> Based on the agencies’ survey responses, this part of the digest discusses what transit agencies’ practices are with respect to Title VI and the ADA when transit agencies have to reduce service or increase fares. Many of the practices mentioned by agencies are covered, for example, in the 2007 FTA Title VI Circular or the USDOT LEP Policy Guidance.

### A. Transit Agencies’ Title VI Policies

Thirty-two agencies stated that they had a policy for dealing with Title VI issues that may be implicated by a reduction in transit service and/or an increase in fares, whereas the same number of agencies, 32, stated that they do not.

<sup>548</sup> *Am. Bus. Ass’n v. Slater*, 231 F.3d 1, 4, 343 U.S. App. D.C. 367 (D.C. Cir. 2000).

<sup>549</sup> *Id.* at 3, 6.

<sup>550</sup> *Id.* § 12205. The statute provides:

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

<sup>551</sup> *Id.* §§ 12188(a)(1), (2) (2009) and § 2000a-3(a) (2009). See *James v. Peter Pan Transit Mgmt., Inc.*, 1999 U.S. Dist. LEXIS 2565, at \*21 N 4 (E.D. N.C. 1999) (stating that the “[p]laintiff may not recover money damages from Peter Pan on her ADA claim because money damages are not recoverable under title III of the ADA,” (citing 42 U.S.C. § 12188)).

<sup>552</sup> Colker, *supra* note 518, at 377, 395 (citations omitted).

<sup>553</sup> *Id.* at 406.

<sup>554</sup> 87 F. Supp. 2d 894 (D. Minn. 2000).

<sup>555</sup> *Id.* at 895.

<sup>556</sup> *Id.*

<sup>557</sup> *Id.* at 899 (citing 49 C.F.R. §§ 37.5(a), 37.21(a), and 37.23(a)) (quotation marks omitted).

<sup>558</sup> *Id.* at 899–900 (footnote omitted).

<sup>559</sup> *Id.* at 899.

<sup>560</sup> In *James*, 1999 U.S. Dist. LEXIS 2565, at \*20, the magistrate judge recommended that Peter Pan’s motion for summary judgment be denied, because a “genuine issue of material fact exists as to whether Peter Pan adequately maintained and repaired its CAT Connector wheelchair lifts and adequately trained its employees to operate the lifts” in violation of Title III of the ADA.

<sup>561</sup> *United States v. New Century Travel, Inc.* (D.D.C. July 10, 2008) (consent decree available at <http://www.ada.gov/newcentury.htm> (Last visited Sept. 8, 2010)).

<sup>562</sup> See pts. I.E.4 (transit agencies’ response to the 2007 FTA Title VI Circular); pt. V.C (transit agencies’ reported Title VI complaints in the past 10 years caused by a reduction in service or an increase in fares); pt. VI.E (transit agencies’ reported ADA complaints in the past 10 years); and pt. VIII.C (§ 13(c) certifications and the transit agencies’ responses to the survey regarding § 13(c)).

**Table 1.**  
**Transit Agencies Having a Title VI Policy Applicable to Reduction in Service or Increases in Fares**

Transit Agencies Having a Title VI Policy	32
Transit Agencies Not Having a Title VI Policy	32

For agencies having a policy, some of the transit agencies' responses were:

- The agency's "policy/procedures regarding fare increases and service changes and the public review of such proposals is part of the Agency's policy and procedure manual which does not differentiate between Title VI or ADA complaints."
- The agency has a written policy but it is not "specific to reductions in service or increases in fares."
- The agency "regularly includes information on [its] policy and complaint process in monthly brochures to our passengers."

Several agencies referred to their formal Title VI investigation and complaint process. For example, one agency in describing its practice stated that any complaints are logged and forwarded to the appropriate officer, an internal investigation is conducted with the assistance of counsel, and the results are conveyed in a letter to the complainant.

A more detailed description provided by one agency was that:

- It has established procedures and developed "local standards" for compliance with Title VI.
- It has established internal guidelines for making determinations of Title VI compliance as part of the local decision-making processes and "continuing project management responsibilities."
- It evaluates system-wide changes in service and proposed improvements at the planning stage to determine whether the benefits and costs of the changes are distributed equally and are not discriminatory.
- It conducts compliance assessments of transit services and benefits to assure that service levels are equitable and to ensure consistency in the quality of service among different user groups and to ensure responsiveness to the needs of minorities.
- It takes action on the findings and recommendations made by officials reviewing the agencies' policies and actions.

In the resolution of complaints on an informal basis, the practices of some agencies are of interest. One agency stated that in one instance when there were complaints regarding a service reduction, the com-

plaints were resolved by explaining to patrons why the service changes were occurring and that most riders would experience only minor inconvenience. In addition, the agency used an appeals process to consider complaints with special circumstances, a method that resulted in approximately 10 percent of proposed bus stop consolidations being reinstated.

Another agency described its practice in the handling of specific complaints regarding service reductions and fare increases. First, the agency's service planning group used statistical analyses and documentation to demonstrate that none of the allegations could be substantiated. Second, an analysis by the agency's revenue department demonstrated that complaints regarding fare increases also could not be substantiated.

In neither of the two agencies' situations described above were complaints filed with the FTA.

In sum, many agencies having a policy referred to their Title VI investigation and complaint process. As discussed below, when asked specifically about consideration of low-income populations or outreach to LEP persons, a much higher number of transit agencies reported having a policy of evaluating the effect of a reduction in service or an increase in fares on low-income populations and having implemented methods to communicate with and involve LEP persons with respect to such changes.

**B. Low-Income Populations**

Fifty-nine transit agencies said that when reducing transit service and/or increasing fares they take into account the effect of the change on low-income populations as a factor in the agency's decision-making. Three agencies stated that they do not.

