



**Maryland Department of Transportation**  
The Secretary's Office

**Larry Hogan**  
Governor

**Boyd K. Rutherford**  
Lt. Governor

**Pete K. Rahn**  
Secretary

March 9, 2016

Via Email Only

Mr. Kevin Resler  
FHWA National Title VI Program Manager  
kevin.resler@dot.gov

Re: DOT# 2016-0059

Dear Mr. Resler:

As requested by Acting Director Stephanie J. Jones, this letter responds to the complaint filed on behalf of the Baltimore Regional Initiative Developing Genuine Equality and Earl Andrews, alleging discrimination on the basis of race in violation of Title VI of the Civil Rights Act of 1964. Upon reviewing the facts and the law, the U.S. Department of Transportation should find that there is no basis for the complainants' allegations, and that the State of Maryland, the Maryland Department of Transportation ("MDOT"), the Maryland Transit Administration ("MTA"), and the Maryland State Highway Administration ("SHA") have not violated Title VI.

**I. Background**

MDOT is a principal department of Maryland State government, and is responsible for most State-owned transportation facilities and programs, exclusive of toll facilities. Md. Code Ann., Transp. §§ 2-101, 2-103 (2015). This responsibility includes the planning, financing, construction, operation, and maintenance of various modes of transportation. *Id.* § 2-103. MDOT encompasses the following modal administrations: the Maryland Aviation Administration ("MAA"), Maryland Port Administration ("MPA"), Motor Vehicle Administration (the "MVA"), MTA and SHA. *Id.* § 2-107. MTA provides a State-wide system of transportation services that includes the operation of local and commuter buses, light rail, subway, Maryland Area Regional Commuter

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(“MARC”) train service, and a comprehensive Mobility/Paratransit system.<sup>1</sup> SHA is responsible for project development, construction, and maintenance of the State highway system, which includes more than 5,152 miles, or 14,764 lane miles, of roadway and 2,570 bridges.<sup>2</sup>

Governor Larry Hogan is the Chief Executive Officer of the State of Maryland. As Governor, he is responsible for the State’s budget, including expenditures from the Transportation Trust Fund, which is the primary source of State funding for highway and bridge projects. During his campaign, Governor Hogan made clear that all spending, particularly capital projects, would be reviewed when he assumed office on January 21, 2015. He stated that he considered that the State could not afford to build both the Red Line and the Purple Line, which were at the time projected to cost \$2.9 and \$2.45 billion respectively, more than double the original projections.<sup>3</sup> Together, the \$5.35 billion cost would have made them the most expensive public works projects in Maryland history. The Governor further stated his intention to make sure that available transportation funds would be directed toward repair of Maryland’s aging bridge and highway infrastructure to protect all Marylanders and to promote economic development.

A Governor has every right and, in fact, a duty, to direct funds consistent with his policies. Maryland’s Constitution “vest[s] in the Governor responsibility for the fiscal affairs of the State,” and the State’s budget system, “in which the executive plays a

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<sup>1</sup> See “About MTA,” [http://mta.maryland.gov/about\\_mta](http://mta.maryland.gov/about_mta) (last visited Mar. 7, 2016).

<sup>2</sup> See Maryland State Highway Administration, Data Services Engineering Division, “2014 HISD Reports,” available at [http://roads.maryland.gov/OPPEN/2014\\_DSED\\_REPORTS.pdf](http://roads.maryland.gov/OPPEN/2014_DSED_REPORTS.pdf) (last visited Mar. 7, 2016); Maryland State Highway Administration, “FY14 Annual Report” at 1, available at <https://www.roads.maryland.gov/OC/SHAAnnualReportFY2014.pdf> (last visited Mar. 7, 2016).

