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Discrimination in the Funding of Mass Transit Systems: Formulating a Title VI Challenge to the Subsidization of the Alameda Contra Costa Transit District as Compared to the Bay Area Rapid Transit District

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I. Introduction

In metropolitan areas across the United States, public transportation agencies are massively subsidizing the improvement and expansion of inter-city rail systems which largely benefit white commuters from the suburbs. Meanwhile, transportation agencies are disproportionately raising fares and are often cutting services on inner-city transit systems which serve mostly minority riderships. The evidence is mounting that the mostly minority, inner-city riders are paying a greater share of the transit costs than the generally white inter-city riders.

The minority riders have been fighting back, refusing to allow their inner-city transit systems to take a back seat to the inter-city systems. In New York City, the regional transportation agency attempted to raise fares disproportionately on the inner-city subway and bus systems as compared to proposed increases on fares for commuter trains. Minority riders filed suit under Title VI of the Civil Rights Act of 1964 ("Title VI") to block the increase, and after a preliminary injunction was overturned by the Second Circuit, the parties settled the case. Under the settlement agreement, the regional transportation agency will provide free transfers between the bus and subway systems and will fund a study on transportation inequities. In addition, the New York City and New York State promised to commit funds to the inner-city transit systems.

In Los Angeles, the regional transportation agency was neglecting the needs of bus riders and voting for bus fare increases while channelling hundreds of millions of dollars to rail projects. The bus riders sued the transportation agency, alleging the agency's actions had a discriminatory impact on racial minorities. As in New York, the parties settled, entering a consent decree which guarantees a variety of services, the freezing of cash fares, a commitment from the regional agency to expand and improve bus service, and the creation of a joint working group by which the plaintiffs will participate in mass transit decision making.

The discriminatory pattern repeats in the San Francisco Bay Area. The Alameda Contra Costa Transit District ("AC Transit"), providing bus transportation to a mostly minority ridership, has recently increased fares and cut service. In contrast, the Bay Area Rapid Transit District ("BART"), providing rail transportation to a largely white ridership, is extending service to several, mostly white, suburbs, although it has also raised fares in three installments over three years. Both agencies are affiliated with the Metropolitan Transportation Commission ("MTC") which provides comprehensive regional...
al planning and allocates capital and operating subsidies for transportation agencies in the nine-county San Francisco Bay Area.

The purpose of this note is to provide AC Transit riders interested in ending the discrimination with factual and legal research that would aid them in pursuing a Title VI action. To achieve this goal, this paper reviews Title VI law, examines the New York and Los Angeles cases and settlements, uncovers the disproportionate subsidization of BART over AC Transit, and synthesizes the information in order to suggest strategies and point out obstacles for plaintiffs interested in filing a Title VI case to remedy the discrimination suffered by AC Transit riders.

II. Title VI

A. The Statute and Implementing Regulations

Title VI prohibits racial discrimination by any agency which accepts federal funds. Section 2000d declares that "No person in the United States shall, on the ground of race, color or national origin, be subjected to discrimination under any program or activity receiving Federal financial assistance." Federal administrative agencies have authority to issue implementing regulations under Title VI. In Guardians Ass’n v. Civil Service Commission, the Supreme Court held valid administrative regulations implementing Title VI which prohibit disparate impact discrimination. The majority fractured over whether Title VI itself forbids disparate impact or only intentional discrimination, but did concur that implementing regulations could reach disparate impact discrimination. Both holdings were affirmed in Alexander v. Choate. A different majority in Guardians concluded that both prospective and retrospective equitable relief are available to plaintiffs, regardless of whether they prove intentional or disparate impact discrimination.

Therefore, while plaintiffs are required to show purposeful discrimination in a claim under Title VI itself (as in an Equal Protection claim), they need only show discriminatory effect when suing under implementing regulations prohibiting disparate racial impact.

The United States Department of Transportation’s ("U.S. DOT") Title VI regulations prohibit entities accepting federal financial assistance from following practices which have discriminatory effects on racial minorities. The regulations state:

A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color or national origin.

B. The Shifting Burdens of Proof

In a Title VI case, the burden of proof begins with the plaintiff, shifts to the defendant if the plaintiff’s burden is met, and shifts back to the plaintiff if the defendant’s burden is met. The evidentiary structure has been imported from Title VII employment discrimination cases. The Supreme Court has not ruled on the applicability of the Title VII evidentiary structure for Title VI cases, but the Federal Courts of Appeals have consistently applied it. The Ninth Circuit expressly adopted and applied the Title VII standard in the Title VI case Larry P. v. Riles. Michael Fisher has summarized the Title VII evidentiary structure, as amended by the Civil Rights Act of 1991, as follows:


2. 42 U.S.C.S. § 2000d-1 (1994). This section authorizes and directs each federal agency distributing financial assistance “to effectuate the provisions . . . by issuing rules, regulations, or orders of general applicability.” Id.
4. See id. at 584 n.2.
8. See Guardians, 463 U.S. at 584.
10. See Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).
12. See Riles, 793 F.2d at 982, n.9.
Prior to the Civil Rights Act of 1991, the Supreme Court had ruled that, in the second stage, the defendants in a Title VII case needed only to show a legitimate business necessity, while in the third stage, the plaintiffs had the ultimate burden of demonstrating that alternatives "without a similarly undesirable racial effect, would also serve the employer's legitimate interests." Thus, Michael Fisher argues, the defendant must "prove both the non-racial nature of the program and the necessity for retaining it in its current form." As for Title VI, Michael Fisher continues, since the Title VI evidentiary structure was adopted from Title VII, the 1991 amendments should be adopted as well. For the purposes of this paper, I will assume the challenged practices are non-racial in nature, and the focus of the defendant's burden discussion will be on the necessity issue.

Several commentators argue that a defendant's burden of proof in Title VI cases should be higher than in Title VII cases. The rationale is that Title VII injects government interests and public policy into the private sector where employers and employees are presumptively contracting at will. In contrast, Title VI only applies to entities that elect to receive federal funding. Therefore, entities choosing to take federal money should have to meet a higher standard of proof when justifying their practices which have a discriminatory impact on minorities. This reasoning is logical, but, unfortunately, it contradicts experience. Since the purpose of this paper is to advise plaintiffs on how to pursue on a Title VI transportation case in the Bay Area, I will not explore the proposal.

The plaintiff's burden in the third stage may be clarified by reference to United States Attorney General Janet Reno's Memorandum to Heads of Departments and Agencies that Provide Federal Assistance to state and local agencies dated July 14, 1994. The President has the authority to review and approve federal agency Title VI regulations. In Executive Order 12,250, the President delegated this statutory power to the Attorney General. The Attorney General's Memorandum explains the policy rationale behind Title VI and enunciates the disparate impact standard:

Individuals continue to be denied, on the basis of their race, color, or national origin, the full and equal opportunity to participate in or receive the benefits of programs assisted by Federal funds. Frequently discrimination results from policies and practices that are neutral on their face but have the effect of discriminating. Those policies and practices must be eliminated unless they are shown to be necessary to the program's operation and there is no less discriminatory alternative.

The Attorney General's statement of the evidentiary structure will provide the format for analyzing the potential Bay Area Title VI case. Thus, the
burdens of proof may be summarized as follows: (1) Plaintiff's burden of demonstrating a prima facie case of disparate impact; (2) Defendant's burden of demonstrating a legitimate business necessity; (3) Plaintiff's burden of demonstrating a less discriminatory alternative.

C. Liability of Defendants for Their Programs and Activities

In Grove City College v. Bell, the Supreme Court held that the receipt of federal financial assistance by a program or unit of an institution does not make other programs or units liable under the Civil Rights Act of 1964. Congress overruled the decision when it passed the Civil Rights Restoration Act of 1987 ("Restoration Act"). The Restoration Act restored the "broad institution-wide application" of the Civil Rights Act. The sections applicable to Title VI cases state, in part:

For the purposes of this title, the term "program or activity" and the term "program" mean all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State of local government; or

(B) the entity of such State or local government that distributes such assistance to which the assistance is extended, in the case of assistance to a State or local government . . .

Therefore, if a program or sub-unit of an agency receives federal financial assistance, the whole agency is subject to the provisions of Title VI. Similarly, if an agency allocates the federal funds to another agency, the allocating agency is subject to the provisions of Title VI.

III. Review of the New York and Los Angeles Cases

A. New York Urban League v. Metropolitan Transportation Authority

The plaintiffs in New York Urban League v. Metropolitan Transportation Authority ("NYCTA") alleged in Federal District Court for the Southern District of New York that fare increases of 20% on inner-city transit versus 9% on inter-city commuter transit would disproportionately impact racial minorities in violation of Title VI. The plaintiffs won a preliminary injunction in District Court, but the Second Circuit Court of Appeals reversed. The parties reached a settlement in February 1997 under which the New York Metropolitan Transportation Authority ("NYMTA") agreed to pay up to $150,000 to fund a study of transportation inequities and to provide free transfers between the subway and bus systems. New York City also agreed to provide $250 million in funds for rebuilding city transit and New York State agreed to restore $128 million to the city transit system which had been singled out for budget reductions. An examination of the facts and both courts' applications of Title VI in New York Urban League provides valuable insights for potential plaintiffs in a Bay Area action.