**Table 2.**  
**Transit Agencies That Consider the Effect of a Reduction in Service or an Increase in Fare on Low-Income Populations**

Transit Agencies That Consider the Effect on Low-Income Populations	59
Transit Agencies That Do Not Consider the Effect on Low-Income Populations	3
Transit Agencies Not Responding	2

In describing their practices, the agencies stated, for example, that:

- The agency collects and analyzes demographic and service data showing the extent to which members of minority and low-income populations within the



agency's service area are beneficiaries of programs receiving FTA financial assistance.

- The agency's Title VI plan calls for the agency to examine the impact in particular within census tracts with a poverty level higher than the community as a whole.

- The agency raises fares in accordance with federal guidelines, compares its fares with those of other agencies of similar size in its state and with nearby cities, and works with a Citizen Advisory Committee and community advocacy groups.

- The agency's service changes have been based upon performance measures, and the agency has reduced service only on routes with the lowest ridership and contract services with the highest costs.

- The city has conducted an analysis that compares the level of service provided to low-income and non-low-income populations that demonstrated that transit service was provided equitably and that disparities in service did not exist.

- The MPO's analysis and mapping of the low-income populations are completed for any service reductions or fare increases.

- The mayor's Transit Rates and Service Commission's membership will include someone from the low-income population.

- Public information sessions are held at the agency's central transfer facility (accessible by all routes), as well as in low-income neighborhoods at community centers and meeting rooms of public housing complexes.

Some agencies provided a more detailed description of their practices. For example, Metropolitan Transit of Harris County, Houston, Texas, explained that

[D]uring the FY 2004 System Productivity Program, five weekday routes were identified as being both poor performing routes with subsidies per boarding in excess of 100% above the average for local routes and lifeline with very low average household incomes. ... Non-lifeline poor performing routes were discontinued in fall 2004, but these lifeline poor performing routes were retained for an additional 6 months to try and increase the ridership such that their subsidy per boarding would decrease to target levels. None of the five weekday routes met the ridership/subsidy per boarding targets at the end of the 6-month period. With community support, the alignment of one of these lifeline routes, the headway, and the span of service were shortened, but the route was retained. A new route was created from the remnants of another lifeline route, while the remaining three routes were discontinued due to poor performance.

According to Omnitrans, San Bernardino, California, [The agency] use[s] GIS analytical techniques to model impact of multiple change scenarios in order to determine the least onerous scenario. ... The effect of any proposed change is modeled against the demographics of the area in question. For any proposed service change, for example, the new route is compared to the old route, half-mile walking distance buffers are placed around the routes, and by using GIS analysis, the census blocks and block-groups affected by the change are identified within these

buffers. Multiple scenarios are always generated as alternatives, and their effects are also determined. Disproportionate impact upon low-income or minority populations is noted in each case....

The agency also stated that

[O]nce a consensus is reached, there is always extensive public outreach, public hearings, and opportunity for public feedback. Very often, input from the public will substantially modify the original change scenario so that disproportionate effect is mitigated even further. In the case of fare changes, multiple scenarios are always tendered, and compromises or least-impact alternatives are what the agency frequently chooses. As a matter of course, whenever fare increases are proposed, an accompanying pass discount of some type is often included as well; this gives the public a way to offset the effects of the fare increase. In all cases, ...the public is given ample opportunity to comment upon them; the public's input frequently mitigates any disproportionate effect the change might cause to low-income riders. Finally, and in all cases, proposed changes are only made, finalized, and approved by our Board if the changes in question are of substantial need and would have less of an impact than the status quo or other alternatives.

The San Francisco Municipal Transportation Agency (SFMTA) states that

[It employs] various off-setting measures in order to decrease the impact of fare changes on minority and/or low-income groups: 1) increases in the Single Ride-Senior/Youth/Disabled Fare were designed to continue to offer deep discounts over the full fare via the Single Ride-Adult Fare and the Adult Monthly Passes; 2) the Lifeline Pass, created by SFMTA in 2005 in conjunction with the Human Services Agency in order to minimize the impact of fare increases being implemented at that time, remained an option for qualifying riders (according to an analysis of the 2000 U.S. Census data, minority communities are the major beneficiaries of the Lifeline Pass program); and 3) in order to mitigate the effect of fare changes to minority and/or low-income youth transit customers, SFMTA continued its partnership with the San Francisco Human Services Agency (HSA) to provide at-risk minority and/or low-income youth with City-funded Single Ride-Senior/Youth/Disabled Monthly Passes.

In sum, the vast majority of transit agencies report that they consider the effect of a reduction in service or an increase in fares on low-income populations. The practices include geographic information system (GIS) mapping and collecting and analyzing demographic, income, and service data; assessing the impact of proposed service reductions on low-income areas; comparing fares with fares in other areas; making efforts to assure that service and fares are equitable; using public information sessions and public hearings; being responsive to community involvement and input; and using discounts for low-income populations most affected by increased fares.

### C. Limited-English-Proficiency Persons

Fifty-three transit agencies responded that when reducing transit service and/or increasing fares they take steps to give notice to and otherwise involve LEP per-

sons, including the use of public hearings. Nine transit agencies responded that they do not take LEP persons into consideration; two agencies did not respond to the question.