<sup>3</sup> See Federal Transit Administration, “Baltimore Red Line, Baltimore Maryland, New Starts Project Development (Rating Assigned November 2014)” at 1, available at [http://www.fta.dot.gov/documents/MD\\_Baltimore\\_Red\\_Line\\_Profile\\_FY16.pdf](http://www.fta.dot.gov/documents/MD_Baltimore_Red_Line_Profile_FY16.pdf) (last visited Mar. 3, 2016); Federal Transit Administration, “Maryland National Capital Purple Line, Bethesda to New Carrollton, Maryland, New Starts Engineering (Rating Assigned November 2014)” at 1, available at [http://www.fta.dot.gov/documents/MD\\_Maryland\\_National\\_Capital\\_Purple\\_Line\\_Profile\\_FY16.pdf](http://www.fta.dot.gov/documents/MD_Maryland_National_Capital_Purple_Line_Profile_FY16.pdf) (last visited Mar. 7, 2016).

dominant role,” is designed “to ensure a balanced budget.” *Judy v. Schaefer*, 331 Md. 239, 246 (1993). That is, the Governor is both empowered and mandated to assess the State’s various fiscal needs and address them in a balanced budget. *See* Md. Const., Art. III, § 52, subsections (3) and (4) (Governor’s responsibility to produce annual budget); *id.* subsection 5a (“[I]n the budget bill as enacted the figure for total estimated revenues always shall be equal to or exceed the figure for total appropriations.”). This constitutional authority includes the ability to stop a public works project that the Governor determines to be impractical, inefficient and unaffordable, and therefore not good for the citizens of Maryland. Such action is not a violation of Title VI of the Civil Rights Act of 1964.

**A. Maryland Has a Backlog of Critical Transportation Projects and Limited Funds to Address Them.**

The Governor reviewed the State’s budget generally and the Red Line and the Purple Line projects, specifically. Notably, all of Maryland’s transportation systems, including the Red Line and the Purple Line, compete for funding through an integrated account called the Transportation Trust Fund. Md. Code Ann., Transp. § 3-216(a) (2015). This includes Maryland’s highways and bridges, the State’s airports, the MVA, the MPA, and transit operations throughout the State, all of which require substantial capital and maintenance investments.<sup>4</sup> *Id.* § 3-216(c) and (d). The Transportation Trust Fund is a dedicated fund that supports all MDOT activities including debt service, maintenance, operations, administration, and capital projects. *Id.* § 3-216. Sources of funds include motor fuel taxes, vehicle excise (titling) taxes, motor vehicle fees (registrations, licenses and other fees), and federal aid. *Id.* § 3-216(b). In addition, the Trust Fund also includes corporate income tax distributions, sales and use tax distributions, operating revenues (e.g., transit fares, port fees, airport fees), bond proceeds and sometimes, contributions from the State’s General Fund. *Id.* All funds dedicated to MDOT are deposited in the Transportation Trust Fund, and disbursements for all MDOT bonds, programs, and projects are made from the Trust Fund. The allocation of funds specific to programs and projects is made in

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<sup>4</sup> MDOT’s anticipated capital and operating expenditures for 2015-2020 totaled \$28.7 billion, and total revenues were projected to be \$28.5 billion. *See* Maryland Department of Transportation, Consolidated Transportation Program FY 2015-2020 (“2015 CTP”), p. A-19, available at

[http://www.mdot.maryland.gov/Office\\_of\\_Planning\\_and\\_Capital\\_Programming/CTP/CTP\\_15\\_20/CTP\\_Documents/2015\\_Final\\_CTP.pdf](http://www.mdot.maryland.gov/Office_of_Planning_and_Capital_Programming/CTP/CTP_15_20/CTP_Documents/2015_Final_CTP.pdf) (last visited Mar. 8, 2016).

conjunction with State and local elected officials. *Id.* § 2-103.1(d) and (e). At the end of each State fiscal year, unexpended amounts remaining in the Trust Fund are carried over and are not reverted to the State's General Fund. *Id.* § 3-216(f).