1. Summary of Facts

The inner-city transit systems at issue were New York City's subway and bus systems which are administered by the New York City Transit Authority ("NYCTA"). The inter-city commuter transportation systems at issue were the Long Island Railroad ("LIRR") and the Metro-North Commuter Railroad ("Metro-North") (collectively, the "commuter lines"). Both NYCTA and the commuter lines operate under the umbrella of NYMTA which is a public benefit corporation under New York law. NYCTA is


28. Id.


30. See Radcliff v. Landau, 883 F.2d 1481, 1483 (9th Cir. 1989) "Receipt of federal financial assistance by any student or portion of a school thus subjects the entire school to Title VI coverage." Id.


33. See id. at 1278–79.


37. See id.

38. See New York Urban League, 71 F.3d at 1033.

39. See id.

40. See id.
a legally separate entity affiliated with NYMTA. The commuter lines are wholly owned subsidiaries of NYMTA. U.S. DOT provides funding assistance to NYMTA and the commuter lines through NYMTA.

For the purposes of the preliminary injunction motion, the District Court accepted the plaintiffs’ assertions that NYCTA’s ridership is 60% non-white and that the commuter lines’ ridership is less than 20% minority. In August 1995, NYMTA proposed a 20% fare increase for NYCTA and a 9% fare increase for the commuter lines.

2. The District Court’s Application of Title VI
   a. Prima Facie Case

   The plaintiffs sought to enjoin the increases by comparing operating costs and subsidies. Before the District Court, the parties introduced a variety of methods to measure the disparate impact on minorities, or a lack thereof. Methods offered by the plaintiffs included (a) comparing total revenues to total subsidies for each system; (b) comparing total subsidies per revenue passenger; (c) comparing total subsidies per revenue vehicle mile; (d) comparing total subsidies per revenue passenger mile; and (e) comparing the farebox recovery ratios of the two systems (the ratio of total fares paid to the total operating cost). The defendants’ offered method was the ratio of the revenue per passenger mile to operating costs, the reverse of the ratio of the subsidy per passenger mile to operating costs. The District Court focused on the farebox recovery ratio.

   The following table illustrates the respective farebox recovery ratios, assuming the proposed fare increases were implemented:

<table>
<thead>
<tr>
<th>FAREBOX RECOVERY RATIOS</th>
<th>Jan. 95- 1996</th>
<th>1999</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Aug. 95</td>
<td>Forecast</td>
</tr>
<tr>
<td>NYCTA</td>
<td>48.3%</td>
<td>60.5%</td>
</tr>
<tr>
<td>LIRR</td>
<td>38.2%</td>
<td>40.8%</td>
</tr>
<tr>
<td>Metro North</td>
<td>47.4%</td>
<td>49.6%</td>
</tr>
</tbody>
</table>

   The District Court found that “these projections by the MTA demonstrate that the proposed fare increases result in a substantial reduction in the present percentages of subsidy benefit enjoyed by the NYCTA rider, and do not similarly reduce the subsidy benefit enjoyed by the commuter.” Moreover, the District Court found that NYMTA had not opposed the diversion of state subsidies from NYCTA to the State’s general fund. Thus, the plaintiffs satisfied their initial burden, according to the District Court, with a prima facie case built on the farebox recovery ratio comparison.

   b. Defendant’s Burden

   The District Court then shifted the burden to the defendants to show “legitimate, non discriminatory justifications or a business necessity for the action.” The District Court found NYMTA had presented neither a legitimate justification nor a business necessity. Although the District Court found future deficits may indicate a business necessity for NYCTA fare increases, the Court found it unnecessary to increase fares more for a system whose riders are 60% minority than for systems whose riders are 80% white. Again relying on the farebox recovery ratio, the District Court stated:

   No business reason has been shown to demonstrate why the 173,000 riders of the commuter lines, over eighty percent of whom are white, should have approximately 60% and 50% of their transportation to work costs paid by the government subsidies while only 40% of those costs are paid for the 1.6 million persons, 969,000 of whom are minorities, who depend on the NYCTA subways and buses to get to work.

   In fact, the Defendants offered no evidence to support any business necessity for the disproportionate impact of the proposed fare increase on the NYCTA riders. They seem to argue that low commuter fares result in less use of automobiles on the City streets and thus, less traffic congestion and pollution. [Citations omitted.] However, the Defendants offered no evi-

41. See id.
42. See id. at 1034.
43. See New York Urban League, 905 F. Supp. at 1272, rev’d on other grounds, 71 F.3d 1031.
44. See id. at 1268.
45. See id. at 1275.
46. See id.
47. See id.
48. Id. at 1276.
49. Id.
50. See id.
51. See id. at 1275-77.
52. Id. at 1277.
53. Id. at 1278.
54. See id.
dence that the boards of directors were presented with any studies to demonstrate that these undesirable effects would occur if the fare increase resulted in a [f] farebox recovery ratio no higher than the present.55

3. The Court of Appeals' Reversal

The Second Circuit reversed the District Court's preliminary injunction. The Circuit Court's general problem with lower court's opinion was that it "assessed the impact of the NYCTA and commuter line fare increases without examining the larger financial and administrative picture of which those fare increases are a part."56

a. Prima Facie Case

The Circuit Court chastised the District Court for relying on the farebox recovery ratio in concluding that the plaintiffs had made a prima facie showing of disparate impact. First, since "the underlying claim challenges the total allocation of subsidies," the District Court should have "assessed whether any measure or combination of measures could adequately capture the impact of these subsidies upon NYCTA and commuter line passengers."57 The Circuit Court noted, but did not endorse, NYMTA's argument that the relative costs borne and benefits received by passengers of the two systems cannot be measured at all, because users of the NYCTA derive significant but difficult-to-quantify benefits from the subsidization of the commuter lines, including a reduction in traffic congestion, pollution and other adverse effects that would accompany an increased use of cars by those commuting from the suburbs.58

Moreover, the Circuit Court recognized NYMTA's argument that, to the extent that the relative costs and benenfits were measurable, measurements other than the farebox recovery ratio should have been used.59

The District Court had implicitly found the farebox recovery ratio to be the most appropriate measure, but the Circuit Court held that the District Court "could not properly find a disparate impact on the sole basis of the farebox recovery ratio unless it reasonably found that [the] ratio would be a reliable indicator of a disparate impact."60

More to the point, the Circuit Court held that "the farebox recovery ratio is not a sufficient basis for a finding of disparate impact."61 The Circuit Court reasoned the ratio is too narrow a focus:

It 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. There is no reason to assume that the expenses of each system would bear any sort of proportionate relationship, particularly when those systems are fundamentally different in terms of how they carry passengers, frequency of stops, and operating schedules... The farebox recovery ratio thus says very little about the overall allocation of funds to the two systems which is the focus of the complaint in this action.62

b. Defendant's Burden

The Circuit Court also found "the district court's conclusion as to the second prong of the analysis—whether the defendants have shown a substantial legitimate justification for the challenged conduct..." to be unsupported.63 The District Court acknowledged that "a fare increase for the NYCTA is a business necessity in the near future,"64 but the Circuit Court disagreed with the conclusion that alternatives existed to raising fares disproportionately.65 For example, the District Court did not decide whether NYMTA could shift fare revenues from the commuter lines to NYCTA, or whether the shift would significantly affect the need to raise fares.66

A. Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority

The plaintiffs in Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority ("Los Angeles County MTA") alleged in Federal District Court for the Central District of California that the Los Angeles County Metropolitan Transportation Authority's ("LACMTA") substantially greater allocation of funds to its rail systems over

55. Id.
56. New York Urban League, 71 F.3d at 1037 (emphasis added).
57. Id. (emphasis added).
58. Id.
59. See id. at 1038.
60. Id.
61. Id.
62. Id. (emphasis added).
63. Id.
64. Id. (quoting Revised Opinion and Order at 29, New York Urban League, 905 F. Supp. at 1278).
65. See id. at 1038–39.
66. See id. at 1039.
its bus system had the purpose and effect of discriminating against racial minorities. The plaintiffs' financial analysis focused on the total allocation of funds, both capital and operating, to the transportation systems.

1. Summary of Facts

LACMTA operates a bus system and a rail system (the Red, Blue and Green Lines). In 1992, prior to the opening of the Green line, the bus system carried 94% of the riders but received only 29% of LACMTA's $2.6 billion capital and operating budget. In contrast, the rail lines carried less than 6% of the passengers but received 71% of LACMTA's capital and operating budget. MTA also created, staffed and primarily funds Metrolink, a commuter rail service with five lines which all converge in downtown Los Angeles.