**Table 3.**  
**Transit Agencies That Involve LEP Persons When Reducing Service or Increasing Fares**

Transit Agencies That Involve LEP Persons	53
Transit Agencies That Do Not Involve LEP Persons	9
Transit Agencies Not Responding	2

Some of the agencies' responses were:

- The agency has an "LEP plan in effect that calls for us to provide translation assistance and other assistance to individuals identified as LEP."
- All prominent information is translated into Spanish, which makes up 29 percent of the non-English-speaking population in the area as obtained from school district and census data, and materials are translated into Asian languages even though the 5 percent threshold is not met in the community the agency services.
- Notices are published in local foreign language newspapers.
- The agency uses multi-language advertisements and brochures and has interpreters and signers at all meetings with relevance to the riding public.
- The city staff conducts outreach at "high passenger-transfer points such as transit centers or in communities known to have high levels of transit passengers"; all notices of public hearings are published in English and Spanish; and information is broadcast in media outlets that specifically serve African-American, Hispanic, and Asian communities.

Other transit agencies described their practices in more detail. For example, the practice of Greater Bridgeport Transit Authority, Bridgeport, Connecticut, is to recognize "that there are more than 50,000 Hispanic or Latino residents in its service area, which translates to roughly 25 percent of the service area's population." The Authority undertakes to make available its timetables, newsletters, on-board displays, special notices, and radio advertisements and announcements to Hispanic or Latino residents.

The Greater Cleveland Regional Transit Authority (GCRTA) reported that it uses language banks as one of its practices.

[The agency] provides meaningful communication access to LEP persons through the assistance of Cleveland State University's language bank. The language bank is a tele-

phone interpreter service line offering speedy interpretation assistance in many different languages. In addition, GCRTA's Community Relations Specialist translates as needed to provide two-way communication between the Hispanic Community and GCRTA. GCRTA also employs three Customer Service Representatives in the Telephone Information Center (Call Center) who are Hispanic and speak fluent Spanish.

Another agency provided an example of its recent outreach when it discontinued a lightly used branch and extended the route to serve a community college. The agency stated that prior to the changes, agency staff conducted research regarding languages spoken at home in the neighborhoods surrounding the route and disseminated handouts, brochures, and bus stop information in four languages (English, Spanish, Korean, and Vietnamese) to communicate successfully with affected transit riders.

Another agency's practice is to make certain it is aware of the ethnic and linguistic makeup of its service population. The agency uses an Attitude and Awareness Survey of its service population every 3 years. The survey provides the agency with a profile of its patrons by age, ethnicity, gender, and income, as well as the typical rider's dependence on transit use. For instance, only 55 percent of its riders have a driver's license; 14 percent of its riders live in a household without a licensed driver compared to 2 percent of nonriders.

Not unlike other agencies responding to the survey, one agency stated that because of the linguistic makeup of the agency's service area, the agency seeks to improve communication with its Spanish-speaking community by printing materials in both English and Spanish, including its Rider Alerts; having bilingual Information Clerks; providing interpreters at public hearings; printing advertisements in both English- and Spanish-language newspapers; and making announcements on local radio stations that serve listeners who speak English or Spanish.

TriMet uses a variety of methods to communicate proposed changes and solicit feedback from the community, including on-board notification, notification at affected stops, notification through a diversity list-serve, and public notices in local, minority newspapers and community publications. Its proposed changes are posted within buses and shelters, and individual notices are mailed to businesses or individuals identified as key stakeholders.

TriMet advises that public hearings generally are held at public facilities (schools, community centers) within the affected neighborhoods. The agency communicates with community-based organizations that represent minority or low-income communities; employs GIS mapping software to identify affected LEP communities for targeting its materials; and provides interpreters at open houses or public hearings. TriMet has a full-time LEP Outreach Coordinator who solicits feed-

back from LEP audiences both from within their communities and at TriMet’s activities such as open houses and public hearings. It may be noted that TriMet’s “Language Implementation Plan” is made available by FTA on its Web site.<sup>563</sup>

Thus, most agencies responding to the survey reported that they undertake to communicate effectively with and involve LEP populations. The transit agencies’ practices include some of the “promising practices” discussed in the USDOT LEP Policy Guidance, such as language banks, language support offices, the use of technology, telephone information lines and hot lines, and signage and other outreach.<sup>564</sup> Transit agencies report using surveys or GIS mapping software to identify LEP communities; determining the languages spoken by the LEP persons in the area served; publishing notices, advertisements, brochures, and newsletters in the languages of the LEP persons; holding hearings in locations convenient to neighborhoods with affected LEP populations; and providing interpreters at meetings and hearings.

**D. Transit Agencies’ ADA Policies**

Twenty transit agencies responding to the survey stated that they had a policy for dealing with ADA issues that may arise because of a reduction in transit service and/or an increase in fares, although not all policies were necessarily in writing or specific to the ADA. Forty-two agencies responded that they did not have an ADA policy in connection with issues arising because of a reduction in transit service and/or an increase in fares.

**Table 4.**  
**Transit Agencies Having an ADA Policy for Dealing With Issues Arising Because of a Reduction in Transit Service and/or an Increase in Fares**

Transit Agencies Reporting an ADA Policy Regarding Reduction in Transit Service and/or Increase in Fares	20
Transit Agencies Not Reporting an ADA Policy Regarding Reduction in Transit Service and/or Increase in Fares	42
Transit Agencies Not Responding	2

<sup>563</sup> See *Examples of Language Implementation Plans Developed by Transit Agencies*, available at [http://www.fta.dot.gov/civilrights/civil\\_rights\\_5088.html](http://www.fta.dot.gov/civilrights/civil_rights_5088.html) (Last accessed on Sept. 9, 2010).

<sup>564</sup> DOT LEP Policy Guidance, 70 Fed. Reg. 74087, 74097–098 (Dec. 14, 2005), available at <http://edocket.access.gpo.gov/2005/05-23972.htm>.

Of the agencies responding that they have a policy, several referred to their complaint procedures or to their Title VI FTA reports. The responses were that the agency has a “formal ADA complaint investigation process,” “employs a grievance process for addressing all disagreements with service to ADA customers,” or that “ADA issues are forwarded to either the specialized service or operations department to determine if a violation of [the] ADA has occurred.”