The allocation of Transportation Trust Funds for capital projects is set forth in the annual Consolidated Transportation Program, which is the State's six-year capital budget for transportation projects. *Id.* § 2-103.1(c). When the Governor assumed office, the Consolidated Transportation Program allocated \$15.8 billion for capital projects,<sup>5</sup> but that total did not reflect the amounts required to address all of the transportation-related construction needs of the State.<sup>6</sup> The Governor determined that, even with federal dollars, the cost of the Red Line would force the State to delay the development and completion of other projects for years.<sup>7</sup> Because there is a finite amount of money available to MDOT for capital projects, any large project, especially two enormous projects like the Red Line and Purple Line, would necessarily absorb a disproportionate share of available funds and render funding unavailable for other important projects or expenses.<sup>8</sup>

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<sup>5</sup> *See id.*, p. 9 (containing graph of MDOT's "Total Capital Program Levels," including State, federal and other funding for 2015 through 2020).

<sup>6</sup> In addition to the \$15.8 billion allocated for capital projects, the 2015 CTP contained a number of projects in the Development and Evaluation ("D&E") Program. The projects in the D&E Program received funding for planning and/or engineering, but they were far from completion because the construction costs were not funded. For examples of projects in the D&E Program, *see id.* at pp. TSO-5, TSO-6, MTA-38 – MTA-40, and SHA D&E Program breakdowns by county, including pp. SHA-AA-5 – AA-9, SHA-HO-6 – HO-10, SHA-PG-14 – PG-31 and SHA-M-13 – M-27.

<sup>7</sup> For examples of projects that would not have been funded if the Red Line had proceeded, *see* the \$721.1 million worth of projects added to the Maryland Department of Transportation, Consolidated Transportation Program FY 2016-2021 ("2016 CTP"), as described at pp. A-1 – A-3, "Major Project Significant Changes to the FY 2015-2020 CTP," available at [http://www.mdot.maryland.gov/newMDOT/Planning/CTP/Final\\_CTP\\_16\\_21/Documents/2016\\_Final\\_CTP\\_020216.pdf](http://www.mdot.maryland.gov/newMDOT/Planning/CTP/Final_CTP_16_21/Documents/2016_Final_CTP_020216.pdf) (last visited Mar. 8, 2016). *See also, id.* at p. A-5 (identifying additional projects to be funded in the amount of approximately \$1.02 billion, which were moved from the D&E Program to the Construction Program).

<sup>8</sup> *See id.*

**B. The Unprecedented Costs of the Red Line Make it a Bad Transportation Investment for Maryland Taxpayers.**

At the beginning of 2015, Governor Hogan was constitutionally obligated to evaluate the State's revenues and liabilities based on the best and most up-to-date information then available; he could not simply rely on estimates and projections made by his predecessors years earlier. A review of available information on the cost of constructing transit rail projects revealed that the average cost of such projects had risen considerably.<sup>9</sup> The evaluation of the Red Line revealed huge and increasing costs. In 2009, the Red Line was projected to cost \$1.63 billion, or more than \$115 million per mile<sup>10</sup>; by 2015, the projected costs had increased to more than \$2.9 billion, or \$206 million per mile.<sup>11</sup> That is a 78% increase in anticipated costs, even before any additional unplanned cost overruns. Over that period, costs for the Red Line had escalated at a rate of more than \$570,000 per day. Even with that acknowledged increase in estimated cost, the FTA's own most recent analysis had given a "medium to low" rating to the Red Line's "Capital and Operating Cost Estimates, Assumptions and Financial Capacity," and FTA had determined that "[t]he capital cost estimate is optimistic for this stage of the project."<sup>12</sup>

These costs are particularly disconcerting with respect to the proposed 3.4 mile tunnel under downtown Baltimore. This single component would have consumed more than two-thirds of the Red Line budget. Tunnel projects are inherently more complex and difficult than other projects. "[U]nderground construction is arguably the most risky of all construction" and "is rife with changed conditions" over the life of a given

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<sup>9</sup> See, e.g., Randal O'Toole and Michelangelo Landgrave, "Rails and Reauthorization: The Inequity of Federal Transit Funding" (Apr. 21, 2015) (hereinafter cited as O'Toole, "Rails") at 1, available at <http://www.cato.org/publications/policy-analysis/rails-reauthorization-inequity-federal-transit-funding> (last visited Mar. 7, 2016).