According to the plaintiffs, bus ridership was 80% minority. The rail lines ridership was projected to be two-thirds minority. The Metrolink ridership was estimated as 69% white. On July 13, 1994, LACMTA Board voted to increase bus cash fares by 23%, eliminate the $42 monthly pass providing unlimited bus rides, and retain the $0.90 bus tokens. The following week, the Board voted to spend another $123 million on a rail project designed to serve Pasadena.

2. Preliminary Injunction and Consent Decree

The plaintiffs did well at the early hearings. The District Court entered a Temporary Restraining Order on September 1, 1994, enjoining the defendants from implementing the proposed changes. On September 12, 1994, the Court entered a preliminary injunction, which was subsequently modified on January 25, 1995, to allow for fare increases but not the elimination of the monthly pass.

On October 29, 1996, the plaintiffs entered a consent decree with LACMTA in which the agency promised more buses, fare relief for bus riders, less overcrowding, more transit police, and a role in the transit decision-making for the plaintiffs for up to ten years, under federal court supervision. LACMTA agreed to add 102 buses to its fleet by July, 1997, and to add a total of 275 buses over the next six years. LACMTA also agreed to reduce the monthly pass from $49 to $42, to sell bi-monthly passes for $21 and weekly passes for $11, and to freeze the current $1.35 cash fare and the $0.90 token fare for two years. In addition, LACMTA promised a $0.75 off-peak fare on a bus line utilized by transit dependent riders and set a goal to reduce the "maximum load factor ceiling" on all routes from 1.45 to 1.2 within five years. Finally, the Consent Decree established the Joint Working Group—an institution composed of bus riders and
transit officials—to ensure implementation of the agreement. If the Joint Working Group is unable to resolve a dispute regarding implementation of the consent decree, the matter will be referred to a special master, and if necessary, be reviewed by the District Court.

IV. Bay Area Transportation Inequities

A. The Inequity

The inequity is simply stated: The Alameda Contra Costa Transit District ("AC Transit"), an East Bay bus system with a mostly minority ridership, has raised fares and instituted severe service cuts while the Bay Area Rapid Transit District ("BART"), an inter-city rail system with a largely white rider—while the Bay Area Rapid Transit District ("BART"), Contra Costa Transit District ("AC Transit"), an East

67. See Consent Decree, supra note 80, at 11; see also Simon, supra note 82, at 2.

68. See Consent Decree, supra note 80, at 10-11; see also Simon, supra note 82, at 2.

69. See discussion infra Part IV.B.

70. See Metropolitan Transportation Commission, Transportation Improvement Program for the Nine-County San Francisco Bay Area, 1993, vol. 1, § 1, at 5 (1994) [hereinafter "MTC, 1995 TIP"].


72. Cities AC Transit serves include: Richmond, Berkeley, Hayward, Oakland, and Union City. AC Transit also provides transbay service to San Francisco. AC Transit, 1995 SRTP, supra note 90, at 28.

73. See id. at 36, 144.


75. See Tara Shioya, AC Transit Delays Cuts in Weekend, Late-Night Service, supra note 93, at A17.

76. See id. at 36, 144.


79. BART currently provides rail transit between Bay Area cities including San Francisco, Colma, Richmond, Berkeley, Oakland, Fremont, Walnut Creek and Concord. See Bay Area Rapid Transit District, Short Range Transit Plan, July 1996 through June 2006, ch. 1, at 3 fig.1-2 (1996) [hereinafter "BART, 1996 SRTP"].


The issue is whether MTC, BART and other potential defendants utilized "criteria or methods of administration" in the allocation of the agencies' operating and capital subsidies—federal, state and local—"which have the effect of subjecting persons to discrimination because of their race" in violation of Title VI of the Civil Rights Act of 1964.102

B. Financial Matters

This section outlines AC Transit's and BART's operating and capital costs, revenues, subsidies, and performance statistics. The discussion includes more information on funding than is referred to infra Part IV.C, "Presenting a Title VI Claim," in order to provide potential plaintiffs with a more complete picture of the agencies' budgets and performance statistics so they could best utilize the legal arguments which follow or formulate their own.

1. AC Transit

a. Operating Finances

i. Operating Budgets and Projections

AC Transit provided nearly 62 million trips in Fiscal Year ("FY") 1994/95.106 AC Transit's operating expenses for FY 1994/95 were $148.7 million, and its total revenues were $141.5 million, resulting in an operating deficit of over $7 million.107 Of the nearly $142 million in operating revenue, $33.5 million was fare revenue, and the remaining $108.0 million was operating subsidies.108

Before the 1995/96 service cuts were made, MTC estimated AC Transit would run an operating deficit of $4.0 million.109 Shortly before instituting the service cuts, AC Transit announced that the operating deficit would grow in 1996 to $11.7 million.110

In the end, AC Transit enjoyed an operating surplus of $1.9 million in FY 1995/96111 while providing 64.0 million trips.112 AC Transit's operating expenses totaled $149.4 million and its revenues totaled $151.4 million.113 Of the $151.4 million in total revenue, $37.1 million was fare revenue, and the remaining $114.3 million was operating subsidies and income such as interest.114 Despite the surplus in FY 1995/96, MTC estimates that AC Transit will again run operating deficits which will grow to $16 million in FY 1998/99.115

For FY 2004/05, AC Transit projects operating expenses of $219.5 million and revenues of $174.2 million, which would result in a total operating deficit of $45.3 million.116 Of the projected $174.2 million in operating revenue, AC Transit projects fare revenues of only $35.5 million, the remainder being operating subsidies.117

ii. Operating Subsidies

AC Transit receives federal, state and local operating subsidies which are allocated through MTC. Federal subsidies are allocated under sections 8 and 9 of the Federal Transit Act ("FTA"), as amended by the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA").118 AC Transit's section 9 operating subsidy has dropped from over $6 million in the early 1990's to $5.5 million in FY 1994/95 and just under $3 million in FY 1995/96.119 AC Transit receives section 8 financial assistance of about $41,000 per year.120

AC Transit receives state operating subsidies from the State Transit Assistance program ("STA") and from the Transportation Development Act ("TDA").121 The STA funds are derived from a statewide sales tax on gasoline and diesel fuel.122 Half of the STA revenues are allocated according to population, and the other half are allocated according to operator revenues.123 The TDA funds are derived from a statewide 1/4 cent sales tax and are returned by the State to the county of origin.124 MTC estimates AC Transit's STA subsidy will range

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104. See discussion infra Part IV.C.
105. 49 C.F.R. § 21.5(b)(2) (Dep't Transp. 1995).
106. See ALAMEDA-CONTRA COSTA TRANSIT DISTRICT, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, at 45 (1996) [hereinafter "AC TRANSIT, 1996 ANN. REP."]. Both AC Transit and BART operate under fiscal years which begin on July 1. See id. at title; see also BART, 1996 CIP, supra note 100, at subtitle.
108. See id. at vii, xiv.
110. See AC Transit Postpones Cuts in Night Service, supra note 93, at A23.
112. See id. at 45.
113. See id. at vii, xiv.
114. See id. at vii.
117. See id.
118. See MTC, 1995 TIP, supra note 89, vol. 1, § 2, at 1; see also AC TRANSIT, 1995 SRTP, supra note 90, at 78–79.
119. See AC TRANSIT, 1996 ANN. REP., supra note 106, at xii.
122. See id. at 129.
123. See id.
124. See id. at 128.
between $7–8 million per year through FY 1998/99. MTC estimates AC Transit’s TDA funds will grow from $39 million to $41 million in FY 1998/99.\textsuperscript{126}

Under state law, AB 1107, AC Transit receives operating subsidies from a 1/2 cent sales tax imposed in three BART counties (Alameda, Contra Costa, and San Francisco).\textsuperscript{127} AB 1107 dedicates 75% of the revenue collected to BART.\textsuperscript{128} MTC has discretion to allocate the remaining 25% among BART, AC Transit, and San Francisco Municipal Railway (“MUNI”).\textsuperscript{129} MTC has historically divided the discretionary 25% between AC Transit and MUNI.\textsuperscript{130}

AC Transit also receives operating subsidies from the proceeds of 1/2 cent county sales taxes.\textsuperscript{131} The tax was authorized by the voters of Alameda County in Measure B and by the voters of Contra Costa County in Measure C.\textsuperscript{132} Together, the sales taxes provided nearly $10 million in revenues for AC Transit in FY 1995/96.\textsuperscript{133} A portion of the revenue generated by the sales taxes is used for capital expenditures.\textsuperscript{134}

BART used to reimburse AC Transit directly for feeder service. In FY 1989/90, the payment was approximately $6 million.\textsuperscript{135} In FY 1991/92, BART and AC Transit signed a revenue sharing agreement in which MTC directly allocates BART’s revenue-based STA funds to AC Transit.\textsuperscript{136} MTC set $4.0 million as the base amount of the payment, but in FY 1993/94 and FY 1994/95, the payments were only $3.4 and $3.9 million, respectively, due to State budget constraints.\textsuperscript{137} In FY 1995/96, the total payment was $4.6 million, including $0.6 million for prior year adjustments.\textsuperscript{138} AC Transit receives additional operating subsidies, about $30 million annually, from property taxes.\textsuperscript{139}