GCRTA provided a more detailed description of its ADA practice. GCRTA stated that it “has a formal internal complaint procedure with a mission to ensure prompt, fair impartial resolution of complaints and/or problem situations. This internal complaint procedure also identifies areas where corrective action is needed and makes effective recommendations with regard to those areas.”

In the processing of an ADA complaint, GCRTA strives to:

- Maintain the confidentiality of the complainant to the extent permitted under the law.
- Ensure that the complainant is aware of his or her rights at all stages of the complaint process.
- Investigate the allegations by reviewing information and interviewing all the stakeholders.
- Process the complaint within a reasonable amount of time after the matter is brought to the agency’s attention.
- Analyze the allegations of discrimination to identify conditions or circumstances that may exist beyond the individual case that require further investigation.
- Have access to GCRTA officials at all levels to discuss findings and recommendations regarding the complaint and make periodic checks as necessary to assure that any agreed upon corrective action has been taken or is continuing.

GCRTA reported that “[i]n the event that there is a determination that a probable discriminatory impact exists as it relates to decisions made regarding transit services or future capital projects, the appropriate Deputy General manager(s) are notified and required to respond by clarifying and/or resolving the issue in question.”

One agency described how it had successfully resolved complaints by the elderly and the disabled regarding service reductions and fare increases. The service reductions caused some patrons to have to travel an additional one or two city blocks for access to bus service. The agency reported that the complaints concerning reductions in service were resolved by explaining why the changes were occurring and that if the additional distance made access to the bus impossible, riders could be eligible for paratransit service. As for complaints made at a public hearing regarding a proposed increase in fare for paratransit service to \$3.00 per ride (twice the fixed-route rate), the agency responded by reducing the proposed fare increase to \$2.50.

In addition to the survey responses, it may be noted that the Ninth Circuit in *Midgett, supra*, in 2009 held that the evidence demonstrated TriMet’s intention to comply in good faith with the ADA as demonstrated “by its practices and programs directed at ensuring ADA compliance....”<sup>565</sup> The court observed that the FTA had found that, based on TriMet’s FTA Triennial Review, the agency was in compliance with the ADA and that a TriMet internal report showed that its lift-performance exceeded that of providers in similar communities.<sup>566</sup> The court stated that “Tri-Met...presented extensive evidence showing that it has specific programs in place to address ADA issues, including a procedure for classifying ADA-related calls as urgent, training programs to instruct officers how to address ADA-related issues, periodic quality control inspections by outside investigators, and specific practices related to lift failures.”<sup>567</sup> The court held that “TriMet’s practices and procedures for ensuring ADA compliance further show that Plaintiff does not face a threat of immediate irreparable harm without an injunction.”<sup>568</sup>

In sum, of the agencies reporting that they have an ADA policy, most referred to their policy for handling ADA complaints. One agency described how it had resolved complaints regarding service reductions or increases in fares by explaining why the changes were necessary. As seen, one agency in an ADA case presented extensive evidence satisfactory to the court that the agency was in compliance with ADA laws and regulations and had a policy for dealing promptly with ADA issues.

### E. Transit Agency Coordination

Fifty-four transit agencies stated that when considering a reduction in transit service and/or an increase in fares, they coordinate with other government agencies, nongovernmental associations or groups, and the public. Six agencies stated that they do not; four agencies did not respond to the inquiry.

**Table 5.**  
**Transit Agencies’ Coordination with Government Agencies and Others When Reducing Service or Increasing Fares**

Transit Agencies That Coordinate with Government Agencies and Others	54
Transit Agencies That Do Not Coordinate with Government Agencies and Others	6
Transit Agencies Not Responding	4

One agency reported that many “[i]ssues have been resolved through one-on-one discussion between elected officials and our Director of Planning, Director of Business Development, Executive Director and Chairman” and that “extensive outreach to potentially affected partners is done including community partners [and] governmental entities.”

One agency describing its practice when making a change in transit service stated that it:

- Held public hearings to solicit public comments in accordance with the Public Hearing Policy adopted by its board.
- Contacted over 100 elected officials and civic leaders by means of letters and phone calls.
- Conducted research and analysis both locally and nationally.
- Talked to customers on buses and trains.
- Facilitated meetings with editorial boards at local media companies.
- Organized team forums for input from front line experts.

Miami Dade Transit (MDT) in Miami, Florida, described in some detail its practices, which include consultation and coordination “with the Metropolitan Planning Organization, the Citizens’ Independent Transportation Trust, and other local transit agencies prior to implementing changes of this nature.”

These discussions take place in publicly advertised meetings. In addition, MDT encourages public involvement and participation in transportation-related issues, conducting interactive presentations with communities across the county. MDT’s public involvement section monitors help develop a proactive public involvement process that provides complete information, timely public notice, full public access to key decisions, and supports early and continuing involvement of the public in developing transit issues. ...MDT has adopted an involvement plan in an effort to foster two-way communication and trust between the county government and the citizens of [the] County and to ensure that public transit programs reflect community values and benefit all segments of the

<sup>565</sup> *Midgett v. Tri-County Metro Transp. Dist.*, 254 F.3d, 846, 851 (9th Cir. 2001).

<sup>566</sup> *Id.* at 849.

<sup>567</sup> *Id.* (citation omitted) (internal quotation marks omitted).

<sup>568</sup> *Id.* at 850.

community equally. MDT reaches out to all demographic communities and involves the public by providing opportunities early and often in the transportation planning and decision-making processes by holding public workshops, meetings, forums, town hall meetings, etc.