\section*{b. Capital Finances}
\paragraph*{i. Capital Projects}
AC Transit has two sets of capital improvement program projections, one unconstrained and one constrained. Over the next ten years, from FY 1996/97 through FY 2005/06, AC Transit’s unconstrained plan calls for $757 million in spending on capital projects.\textsuperscript{140} Under a financially constrained scenario per MTC revenue projections, AC Transit would only spend $269 million on capital projects over the same ten years.\textsuperscript{141} The capital projects include replacing buses, developing transit centers to facilitate transfers, installing automated loudspeaker systems on buses in compliance with the Americans with Disabilities Act, and acquiring cleaner-burning buses.\textsuperscript{142}

\paragraph*{ii. Capital Subsidies}
According to AC Transit’s unconstrained capital improvement program projections, only $200 million of the $757 million funds needed have been determined.\textsuperscript{143} In other words, AC Transit must secure $557 million in funding to meet its unconstrained capital spending plans.\textsuperscript{144} The determined and underfunded funding is to come from federal, state and local subsidies. AC Transit receives federal capital funds under FTA sections 9 and 3 ($99 million total from FY 1994/95–1998/99 and $29 million total from FY 1994/95–1996/97, respectively).\textsuperscript{145} AC Transit receives state capital funds from bridge toll revenues, Transportation System Management funds, Flexible Congestion Relief funds and AB 434.\textsuperscript{146}

Under AB 434, the Bay Area Air Quality Management District (“BAAQMD”) imposes a $4.00 surcharge on vehicle registration fees in the agency’s jurisdiction.\textsuperscript{147} BAAQMD has some discretion on how to spend 60% of the revenues. Of this 60% portion of the revenues, BAAQMD must first allocate funding to pre-established programs.\textsuperscript{148}

\begin{footnotesize}
\begin{itemize}
\item[125.] See MTC, 1997 TIP, supra note 96, vol. ii, at 19.
\item[126.] See id.
\item[127.] See AC TRANSIT, 1995 SRTP, supra note 90, at 128.
\item[128.] See id.
\item[129.] See id.
\item[130.] See id.
\item[131.] See id. at 129.
\item[132.] See id.
\item[133.] See AC TRANSIT, 1996 ANN. REP., supra note 106, at vii.
\item[134.] See AC TRANSIT, 1995 SRTP, supra note 90, at 129.
\item[135.] See id. at 125.
\item[136.] See id.; see also AC TRANSIT, 1996 ANN. REP., supra note 106, at xi-xii.
\item[137.] See AC TRANSIT, 1995 SRTP, supra note 90, at 125.
\item[138.] See AC TRANSIT, 1996 ANN. REP., supra note 106, at xii.
\item[139.] See MTC, 1995 TIP, supra note 89, vol. 1, § 5, at 5; AC TRANSIT, 1996 ANN. REP., supra note 106, at vii.
\item[140.] See AC TRANSIT, 1995 SRTP, supra note 90, at 120, tbl. 4–7.
\item[141.] See id. at 121, tbl. 4–8.
\item[142.] See id. at 72–122.
\item[143.] See id. at 120 tbl. 4–7.
\item[144.] See id.
\item[145.] See MTC, 1995 TIP, supra note 89, vol. 1, § 5, at 7.
\item[146.] See AC TRANSIT, 1995 SRTP, supra note 90, at 79–80.
\item[147.] See id. at 80.
\item[148.] See id.
\end{itemize}
\end{footnotesize}
BAAQMD awards the remainder of the 60% portion to eligible agencies competing for the funds.149

Finally, AC Transit plans to set aside 2% of its unrestricted general operating revenues to create capital reserves.150

c. Performance Statistics

There are various statistics transportation agencies use to measure their operating performances and efficiencies. The statistics provided by the agencies do not reflect capital expenditures.

A common statistic is the farebox recovery ratio which measures the percentage of operating costs recovered by fare income. In the years since FY 1990/91, AC Transit's farebox recovery ratio has been approximately 23%.151 In FY 1994/95, AC Transit's farebox recovery ratio was 23.6%, and in FY 1995/96, it was 24.5%. In order to be eligible for inter-governmental funding, AC Transit must maintain a minimum farebox recovery ratio of 30%; however, the ratio includes other revenues such as the sales taxes generated under Measures B and C.154

Other operating performance measures are cost per passenger ($2.69 in FY 1994/95),156 cost per vehicle mile ($0.62 in FY 1994/95),157 passengers per hour (28.7 in FY 1994/95),158 passengers per mile (2.33 in FY 1994/95),159 and cost per passenger mile ($0.62 in FY 1993/94).160

2. BART
a. Operating Finances

i. Operating Budget and Projections

BART provided 72.1 million trips in FY 1994/95.161 BART's operating expenses for FY 1994/95 were $263.9 million, and its total revenues were $275.2 million, resulting in a total operating surplus of $11.3 million.162 Of the $275.2 million in total revenue, $116.5 million was operating revenue, and the remaining $158.7 was other revenue, essentially subsidies.163

BART provided 72.4 million trips in FY 1995/96.164 For that year, MTC estimated BART would run a de minimis deficit of approximately $1,000.165 MTC now projects that BART will run an operating deficit of $9.4 million in FY 1998/99.166

For FY 2005/06, BART estimates operating expenses of $410 million and net passenger revenue of $210.7 million.167 These projections show an operating surplus which would be allocated to bond debt service and capital projects, among other expenditures.168 For example, BART plans to allocate $76 million over ten years from its operating budget to capital projects.169

ii. Operating Subsidies

Like AC Transit, BART's federal, state and local subsidies are allocated through MTC. As for federal operating subsidies, BART receives FTA section 8 funds, about $41,000 annually,170 but no section 9 funds.171

BART receives state subsidies from the TDA and the STA. BART received approximately $95 million in TDA funds in FY 1995/96. However, BART's revenue-based STA funds are allocated to AC Transit under the revenue sharing agreement discussed above, and aside from funds employed for compliance with the Americans with Disabilities Act, the remainder has typically been allocated to BART's capital projects.175

149. See id.
150. See id.
152. See id. at xvi.
153. See AC Transit, 1995 SRTP, supra note 90, at 34.
154. See Letter from Thomas A. Rubin, CPA, to Kevin Siegel, supra note 70, at 7.
155. See AC Transit, 1995 SRTP, supra note 90, at 48.
156. See id. at 47.
157. See id. at 49.
158. See id. at 90.
159. $135.3 million operating expenses divided by 217.0 million passenger miles equals $0.62 per passenger mile. See Federal Transportation Administration, U.S. Dep't of Transp., Transit Profiles: Agencies in Urbanized Areas Exceeding 200,000 Population for the 1994 National Transit Database Report Year, at 226 (1994).
162. See id.
164. See MTC, 1995 TIP, supra note 89, at 14.
165. See BART, 1996 SRTP, supra note 97, ch. 2, at 20, 22.
166. See MTC, 1997 TIP, supra note 96, at 33.
167. See BART, 1996 SRTP, supra note 97, ch. 4, at 10.
168. See id.
169. See id. at 9–10.
172. See BART, 1996 SRTP, supra note 97, ch. 2, at 20, fig. 2–5.
173. See id.
175. See BART, 1996 SRTP, supra note 97, ch. 4, at 5.
In FY 1994/95, MTC estimated BART's AB 1107 operating subsidy to be approximately $114 million. The subsidy is expected to grow to just under $146 million by FY 1998/99. BART receives about $13 million annually from property taxes.

b. Capital Finances

i. Capital Projects

Like AC Transit, BART has a constrained ("Track One") as well as an unconstrained ("Track Two") capital improvement program. Under Track One, from FY 1996/97 through FY 2005/06, BART plans to fund $3.710 billion in projects. Under Track Two—which includes the Track One constrained scenario—BART plans to fund a total of $6.817 billion in projects.

BART is extending its rail system in three phases. Under "Phase One," BART has completed extensions to Colma, North Concord/Martinez, Pittsburg/Bay Point, and East Dublin/Pleasanton, and plans an extension to San Francisco International Airport. These Phase One projects are included in the Track One plans. In addition, BART plans a Warm Springs extension partly under Track One and partly under Track Two.

Under Phases Two and Three, BART plans an Oakland Airport Connector and extensions to Antioch, Livermore, the San Ramon Valley, and other corridors. These extensions are included under the Track Two plans.

It is illustrative to highlight the capital costs of some of the extensions, particularly the Track One East Bay extensions, given that AC Transit is an East Bay transit provider. The Pittsburg/Bay Point extension's total capital cost was $506 million. The completed East Dublin/Pleasanton extension's total capital cost was $517 million. The Warm Springs extension's total capital cost is projected to be $541 million, which is not fully funded. The capital cost for the Antioch extension, a Track Two project, is undetermined, and it is not fully funded.

Note that the East Dublin/Pleasanton extension is part of a 13.8 mile double track extension which includes two other stations (Castro Valley and West Dublin/Pleasanton). The Pittsburg/Bay Point extension added only 5 miles of track from the recently opened North Concord station.

Considering only the Phase One extensions in the East Bay, BART still plans to raise at least $536 million to fund the projects. The Warm Springs extension needs $487 million, and the Oakland Airport Connector needs approximately $149 million.

ii. Capital Subsidies

BART's federal subsidies for capital projects include FTA section 9 funds ($128 million from FY 1994/95–1998/99) and FTA section 3 funds ($183 million from FY 1994/95–1998/99). The subsidy sources for BART's East Bay extensions is unclear. It appears BART is not receiving federal assistance and may be relying exclusively on state and local funds. For example, from 1995–1997, the East Dublin/Pleasanton extension secured subsidies from the State for $4 million and from local sources for $96 million, but it did not secure any federal funds. Similarly, the West Pittsburg extension secured only state and local funds in 1995.

c. Performance Statistics

BART's farebox recovery ratio was 47.6% in FY 1994/95 and 50.6% in FY 1995/96. BART projects that the farebox recovery ratio will peak at 54.2% in FY 1998/99 and drop to 51.4% in FY 2005/06. BART's cost per passenger mile was about $0.23 in both FY 1993/94 and FY 1994/95 and is projected to be $0.27 in FY 1997/98 and again in 2005/06.

179. See BART, 1996 CIP, supra note 100, ch. 1, at 7.
180. See id.
182. See BART, 1996 CIP, supra note 100, ch. 2, at 5.
183. See id. ch. 2, at 4–5.
184. See id. ch. 2, at 5.
185. See id. ch. 3, at 10.
187. See BART, 1996 CIP, supra note 100, ch. 2, at 5.
188. See id.
C. Presenting a Title VI Claim

AC Transit riders, the potential plaintiffs, are suffering through severe cuts in service, especially on weekends and after 7:00 p.m.\textsuperscript{200} AC Transit's ridership is largely minority.\textsuperscript{201} Meanwhile, BART riders are enjoying increased service through rail extensions. BART's ridership is already mostly white, and its extensions are going to cities which are largely white.\textsuperscript{202} On the surface, these facts appear to show disparate impact. The question is whether MTC and other potential defendants utilize criteria or methods of administration which effect the disparate impact.

As a preliminary matter, potential defendants include MTC and BART, which both receive federal funds, and the State of California. The State may contend it is not a proper plaintiff under Section 2000d of Title VI because it is not a "program or activity." However, California would be a proper defendant under "a long line of cases in which a state was a Title VI defendant even though it was not a 'program or activity.'"\textsuperscript{203} BAAQMD may also be a potential defendant, if it receives federal funds, as it has discretion to allocate 60% of AB 434 funds to capital projects.\textsuperscript{204}

Each agency is subject to the provisions of Title VI on an "institution-wide" basis as each receives federal financial assistance or allocates the same for or through its "programs or activities."\textsuperscript{205} Further research is needed to uncover whether BAAQMD funding practices have favored BART extension projects over AC Transit capital projects.

1. Building the Prima Facie Case
   a. Subsidy Per Passenger: Three Ways to Compare Relative Subsidies

AC Transit riders have essentially three ways to compare MTC's allocation of subsidies per passenger. First, AC Transit riders could argue MTC allocates operating subsidies in a manner which has a disparate impact on minorities. Second, AC Transit riders could argue MTC allocates capital subsidies in a manner which has a disparate impact on minorities. Third, AC Transit riders could argue MTC's total allocation of subsidies—operating and capital—has a disparate impact on minorities. The third is the most complete of the three options and comports with a broad reading of the Second Circuit's opinion in \textit{New York Urban League} as well as with the plaintiffs' successful strategy in \textit{Los Angeles County MTA}.

i. MTC Allocates Operating Subsidies in a Manner which has a Disparate Impact on Minorities

The first option would not likely succeed. MTC does not appear to allocate operating subsidies disproportionately between BART and AC Transit. For example, in FY 1995/96, BART provided 12% more passenger trips annually (72.4 million for BART vs. 64.0 million for AC Transit) but was estimated to have received only 9% more in total operating subsidies ($116.1 million for BART vs. $105.2 million for AC Transit).\textsuperscript{206} Under Title VI, AC Transit riders would need only to show that MTC's allocation of operating subsidies has a discriminatory effect. That it appears to do, on the surface at least, as AC Transit's largely minority ridership is suffering service cuts while BART's largely white ridership is enjoying expanded service.

But the cause of the deficits appears attributable to comparatively weak operating revenues rather than weak operating subsidies. MTC estimated AC Transit's operating revenues totaled only $50.8 million in FY 1995/96\textsuperscript{207} while it estimated BART's totaled $155.3 million.\textsuperscript{208} The operating revenue difference is reflected in the agencies' farebox recovery ratios. AC Transit's farebox recovery ratio grew to a meager 24.5% in FY 1995/96\textsuperscript{209} while BART's was a healthy 50.6%.\textsuperscript{210}

Even if a court found AC Transit riders presented a prima facie showing of disparate impact, MTC could present several arguments to show a business necessity for not increasing AC Transit's operating subsidies to offset the weak operating revenues. For example, MTC could argue that increasing operating subsidies would only exacerbate AC Transit's inefficiency. Presumably, MTC has a duty to ensure its affiliated agencies operate efficiently.

Finally, the burden would shift back to the AC Transit riders to show a less discriminatory alternative. One alternative would be to guarantee AC Transit adequate operating subsidies to restore services. But it is counter-intuitive to argue that the

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200. \textit{See discussion supra} Part IVA.
201. \textit{See id.}
202. \textit{See id.}
204. \textit{See discussion supra} Part IV.B.1.b.2.

205. \textit{See discussion supra} Part II.C.
206. \textit{See discussion supra} Parts IVA.1.a and 2.a.
more inefficiently a transit agency operates, at least with respect to farebox recovery, the more the agency should be subsidized. Under this theory, there is no logical stopping point. As long as minorities would be hurt by decreasing services on AC Transit, funding would be increased, even as cost per passenger soared and farebox recovery ratio dropped.

ii. MTC Allocates Capital Subsidies in a Manner which has a Disparate Impact on Minorities

The second option for presenting a prima facie case, that MTC allocates capital subsidies in a manner which has a disparate impact on minorities, provides an incomplete picture. The immediate discriminatory impact for AC Transit riders is reduced operations, not a lack of subsidies for capital projects. However, creative plaintiffs could fashion an argument that if MTC were to allocate capital subsidies to AC Transit in proportion to its allocation of capital subsidies to BART, AC Transit would have beautiful, clean, fuel efficient buses departing from state of the art transit centers which would tremendously increase ridership and operating revenues thereby wiping out any operating budget deficits and any need for service cuts. In fact, like BART, AC Transit service could expand services.

iii. MTC's Total Allocation of Subsidies—Operating and Capital—has a Disparate Impact on Minorities

The third option for presenting a prima facie case of disparate impact, that MTC’s total allocation of subsidies—operating and capital—has a disparate impact on minorities, is the best option. Combining operating and capital subsidies demonstrates the true extent to which the systems are disproportionately funded. Moreover, a comparison of total allocation of subsidies comports with an underlying principle of the Second Circuit’s instructions in New York Urban League and the approach of the plaintiffs in Los Angeles County MTA.

In New York Urban League, the Second Circuit instructed the lower court not to focus on the narrow farebox recovery ratio, which only assesses operating efficiency. Although New York Urban League only concerned operating budgets, a principle underlying the Court’s opinion is that a court ought to consider the complete subsidization of the systems. According to the Second Circuit, since the underlying claim challenged the total allocation of subsidies, the lower court should have “assessed whether any measure or combination of measures could adequately capture the impact of these subsidies upon NYCTA and commuter line passengers.” In Los Angeles County MTA, the plaintiffs alleged that the disproportionate allocation of operating and capital funds was discriminatory, and they were able to forge a powerful settlement. Following a broad reading of the Second Circuit’s language and the successful strategy in Los Angeles County MTA, AC Transit riders should challenge the total allocation of subsidies—operating and capital—to AC Transit and BART.

Combining the subsidies is a factually complicated task. First, capital subsidies spent in any one year are actually consumed by users over many years. Therefore, capital subsidies should be annualized over time. Second, capital subsidies vary from year to year due to the realities of investment and construction. Thus, the total capital subsidies should be annualized over a term of years in order to reflect accurately the yearly costs. After the annualized capital subsidies have been calculated, they may be added to an annualized operating subsidy in order to determine the total annual subsidization of a transit system. The subsidization per passenger may be derived by dividing the total annual subsidization of each system by the projected number of passengers per year.