SFMTA stated that

[It] works with a diverse set of stakeholders, including community members, local organizations, City Departments and other regional transit properties. For example, SFMTA coordinates with BART, its partner transit agency, which provides regional rail service.... SFMTA also coordinate[s] with the [San Francisco] Human Services Agency, which helps us distribute our low-income “lifeline” pass. Additionally, we work closely with a variety of non-profit organizations that represent the needs of our customers and other stakeholders....

SFMTA’s most recent changes were informed by the Transit Effectiveness Project, a comprehensive operations analysis conducted to increase the effectiveness of the City’s transit system. During the TEP process, SFMTA’s Service Planning staff met with dozens of community organizations to get input on service changes.

Finally, TriMet stated that

[It] provides notice of proposed reductions in service and/or fare increases through [a] public notice, outreach, and comment process that reaches community, business, and jurisdictional stakeholders. ...Methods of outreach and involvement include on-board notification, notification at affected stops, notification through a diversity list serve, and public notice in local minority newspapers and community publications. Proposed changes are also contained in postings within buses and shelters. Among the other measures taken, individual notices are mailed to any party who has requested such notice and any businesses or individuals identified as key stakeholders. Public hearings are generally held within the affected community...at public facilities (schools, community centers) within the affected neighborhoods. TriMet communicates with community-based organizations who represent minority or low-income communities that are interested in policy changes or may be affected by changes.

Thus, besides having public hearings, agencies reported a wide variety of methods of coordination, including having multiple public meetings and forums to gain public input; coordinating with school districts and other public entities; communicating directly with elected officials in advance of any changes, including the mayor and council members, and inviting public officials to attend meetings; and making effective use of workshops, staff working groups, customer comments, neighborhood associations, advisory committees, local civic groups, transit advocacy groups, disabled community and LEP support centers, and Internet postings.

**F. Transit Agency Resources**

Twenty-eight transit agencies stated that they have specific resources to assist them in complying with Title VI and/or the ADA when considering a reduction in service or an increase in fares. Thirty-two agencies said they do not; four agencies did not respond to the inquiry.

**Table 6.  
Transit Agencies’ Resources When Reducing Service or Increasing Fares**

Transit Agencies That Have Specific Resources to Assist Them When Reducing Service or Increasing Fares	28
Transit Agencies That Do Not Have Specific Resources to Assist Them When Reducing Service or Increasing Fares	32
Transit Agencies Not Responding	4

Although some of the resources identified below overlap, the resources include:

- The FTA, the tri-annual report to the FTA, and the FTA Civil Rights Officer.
- GIS mapping of transit areas, on-board fare surveys, and reviews by the FTA District Office.
- Census data to identify low-income and minority neighborhoods.
- The agency’s own Title VI Committee that “is made up of members from critical areas throughout the agency.”
- The city’s Mayor’s Commission on Disability Issues that provides “input on accessibility to city facilities and properties and public transportation needs for people with disabilities.”
- In-house software (Trapeze Plan) that the agency uses and the agency’s “MPO, if necessary, for GIS assistance.”
- A “management firm for fixed route service assessments.”
- Demographic and service profile maps and charts to identify populations in service areas.

The GCRTA identified its Citizen Advisory Board (CAB) and ADA Advisory Committee as important resources.

The CAB is a transit-related group of volunteers that meets monthly to discuss relevant issues pertaining to the operations of the Authority. Members of the CAB work to increase citizen participation in community activities and involve the public in transit decision-making. The ADA Advisory Committee is comprised of representatives selected from public and private agencies, consumer groups, interested individuals and users of the transit system. This group’s primary task is to assist the Authority in planning for and providing comments and suggestions about RTA’s service for its disabled customers.

Omnitrans stated that

[It] employs a variety of tools to aid it in complying with Title VI and ADA requirements whenever reducing transit service or increasing fares. Primary among these is a well-designed and well-organized planning process which ensures that decisions regarding service modification are

never made precipitously. A series of steps are involved, including meetings with experts and constituents, public outreach efforts to all interest groups, and the inclusion of beneficiaries at important stages of the planning process. Along with this, quantitative measures involving census and demographic data are included in the decision-making process very early on such that any effects of service or fare change are mitigated. For example, whenever route changes are planned, a “demographic profile” of the affected area(s) is taken by using GIS analytical techniques and applying walking-distance buffers around routes to obtain a demographic “snapshot” of the route in question at the block-group and block level; this gives us invaluable information about the demographic makeup of this area, including information regarding low-income and minority percentages of residents. Whenever possible, numerous scenarios of change are offered; this is done to minimize the overall effect of change by allowing us to choose the least onerous of scenarios with the minimal impact upon the region in question. So, modeling of change scenarios is done by employing census demographic data at the block-group and block level and using GIS analytical techniques.

In general, the transit agencies mentioned GIS mapping and analysis and census data most often in their responses regarding resources available to them when reducing service or increasing fares.

### G. Policy Regarding Review of Legal Issues When Reducing Service or Increasing Fares

#### 1. Review of Legal Issues

Forty transit agencies stated that they have a policy of reviewing legal issues that may arise when considering a reduction in transit service and/or an increase in fares; however, 22 agencies reported that they do not have such a policy.

**Table 7.**  
**Transit Agencies with a Policy of Reviewing Legal Issues When Reducing Service or Increasing Fares**

Transit Agencies That Have a Policy of Reviewing Legal Issues	40
Transit Agencies That Do Not Have a Policy of Reviewing Legal Issues	22
Transit Agencies Not Responding	2

Some of the responses were that the agency’s “[s]trategic investments staff conducts detailed statistical analyses to determine the impact of proposed service or fare changes on minority communities for the purpose of determining whether or not mitigating action would be required,” that the agency “reviews issues

with the Assistant County Attorney responsible for transit,” or that the agency’s “legal staff specifically focused on regulatory and compliance issues.”