In devising a methodology for calculating the total subsidization per passenger of BART and AC Transit, I worked with Thomas A. Rubin, CPA, a mass transit financial planning expert. First, we calculated total subsidization over ten years for the two systems based on BART’s and AC Transit’s constrained capital program plans. Over ten years, from FY 1996/97 to FY 2005/06, BART’s Track One plan’s total costs are listed as $3.710 billion. To annualize these costs, we used an adaptation of the U.S. Federal Transit Administration’s methodology for proposed “new start” projects. This methodology strained scenarios seem more realistic than the unconstrained scenarios.

211. See discussion supra Part III.A.3.
212. New York Urban League, 71 F.3d at 1037.
213. See discussion supra Part III.B.
214. We limited this analysis to the constrained capital program plans because BART’s operating financial forecasts are based on its Track One (constrained) capital program plans. See BART, 1996 SRTP, supra note 97, ch. 3, at 4. Moreover, the constrained program plans seem more realistic than the unconstrained scenarios.
for annualizing capital costs offers standardized useful lives for categories of capital expenditures, such as 30 years for buildings, 25 years for trains, and 12 years for buses.²¹⁷ In annualizing the capital costs for the various expenditures, we used a discount rate of 7%, as is currently used by the FTA.²¹⁸ 

One difficulty in annualizing BART’s Track One (constrained) capital costs was that BART’s 1996 Capital Improvement Program’s Summary of Funding Needs by Availability Status chart breaks the costs into general categories such as “Phase I Extensions Program” which lumps together projects with different useful lives.²¹⁹ However, the Capital improvement’s Summary of Funding Needs by Program Area chart—which, unfortunately, does not delineate Track One from Track Two—breaks the costs into categories which comport with the useful life categories.²²⁰ Data from the Summary of Funding Needs by Availability Status chart were used to eliminate costs from the Summary of Funding Needs by Program Area chart that are not Track One costs.²²¹ For capital costs such as “Extensions,” where it was not possible to break the expenditures into individual component parts due to lack of data,²²² a composite useful life was estimated.²²³ The analysis shows that BART’s ten year Track One $3.710 billion capital expenditure plan is the equivalent of a $301.2 million annual cost.²²⁴

As to BART’s annual operating costs, for FY 2005/06, BART projects its total operating expenses at $410.0 million.²²⁵ Subtracting projected net passenger revenue of $210.7 million²²⁶ leaves a total projected operating subsidy of $199.3 million for FY 2005/06.²²⁷ Together, the total subsidy—operating and capital—adds up to $500.5 million.²²⁸ Dividing by the projected number of passenger trips for FY 2005/06 (100.6 million)²²⁹ results in a total subsidy per passenger of $4.98.²³⁰ Over ten years, from FY 1996/97 to FY 2005/06, AC Transit’s constrained capital expenditure plan calls for spending $268.9 million.²³¹ Using the methodology applied to BART’s Track One capital plans results in an annualized capital cost of $29.6 million.²³² As to operating expenses, AC Transit’s 1995 SRTP only projects to FY 2004/05. In that year, AC Transit projects its operating expenses to be $219.5 million.²³³ Adjusted by a conservative 2.5% inflation factor, we project AC Transit’s FY 2005/06 operating expenses to be $225.0 million.²³⁴ We project operating revenues—which includes fare revenues, BART transfers and other non-farebox sources of funding—will reach $70.0 million.²³⁵ Subtracting the operating revenues and the tire/tube replacement program from the $225.0 million in projected expenses results in a total operating subsidy for FY 2005/06 of $156.7 million.²³⁶


220. See id. ch. 1, at 6.

221. See id. ch. 1, at 6–7. In most cases, this was a simple matter of elimination of costs of program elements that were not listed as Track Two costs on the Summary of Funding Needs by Availability Status chart. To handle the “Systemwide Renovation” costs, however, a different methodology was necessary because this chart does not clearly divide the costs between Tracks One and Two. The procedure was to calculate the total Track One System Renovation costs by adding Priority 1 and 2 System Renovation Costs. Then, the total Track One System Renovation Costs were divided by the total Track Two System Renovation Costs, producing a factor of approximately 89.5%. This factor was then applied to each Systemwide Renovation cost listed in the Summary of Funding Needs by Program Area chart in order to estimate the percentage of costs attributable to each project category which are likely to be Track One costs. While this is undoubtedly not 100% accurate, the maximum range of error is insignificant for the instant purposes. See Appendix A.

222. See BART, 1996 CIP, supra note 100, ch. 1, at 6.

223. An attempt was made to overestimate the composite useful lives, which produces lower annualized costs, in order to avoid overestimating that actual annualized costs. For example, 30 years was used as the composite useful life for “Extensions.” See Appendix A.

224. See id.

225. See BART, 1996 SRTP, supra note 97, ch. 4, at 10, fig. 4–2.

226. See id.

227. See Appendix A.

228. See id.


230. See Appendix A.

231. See AC TRANSIT, 1995 SRTP, supra note 90, at 121 tbl. 4–8.

232. See Appendix B. AC Transit lists tires and tubes as a capital expenditure, ostensibly so that the agency may apply for federal capital grants. See also AC TRANSIT, 1993 SRTP, supra note 90, at 121, tbl. 4–8. To reflect the fact that tires and tubes are more accurately categorized as operating expenses, the ten year total expenditures were included in operating expenses, with the ten year cost divided by ten to produce the cost for FY 2005/06.


234. See Appendix B.

235. $70.0 million is approximately 31% of the projected $225.0 million in operating expenses. See Letter from Thomas A. Rubin, CPA, to Kevin Siegel, supra note 70, at 9.

236. See Appendix B.
Together, the total subsidy—operating and capital—adds up to $186.3 million. Assuming, conservatively, that AC Transit will enjoy no growth in passenger trips, dividing the total annual subsidy of $186.3 million by the number of passenger trips for FY 1995/96 (64.0 million) results in a total subsidy per passenger of $2.91. AC Transit riders could present a strong prima facie case by comparing the total subsidy per passenger figures. Comparing the data shows that, under the constrained scenarios, BART’s subsidy per passenger by FY 2005/06 will be approximately 71% more per passenger than AC Transit’s ($4.98 v. $2.91 per passenger). Each passenger on the respective systems is presumably using public transportation for essential tasks, such as getting to work or shopping for groceries. It is inequitable for the government to pay more for the costs of these trips for white riders. Of course, BART riders are travelling greater distances to complete these essential tasks, but it does not follow that MTC should fund the expansion of a system which encourages whites to live further from work and the grocery store while cutting inner-city bus service. In essence, the effect of the 71% funding disparity is that Bay Area transportation agencies are saying we value the demographic realities and life choices of whites more than those of non-whites.

Moreover, the disproportionate funding has an especially harsh impact on AC Transit riders who, as a class, are more dependent on public transportation than BART riders. Indeed, AC transit has acknowledged that “a large portion of AC Transit’s passengers have few transportation alternatives.” Supporting the transit dependency claim is the fact that, despite the service cuts, AC Transit ridership increased in FY 1995/96. Thus, AC Transit riders could make a strong argument that the disparate impact of the funding disparity is especially pronounced given their lack of alternatives.

Admittedly, the 71% disparity is based on projections through 2005/06, and a court would likely rule that the issue if so presented is not ripe. However, a plaintiff could present the disproportionate subsidization for any one year and use the projected disparity to illustrate how that year is not an anomaly. In addition, AC Transit riders could use the projected disparity to educate the decision makers and pressure them to address the inequity. This education and pressure would be vital to prevent BART from realizing its unconstrained capital improvement program while AC Transit remained mired in its constrained program.

b. Funding the East Bay Extensions has a Disparate Impact on Minorities

AC Transit riders could focus on the subsidization of BART extensions, particularly the East Bay extensions, as compared to AC Transit’s capital projects. This analysis would concentrate on demonstrating that the capital subsidy per new rider on the BART extensions is astronomical as compared to the capital subsidy per AC Transit rider. This theory may be supported by Federal Transit Administration’s practice of evaluating cost per new transit trip as well as potential mobility improvements, environmental benefits and operating efficiencies when deciding whether to subsidize a new start. More data is needed before these calculations can be made accurately. However, a few figures are worth noting.

The Track One East Bay extensions cost in the range of $500 million each. The East Bay extensions are opening in cities with majority white populations. Meanwhile, the number of new riders the extensions are adding is open to debate. In May, 1996, BART claimed that the North Concord/Martinez station added 3200 weekday passengers. However, the figure may be inflated more than three times. AC Transit riders could research the actual change in ridership and the total costs of the other Track One East Bay Extensions and calculate the capital costs per new rider.

237. See id.

238. See AC TRANSIT, 1996 ANN. REP., supra note 106, at 45.

239. See Appendix B.

240. See AC TRANSIT, 1993 SRTP, supra note 90, at 36.


243. For example, the Dublin/Pleasanton extension’s total cost was $517 million. See Bowman, Net Everyone Is On Board With

244. For example, Pittsburg is 61% white and Dublin is 86% white. See discussion supra Part IV.A.

245. See Nolte, Bay Area Spending More, But Commute Worsens, supra note 190, at A6.

246. University of California Professor Emeritus Wolf Homburger, a transportation expert, contended that only 1000 of the claimed 3200 riders at the station were new riders. He claimed that the other 2000 switched from another station for the easier parking. See id.