Some of the responses were more detailed and thus more indicative of what transit agencies consider to be best practices. For example, Capital District Transit Authority, Albany, New York, stated that it has a “formal process...for consideration of service changes that is laid out in [its] Strategic Business Plan”; that routes and corridors identified for a reduction in service are based primarily on low ridership levels; and that consideration is given to existing service “heavily used by the elderly, disabled, or low-income passengers.”

Another agency reported that

[It discusses] all ramifications which would arise from any service reduction or fare increase. The issues that are typically included in [the] discussion are [the] effect on riders of service reduction and/or [a] fare increase. We look at areas where service reduction is considered and make sure that other routes overlap and cover the region fully. We never remove all coverage from a region during a reduction. Whenever fare increases are considered, we include ameliorating or mitigating options so that the change in fare does not unduly harm those least able to pay. In this sense, we always offer fare savings alternatives, too, so as to lessen the effect of fare increases, e.g., 7-day and 31-day passes with their special rates. As for groups which are often at a disadvantage in paying, we include special pass rates for them (students, seniors, disabled/Medicare recipients).

Our Short Range Transit Plan is the document, which describes fully our legal process for addressing issues involving service reduction or fare increases.

Finally, some of the agencies’ responses indicated for example, that they consulted the Title VI or ADA laws, relied on a “robust public hearing process,” or relied on review by the local FTA office. One agency said that it made “a good faith effort” to assure that the agency complied with the law, while another agency said that it sought to make certain that resources are “distributed equitably.” Another agency commented that a “[r]eview of legal issues in regard to Title VI and the ADA [is] part of [a] larger review of potential impacts on access to jobs and services” and that its review “always includes extens[ive] public participation.”

#### 2. Use of a Legal Memorandum

Fifty-four agencies reported that they do not prepare or have not prepared for the agency an internal legal memorandum on issues that are anticipated to arise when the agency is considering a reduction in transit service and/or an increase in fares, whereas six transit agencies reported that they do have a legal memorandum. Four agencies did not respond to the question.

**Table 8.**  
**Transit Agencies That Prepare a Legal Memorandum on Reduction in Service or Increase in Fare Issues**

Transit Agencies That Have a Legal Memorandum	54
Transit Agencies That Do Not Have a Legal Memorandum	6
Transit Agencies Not Responding	4

One agency having such a memorandum said that it “is reviewed by the directors and legal counsel to determine potential violations, risks, or lawsuits.”

One agency’s reply was that that, although there is no specific internal legal memorandum, the agency has “very precise policies in place to address these issues. The process of route service reduction and fare increase is never...undertaken cursorily or superficially.” Moreover, the agency stated that “before any decisions are made, a series of meetings and public outreach efforts are made with all cities and members of the county, with the public, and with specific transit interest groups. Their input often guides whatever decisions we make regarding route modifications and/or fare changes....”

In sum, although a small number of agencies have a legal memorandum regarding anticipated issues when reducing service or increasing fares, most agencies do not.

## X. CONCLUSION

Reductions in service or increases in fares may affect adversely those who are the most dependent on mass transit for their transportation needs, such as minority and low-income populations. As stated, one objective of environmental justice is to assure that transportation policies avoid or mitigate negative effects on particular communities and ensure that disadvantaged groups receive their fair share of benefits. Consequently, the digest addresses the legal implications of reductions in transit service or increases in fares in the context of environmental justice.

As for Title VI of the Civil Rights Act of 1964, individuals may sue under Section 601 only for intentional discrimination. Section 602 of Title VI is applicable to discrimination resulting from policies and actions that have disparate impact on minorities; however, there is no private right of action to enforce disparate-impact regulations issued pursuant to Section 602 of Title VI. As discussed in Section V of the digest, the sole remedy for a claim of disparate impact is for an aggrieved party to file an administrative complaint pursuant to USDOT regulations and procedures. The majority view is that a Section 602 disparate-impact claim may not be brought under § 1983.

Possibly, in the absence of direct proof of intentional discrimination, evidence of intent to discriminate may be established by proof of the *Arlington Heights* factors and/or the use of statistical evidence. However, in two recent cases, *Darensburg* and *Committee Concerning Community Improvement*, discussed in the digest, the plaintiffs’ disparate-treatment and disparate-impact claims were unsuccessful.

The 2007 FTA Title VI Circular provides recipients and subrecipients of FTA financial assistance with guidance regarding compliance with Title VI regulations and how to integrate into their programs the USDOT’s Order on Environmental Justice and the USDOT LEP Policy Guidance. Nevertheless, recipients of federal funds may implement policies or take actions that have disparate impact if the policies or actions have substantial legitimate justification, if there are no comparably effective alternative practices that would result in less disparate impacts, and if the justification for the policy or action is not a pretext for discrimination.

A federal-aid recipient’s failure to assure that people who are not proficient in English can effectively participate in and benefit from programs and activities may constitute national origin discrimination prohibited by Title VI. Recipients and subrecipients that are not required to develop a plan must consider other ways to provide reasonably meaningful access to LEP persons. Recipients have wide latitude regarding what LEP measures are appropriate.

As for the ADA, Title II, Part B, is applicable to public transportation services and includes essentially all forms of transportation services that state and local governments provide, such as motor vehicle and intercity or commuter rail services. The USDOT issued regulations in 1991 that address a wide variety of issues not directly addressed by the ADA, as well as issued guidelines interpreting the regulations.

The digest discusses the practices that were identified as the result of a survey of transit agencies concerning their handling and resolving of Title VI and ADA issues when it becomes necessary to reduce transit service and/or increase fares. Both Title II of the ADA and Section 504 of the Rehabilitation Act are enforceable through a private cause of action. As noted in the Report, although a state may have sovereign immunity under the Eleventh Amendment in regard to ADA claims, it appears that even if an ADA claim is dismissed on the basis of sovereign immunity, the claim may be brought under the Rehabilitation Act.

## APPENDIX A—SURVEY QUESTIONS

*(This survey appears as it was originally distributed, with the inclusion of questions regarding the 13(c) labor protection provision of the Urban Mass Transportation Act of 1964. Subsequent to distribution, TRB removed discussion of 13(c) from this study due to a more comprehensive consideration of 13(c) in another study.)*



### SURVEY QUESTIONS TCRP J-5, STUDY TOPIC 12-02 REDUCTIONS IN TRANSIT SERVICE: CIVIL RIGHTS, ADA, § 13(C), REGULATORY AND ENVIRONMENTAL JUSTICE IMPLICATIONS

Agency Name: \_\_\_\_\_

Name of Employee: \_\_\_\_\_

Job Title: \_\_\_\_\_

Contact telephone/cell phone number: \_\_\_\_\_

E-mail address: \_\_\_\_\_

How many years have you been with the agency? \_\_\_\_\_

What has been your agency's average annual ridership for the last year?

(a) Number of Passenger trips by rail per year \_\_\_\_\_

(b) Number of passenger trips by bus per year \_\_\_\_\_

*(If insufficient space is allotted for your responses below, please feel free to place your responses on additional sheets of paper and attach them to the survey.)*

1. Has your agency had to reduce transit service and/or increase fares at any time within the past 10-years? **(Please circle) YES NO**

(a) If your answer is **"YES,"** has (or have) the reduction(s) in services and/or increases in fares resulted in any complaints against your agency for disparate treatment or disparate impact based on Sections 601 and/or 602 of Title VI of the Civil Rights Law of 1964?

\_\_\_\_\_

(b) Please describe the complaints and/or, if possible, provide copies of any documents regarding the complaints and how they were resolved.

\_\_\_\_\_

\_\_\_\_\_



2. Has (or have) the reduction(s) in transit services and/or increases in fares resulted in any complaints against your agency under the Americans with Disabilities Act (“ADA”)?

**(Please circle) YES NO**

If your answer is **“YES,”** please describe the complaints and/or, if possible, provide copies of any documents regarding the complaints and how they were resolved.

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3. Does your agency engage in a review of potential legal issues that may arise if there is to be a reduction in transit services and/or an increase in fares? **(Please circle) YES NO**

If your answer is **“YES,”** please describe the issues that typically are considered and the process used by your agency.

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4. Has your agency encountered a specific situation involving Title VI or the ADA and reduction in transit service and/or an increase in fares that would make a good case study for the Report?

**(Please circle) YES NO**

If your answer is **“YES,”** please describe the experience and provide a copy of any relevant documents, such as any memoranda and/or notice to the public or other policy announcements, to permit such a case study to be presented in the Report.

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5. Does your agency have a policy in dealing with Title VI civil rights issues that may be implicated by a reduction in transit service and/or an increase in fares?

**(Please circle) YES NO**

If your answer is **“YES,”** please identify and describe and/or provide a copy.

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6. Does your agency have a policy for dealing with ADA issues that may arise because of a reduction in transit service and/or an increase in fares? **(Please circle) YES NO**

If your answer is **“YES,”** please identify and provide a copy.

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7. With respect to any agency ADA policy you identified above has your agency made, or is it considering making, any changes to its policy as a result of the 2008 amendments to the ADA?

**(Please circle) YES NO**

If your answer is **“YES,”** please provide details.

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8. Does your agency have any specific resources to assist it in complying with Title VI of the Civil Rights Act of 1964 and/or the ADA when reducing transit service or increasing fares?

**(Please circle) YES NO**

If your answer is **“YES,”** please provide details.

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9. Does your agency prepare an internal legal memorandum on issues that are anticipated to arise when the agency is considering a reduction in transit service and/or an increase in fares?

**(Please circle) YES NO**

If your answer is **“YES,”** how is the memorandum used? Please provide details and/or a copy or copies.

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10. When considering a reduction in transit service and/or an increase in fares, is there any coordination with other government agencies, non-governmental associations or groups, or the public?

**(Please circle) YES NO**

If your answer is **“YES,”** please describe and indicate how any disagreements or disputes are resolved.

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11. (a) Within the past 10-years has your agency sought or obtained a certification by the Secretary of Labor under § 13(c) of the Urban Mass Transportation Act (now codified as 49 U.S.C. § 5333(b)), which requires a state or local government to preserve collective bargaining rights by transit workers prior to an agency’s receipt of federal financial assistance?

**(Please circle) YES NO**

If your answer is **“YES,”** please provide details and copies of any relevant documents.

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(b) Have there been any disputes, complaints, or legal actions involving your agency based on § 13(c)? **(Please circle) YES NO**

If your answer is **“YES,”** please provide details and copies of any relevant documents.

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12. With respect to the 2007 FTA Title VI Circular does the Circular resolve any questions that arose in any earlier litigation or administrative proceedings of which your agency is aware or, alternatively, does the Circular raise more issues? **(Please circle) YES NO**

If your answer is **“YES,”** please explain.

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13. Please identify any litigation (name of parties and court and/or citation) of which your agency is aware in which a plaintiff or defendant has used the 2007 FTA Title VI Circular.

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14. With respect to a reduction in transit service and/or an increase in fares does your agency take into account the effect on low-income population(s) as a factor in the agency’s decision-making? **(Please circle) YES NO**

If your answer is **“YES,”** please explain.