Considering that each extension costs hundreds of millions of dollars, it seems likely that the cost per new rider will tower over any comparable costs for AC Transit.

AC Transit riders should note that BART may not be funding the East Bay extensions with federal funds.\(^{248}\) Perhaps BART did not receive federal capital subsidies here, such as FTA section 3 funds, because the projects are too inefficient to be eligible. Thus, these inefficient projects utilize state and local funds, over $500 million per extension. If no federal funds have been used, East Dublin/Pleasanton and Pittsburg/Bay Point alone would have removed over one billion dollars from the state and local transit subsidy pools from which AC Transit seeks to subsidize its operating and capital projects. Perhaps AC Transit has projects which are as efficient or more efficient than BART's, but which have been unable to secure funding because of diminished state and local subsidy pools.

c. Challenging Particular Funding Streams

i. AB 434

AB 434 funds are capital subsidies derived from a state authorized surcharge on vehicle registration fees.\(^{249}\) A regional state agency, BAAQMD, has discretion on how to spend 60% of the revenues.\(^{250}\) AC Transit riders could investigate BAAQMD's criteria and method of allocating subsidies to discover whether BART projects are selected over AC Transit projects in a manner that discriminates against AC Transit's largely minority riders, particularly where BART service would overlap with AC Transit service. If that is the case, BART may be siphoning riders from AC Transit, thereby reducing AC Transit's operating revenues, leading to larger operating deficits and towards new rounds of service cuts.

ii. AB 1107

AB 1107 funds are operating subsidies derived from a 1/2 cent sales tax imposed in three BART counties.\(^{251}\) Under the state law, MTC must allocate 75% of the revenues to BART.\(^{252}\) AC Transit splits the remaining 25% with MUNI.\(^{253}\) Thus, in FY 1995/96, BART received $126.1 million in AB 1107 funds\(^ {254}\) while AC Transit received only $19.7 million,\(^ {255}\) more than six times less. AC Transit riders could argue that since their services are being cut, providing mostly white BART riders with six times more in AB 1107 funds has the effect of discriminating against the mostly minority AC Transit riders.

2. Defendant's Burden

If AC Transit riders meet the burden of demonstrating a prima facie case of disparate impact, the burden would shift to the potential defendants to prove the subsidy decisions are supported by legitimate business necessities. The potential defendants—MTC, BART, BAAQMD and the State of California—would surely have an arsenal of arguments that the subsidy decisions are supported by legitimate business necessities.

a. Countering AC Transit Riders' Subsidy Per Passenger Comparisons

The potential defendants would surely argue that a per passenger subsidy comparison is misleading since the average BART trip covers a much greater distance than the average AC Transit trip. They might point out, for example, that BART's cost per passenger mile for FY 1993/94 was only about $0.23\(^ {256}\) while AC Transit's was about $0.62.\(^ {257}\) AC Transit riders could counter with arguments why a per passenger comparison is better, as discussed supra Part IV.C.1.a.iii.

MTC and BART might point to other performance statistics to argue that AC Transit's operations are inefficient; a problem which increasing operating subsidies would exacerbate. For example, AC Transit's farebox recovery ratio is approximately 25% while BART's is about 50%.\(^ {258}\) Additionally, BART receives only about 9% more in operating subsidies while providing 12% more passenger trips.\(^ {259}\) Therefore, MTC and BART could argue they have a legitimate business necessity to support the current level of operating subsidies allocations.

To counter the claim of legitimate business necessity, AC Transit riders could argue that the Second Circuit was correct to require a more thorough analysis of the subsidy allocations than performance measures such as the farebox recovery ratio. A narrow reading of the Second Circuit opin-
ion would be that courts should only consider funding associated with operating expenses. For example, the Second Circuit noted that the farebox recovery ratio “does not reveal the extent to which one system might have higher costs associated with its operations...” However, “operations” need not mean only “operating expenses,” and the underlying principle is that courts should consider the full range of expenses when determining the appropriate measure or combination of measures for examining the alleged disparate impact. Moreover, this is the approach by the plaintiffs in Los Angeles County MTA who won a preliminary injunction and negotiated a favorable settlement.

Thus, AC Transit riders should argue that focusing on performance statistics such as the farebox recovery ratio does not accurately measure performance. AC Transit riders could promote the combined subsidy allocation measures discussed supra Part IV.C.I.a.iii or at least encourage the court to consider both operating and capital subsidies in some manner to arrive at a better understanding of the true subsidization of each system.

b. Countering AC Transit Riders’ AB 434 and AB 1107 Contentions

To the extent that AB 434 and AB 1107 direct MTC to allocate subsidies in particular percentages to each agency, the potential defendants may argue the constraints create a legitimate business necessity to support the current allocation. This argument should fail. By virtue of the Supremacy Clause, federal laws such as Title VI preempt conflicting state laws if Congress intended such state laws to be preempted.

In preemption analysis, the “sole task is to ascertain the intent of Congress.” Federal law may preempt in three ways: (1) when federal law expressly preempts state law; (2) where the federal law completely occupies the field so that there is no room for state regulation; and (3) where state law directly conflicts with federal law. The third category applies here. To the degree to which AB 434 and AB 1107 cause a disparate impact on racial minorities, they conflict with the Title VI’s purpose.

Recent case law supports the proposition that Title VI may preempt conflicting state laws. In a Title VII case, the Supreme Court specifically held that defendants do not meet the business necessity burden of proof simply because their practices are mandated by a state statute. In Association of Mexican-American Educators v. California, the District Court for the Northern District of California held that minority teacher candidates may sue under Title VI to challenge the California Basic Educational Skills Test (“CBEST”), a teacher certification examination established under state law.

In Campaign for Fiscal Equity v. State of New York, the highest state court of New York held that a Title VI suit challenging New York’s statutory formula for funding school districts may proceed.

The Ninth Circuit, in a Title VII case vacated as moot by the Supreme Court, has summarized the connection between state law and business necessity as follows:

[The adoption of a constitutional provision or a statute does not ipso facto create a business necessity. [Citing Dothard v. Rawlinson.] A state enactment cannot constitute the business justification for the adoption of a discriminatory rule unless the state measure itself meets the business necessity test; otherwise employers could justify discriminatory regulations by relying on state laws that encourage or require discriminatory conduct. Id. For federal law purposes, it is immaterial whether inadequate justifications directly underlie the actions of a government agency or are incorporated in the constitution of a state. In either case, if the proffered justifications fail to meet the business necessity test, they are legally insufficient.

c. Significant but Difficult-to-Quantify Costs and Benefits

The potential defendants may also seize on the defendants’ argument in New York Urban League that heavy subsidization of BART provides “significant but difficult-to-quantify” benefits for AC Transit riders,

260. New York Urban League, 71 F.3d at 1038 (emphasis added).
261. See Los Angeles County MTA (C.D. Cal. 1996) (No. CV94-5936). See also discussion supra Part IV.B.
262. For much of the following preemption analysis, I am indebted to New York City Environmental Justice Alliance’s Brief Amicus Curiae in Support of Plaintiffs-Appellees, New York Urban League, 71 F.3d 1031.
264. See id.
265. See id. at 280-81.
such as reduced congestion and pollution. The potential plaintiffs should point out that the Second Circuit noted but did endorse the argument. AC Transit riders should argue that factoring in such benefits is impossible and distracts from the Title VI violation. In the alternative, at least as far as the extensions are concerned, the potential plaintiffs could argue that the benefits are de minimis since the number of riders added by the extensions is too small to have a significant impact on congestion, pollution, etc.

3. Less Discriminatory Alternatives

If a court were to find the defendants did not demonstrate a legitimate business justification, this analysis would be unnecessary. However, if a court were to find that the defendants met the burden of proof, the burden would shift back to the plaintiffs to demonstrate less discriminatory alternatives. The following discussion is rather brief as the thrust of this note is to provide AC Transit riders with analysis which would aid them in establishing a prima facie case.

The potential plaintiffs should be able to meet this burden. The center of their argument here could be that the total subsidization of the two systems should be more balanced. The simplest and arguably the best alternative would be to require the total subsidies per passenger for BART and AC Transit to be equal or at least more balanced on a per passenger basis. Over ten years and under the constrained scenarios, BART riders are projected to enjoy 71% more in funding. This ought to be corrected.

These statistics show there is a huge disparity in funding the systems and that subsidizing AC Transit at least enough so it would not have to cut services would reduce some discriminatory effects. AC Transit riders should argue that AC Transit's total funding per passenger should be increased so that it could expand and improve its system to reach other neighborhoods as BART has been able to do. Alternatively, the plaintiffs should argue that BART should be extended into minority communities in the East Bay, not just the mostly white communities it has selected.

D. Other Theories

Title VI is not the sole cause of action by which AC Transit riders could challenge the disproportionate funding of BART over AC Transit. For example, AC Transit riders could pursue a 14th Amendment claim. This would present a much more difficult case as the plaintiffs would be required to show discriminatory intent on the part of the defendants.

In addition, AC Transit riders could press the Secretary of the Department of Transportation to find that MTC and BART are violating 49 U.S.C. section 5332. Under section 5332, "[a] person may not be excluded from participating in, denied a benefit of, or discriminated against under, a project, program or activity receiving financial assistance under this chapter because of race, color, creed, national origin, sex or age." If the Secretary makes a finding of noncompliance, he must cut off federal financial assistance under this chapter (49 U.S.C. section 5301 et seq.), refer the matter to the U.S. Attorney General with a recommendation that a civil action be brought, proceed himself under Title VI, and take other action as provided by law. Clearly, the hurdle for AC Transit riders under section 5332 would be to persuade the Secretary that BART and MTC were not complying with the section.

V. Conclusion

The basic facts are simple. Mass transit systems serving mostly white riderships are disproportionately funded over systems serving mostly minority riderships. The effect is to discriminate against racial minorities. In the Bay Area, the MTC is allocating subsidies to BART to assist the commuter rail district in its expansion to mostly white suburbs. Meanwhile, AC Transit's mostly minority riders are suffering through service cutbacks.

The interpretation of the facts is complicated. An analysis of the planned operating and capital subsidization of the systems over the next ten years reveals that, on a per passenger basis, BART riders are projected to enjoy a 71% greater total subsidy than

270. See discussion supra Part III.A.3.a.
271. See id.
272. See discussion supra Part II.B.
273. See discussion supra Part IV.C.1.a.iii.
275. 49 U.S.C. § 5332b (1996). The statute's definition of "person" includes a governmental authority. 49 U.S.C.§ 5332a (1996). Note that section 5332 prohibits discriminating against a person based on sex and age. It may be worth investigating if there is a significant discrepancy between AC Transit and BART riders with respect to these characteristics.
AC Transit riders. Moreover, BART's expansion is extraordinarily expensive, and the cost per new rider may dwarf any comparable costs for AC Transit riders. The effect of the disproportionate funding of the two systems is racial discrimination in Bay Area mass transit services.

AC Transit riders could file suit against MTC, BART and other potential defendants under Title VI of the Civil Rights Act of 1964. U.S. DOT regulations prohibit any entity which receives federal financial assistance from utilizing criteria or methods of administration which have the effect of discriminating against racial minorities. AC Transit riders could make a strong prima facia case by pointing to the substantial per passenger disparity in total funding based on the ten year projections, the figures for any year for which the budgets have been allocated, or a more narrow attack on the huge BART extension subsidies. However, MTC, BART and other potential defendants would have a number of strong counter-arguments—including arguments that a cost per passenger mile is a more accurate performance statistic comparison, that AC Transit's operating inefficiencies are the source of the problem rather than subsidization disparities, and that there are other significant but difficult-to-quantify benefits for the current allocation of funds—and might very well be able to establish legitimate business necessities for the per passenger disparity. If the case proceeded so far, AC Transit riders would have the final burden of offering alternatives for equitably funding the systems, such as equitably subsidizing the systems on a per passenger basis.

A Title VI trial would be lengthy and expensive. Even if the plaintiffs won at trial, the defendants would likely appeal, dragging the case on while AC Transit riders waited for an end to the disparity. Moreover, financial analysis is an interpretative art, and AC Transit riders would face many obstacles in proving their case. Yet, at bottom, BART riders are getting more financial support than AC Transit riders, and the respective expansion and contraction of the two systems is all to clear to those whose bus lines have been cut. In short, while AC Transit riders may have difficulties proving a Title VI case in court, they would have a lot of evidence with which to convince MTC and BART to settle the suit and fairly fund AC Transit.
### Appendix A—BART/AC Transit Costs and Subsidies/Passenger

<table>
<thead>
<tr>
<th>Description</th>
<th>FY97-06 Cost ('000's)</th>
<th>Useful Life</th>
<th>Annualized Cost ('000's)</th>
</tr>
</thead>
<tbody>
<tr>
<td>BART—Track 1 (Constrained)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SYSTEMWIDE RENOVATION:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rolling Stock</td>
<td>$433,966</td>
<td>25</td>
<td>$37,239</td>
</tr>
<tr>
<td>Mainline, Stations, &amp; Shops &amp; Yards</td>
<td>413,730</td>
<td>30</td>
<td>33,341</td>
</tr>
<tr>
<td>Controls &amp; Communications &amp; Work Equipment</td>
<td>196,524</td>
<td>30</td>
<td>15,837</td>
</tr>
<tr>
<td><strong>EXTENSIONS:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Track One Extensions</td>
<td>2,581,690</td>
<td>30</td>
<td>208,049</td>
</tr>
<tr>
<td>Oakland Airport Connection</td>
<td>0</td>
<td>30</td>
<td>0</td>
</tr>
<tr>
<td>W.Dublin/Pleasanton Station</td>
<td>0</td>
<td>30</td>
<td>0</td>
</tr>
<tr>
<td>Pittsburg-Bay Point to Railroad Avenue</td>
<td>0</td>
<td>30</td>
<td>0</td>
</tr>
<tr>
<td>Subtotal Extensions</td>
<td>2,581,690</td>
<td>30</td>
<td>208,049</td>
</tr>
<tr>
<td><strong>SEISMIC RETROFIT</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>30</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>SERVICE IMPROVEMENTS</strong></td>
<td>20,442</td>
<td>30</td>
<td>1,647</td>
</tr>
<tr>
<td><strong>OTHER CAPITAL OBLIGATIONS</strong></td>
<td>63,280</td>
<td>30</td>
<td>5,100</td>
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<tr>
<td><strong>Totals</strong></td>
<td>$3,709,632</td>
<td></td>
<td>301,213</td>
</tr>
</tbody>
</table>

| Operating Cost (FY06) | 410,000 |
| Less: Operating Revenue (FY06) | (210,700) |
| Operating Subsidy (FY06) | 199,300 |
| Total Annualized Subsidy (FY06) | 500,513 |
| Divided By: Unlinked Passenger Trips | 100,600 |
| Subsidy Per Passenger (FY06) | $4.98 |
| Total Annualized Cost | 711,213 |
| Divided By: Unlinked Passenger Trips | 100,600 |
| Cost Per Passenger (FY06) | $7.07 |

### Systemwide Renovation Adjustment Factor

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost ('000's)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Track One/Priority 1 Costs</td>
<td>$824,825</td>
</tr>
<tr>
<td>Track One/Priority 2 Costs</td>
<td>219,395</td>
</tr>
<tr>
<td>Total Track One Costs</td>
<td>1,044,220</td>
</tr>
<tr>
<td>Total Track One/Two Costs</td>
<td>1,167,375</td>
</tr>
<tr>
<td>Percentage</td>
<td>89.5%</td>
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</tbody>
</table>
### Appendix B—AC TRANSIT COSTS AND SUBSIDIES/Passenger

<table>
<thead>
<tr>
<th>Description</th>
<th>FY97-06 Cost</th>
<th>Useful Life</th>
<th>Annualized Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Buses &amp; Clean Fuel Project</strong></td>
<td>$171,017</td>
<td>12</td>
<td>$21,531</td>
</tr>
<tr>
<td>Facilities (Equipment Upgrade)</td>
<td>17,598</td>
<td>30</td>
<td>1,418</td>
</tr>
<tr>
<td>Non-Revenue Vehicles</td>
<td>3,153</td>
<td>4</td>
<td>931</td>
</tr>
<tr>
<td>Transit Centers</td>
<td>7,289</td>
<td>25</td>
<td>625</td>
</tr>
<tr>
<td>Electric Trolley</td>
<td>42,623</td>
<td>25</td>
<td>3,658</td>
</tr>
<tr>
<td>ADA PA Announcement</td>
<td>2,070</td>
<td>10</td>
<td>295</td>
</tr>
<tr>
<td>Data Processing Upgrade</td>
<td>4,665</td>
<td>10</td>
<td>664</td>
</tr>
<tr>
<td>Replace Radio Communications System</td>
<td>3,078</td>
<td>10</td>
<td>438</td>
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<tr>
<td>Facilities Equipment</td>
<td>0</td>
<td>30</td>
<td>0</td>
</tr>
</tbody>
</table>

**Total Capital (Less Tires & Tubes)**

- **$251,493**

**Operating Cost (FY06)**

- **225,000**

**Less: Operating Revenue (FY06)**

- **(70,000)**

**Tire/Tubes Replacement Program**

- **17,441**

**Operating Subsidy (FY06)**

- **156,744**

**Total Annualized Subsidy (FY06)**

- **186,305**

**Divided By: Unlinked Passenger Trips**

- **64,000**

**Subsidy Per Passenger (FY06)**

- **$2.91**

**Total Annualized Cost**

- **254,561**

**Divided By: Unlinked Passenger Trips**

- **64,000**

**Cost Per Passenger (FY06)**

- **$3.98**