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15. When reducing transit service and/or increasing fares does your agency take steps to give notice to and otherwise involve persons with limited English proficiency (“LEP”), such as the use of public hearings? **(Please circle) YES NO**

If your answer is **“YES,”** please explain.

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16. Please describe any other policies or practices used by your agency that are considered to be “best practices” regarding civil rights, ATA, § 13(c), regulatory and environmental justice issues that may arise when having to reduce service and/or increase fares.

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Please return your completed survey to:

The Thomas Law Firm  
ATTN: Larry W. Thomas  
1776 I Street, NW, Suite 900  
Washington, D.C. 20006  
Tel. (202) 280-7769  
lwthomas@cox.net

## APPENDIX B—TRANSIT AGENCIES RESPONDING TO THE SURVEY

Ashville Transit, Ashville, North Carolina  
 Bay Metropolitan Transit Authority, Bay City, Michigan  
 Ben Franklin Transit, Richland, Washington  
 Bi-State Development Agency–Metro St. Louis, St. Louis, Missouri  
 Capital District Transportation Authority, Albany, New York  
 Capital Metropolitan Transportation Authority, Austin, Texas  
 Casco Bay Island Transit District, Portland, Maine  
 Central Florida Regional Transit Authority, Orlando, Florida  
 Central New York Regional Transportation Authority, Syracuse, New York  
 Centre Area Transportation Authority, State College, Pennsylvania  
 City and County of Honolulu’s Department of Transportation Services, Honolulu, Hawaii  
 City of Phoenix Public Transit Department, Phoenix, Arizona  
 City of Pine Bluff Transit, Pine Bluff, Arkansas  
 City Utilities–Transit, Springfield, Missouri  
 Cherriotts–Salem/Keizer Transit, Salem, Oregon  
 Connecticut Department of Transportation, Newington, Connecticut  
 Fort Worth Transportation Authority, Fort Worth, Texas  
 Fresno Area Express, Fresno, California  
 Golden Gate Bridge Highway and Transportation District, San Rafael, California  
 Greater Bridgeport Transit Authority, Bridgeport, Connecticut  
 Greater Cleveland Regional Transit Authority, Cleveland, Ohio  
 Greater New Haven Transit District, Hamden, Connecticut  
 Greater Lynchburg Transit Co., Lynchburg, Virginia  
 Greater Portland Transit District Metro, Portland, Maine  
 GRTC Transit System, Richmond, Virginia  
 Hillsborough Area Regional Transit, Tampa, Florida  
 Interurban Transit Partnership, Grand Rapids, Michigan  
 Kitsap Transit, Bremerton, Washington  
 La Crosse Municipal Transit Utility, La Crosse, Wisconsin  
 Laredo Transit Management, Inc., Laredo, Texas  
 Lehigh and Northampton Transportation Authority, Allentown, Pennsylvania  
 Livermore Amador Valley Transit Authority, Livermore, California  
 Los Angeles County Metropolitan Transportation Authority, Los Angeles, California  
 Manchester Transit Authority, Manchester, New Hampshire  
 Metra, Chicago, Illinois  
 Metropolitan Transit Authority of Harris County, Houston, Texas  
 Metro Transit, Madison, Wisconsin  
 Miami Date Transit, Miami, Florida  
 Montgomery County Transit and Ride On, Rockville, Maryland  
 Montachusett Regional Transportation Authority, Fitchburg, Massachusetts  
 MTA Long Island Rail Road, Jamaica, New York  
 Municipality of Anchorage Public Transportation Department, Anchorage, Alaska  
 New Jersey Transit, Newark, New Jersey  
 Omnitrans, San Bernardino, California  
 Pierce Transit, Lakewood, Washington  
 Pinellas Suncoast Transit Authority, St. Petersburg, Florida  
 Port Authority of Allegheny County, Pittsburgh, Pennsylvania

Port Authority of New York and New Jersey, New York, New York  
Oshkosh Transit System, Oshkosh, Wisconsin  
Pee Dee Regional Transportation Authority, Florence, South Carolina  
Regional Transportation Commission of Washoe County, Reno, Nevada  
SANDAG, San Diego, California  
San Francisco Municipal Transportation Agency, San Francisco, California  
San Joaquin Regional Transit District, Stockton, California  
Santa Clara Valley Transportation Authority, San Jose, California  
Santa Cruz Metropolitan Transit District, Santa Cruz, California  
San Mateo County Transit, San Mateo, California  
Southwest Ohio Regional Transit Authority, Cincinnati, Ohio  
Space Coast Area Transit, Cocoa, Florida  
StarTran, Lincoln, Nebraska  
Transit Authority of River City, Louisville, Kentucky  
Tri County Metropolitan Transportation District of Oregon, Portland, Oregon  
Worcester Regional Transit Authority, Worcester, Massachusetts  
Yakima Transit, Yakima, Washington

**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; **Sheryl King Benford**, Greater Cleveland Regional Transit Authority, Cleveland, Ohio; **Darrell Brown**, Darrell Brown & Associates, New Orleans, Louisiana; **Dennis C. Gardner**, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; **Clark Jordan-Holmes**, Joyner & Jordan-Holmes, P.A., Tampa, Florida; **Elizabeth M. O'Neill**, Metropolitan Atlanta Rapid Transit Authority, Atlanta, Georgia; **Ellen L. Partridge**, Chicago Transit Authority, Chicago, Illinois; and **James S. Thiel**, Wisconsin Department of Transportation, Madison, Wisconsin. **Rita M. Maristch** provides liaison with the Federal Transit Administration, **James P. LaRusch** serves as liaison with the American Public Transportation Association, and **Gwen Chisholm Smith** represents the TCRP staff.

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