<sup>10</sup> See Exhibit 1, Press Release, "Governor O'Malley Announces Red Line Locally Preferred Alternative" (Aug. 4, 2009).

<sup>11</sup> Federal Transit Administration, "Baltimore Red Line, Baltimore Maryland, New Starts Project Development (Rating Assigned November 2014)" at 1, available at [http://www.fta.dot.gov/documents/MD\\_\\_Baltimore\\_Red\\_Line\\_Profile\\_FY16.pdf](http://www.fta.dot.gov/documents/MD__Baltimore_Red_Line_Profile_FY16.pdf) (last visited Mar. 3, 2016).

<sup>12</sup> *Id.* at 3.

project.<sup>13</sup> As stated on FTA's website, "[t]unneling for transit projects is as much an art as a science"; design and construction of tunnels are subject to significant "[v]ariables" and "vagaries"; "[p]redictive models are only of some use because no two projects are the same"; and "[r]esearch is needed in all of these areas."<sup>14</sup>

One need only consider a few of the famous tunnel projects that were notoriously plagued with cost overruns. For example, the Chunnel between England and France had a cost estimate of \$4.3 billion in U.S. dollars and an original completion date of May 15, 1993.<sup>15</sup> Yet, "[w]hen the implementation phase was completed, the project was 19 months late and had cost overruns of some US \$3 billion (total construction costs of US \$7.1 billion)."<sup>16</sup> In the United States, tunnels like the Big Dig in Boston, the New York City East Side Access project, and the Seattle Route 99 Tunnel had similar delays and cost overruns. For example, "[t]he initial estimate [for the Big Dig project] was around \$2.4 billion, and it ended up at \$14 billion."<sup>17</sup> The Seattle Route 99 Tunnel, which will run along Seattle's waterfront, was originally supposed to be completed in 2015 at an estimated cost of \$1.44 billion, with the entire project costing \$4.2 billion. The project is now scheduled to be completed in January 2017, and the cost overruns have yet to be finalized.<sup>18</sup> The New York City East Side Access project, which involves rail tunnels extending from Queens to Grand Central Station, had an estimated cost of \$4.3 billion and anticipated completion date of 2013. The cost estimates and completion dates have changed at least twice, and the project is currently estimated to cost \$10.8 billion with a

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<sup>13</sup> Frank T. Anbari, *et al.*, "The Chunnel Project," *Project Management Institute: Case Studies in Project Management* (George Washington U. 2005) at 12, available at <http://www.pmi.org/~media/PDF/Academic/case%20studies/Chunnel%20Project.ashx> (last visited Mar. 2, 2016) ("Anbari").

<sup>14</sup>"Tunnel Design and Construction: Overview," available at [http://www.fta.dot.gov/12351\\_4508.html](http://www.fta.dot.gov/12351_4508.html) \ (last visited Mar. 3, 2016).

<sup>15</sup> Anbari at 12.

<sup>16</sup> *Id.*

<sup>17</sup> Boston University Metropolitan College, "Digging the Big Dig: A Project Management Case Study," *Metropolitan* (Winter 2012) at 10, available at [http://www.bu.edu/met/files/2012/03/bu-met-newsletter\\_winter\\_2012.pdf](http://www.bu.edu/met/files/2012/03/bu-met-newsletter_winter_2012.pdf).

<sup>18</sup> Karen Weise, "Stuck in Seattle: The Aggravating Adventures of a Gigantic Tunnel," *Bloomberg Business* (March 2015).

completion date in 2023.<sup>19</sup>

In the case of the Red Line, the uncertainties of digging under the streets of a major city inevitably posed substantial and unanswered questions that could not be resolved until the tunnel construction was actually under way.<sup>20</sup> The need to address unbudgeted environmental protection measures would have further increased the cost of tunnel construction.<sup>21</sup> The cost of the Red Line, together with the uncertainty as to the ultimate cost, required a search for a less expensive solution to the transportation issues in Baltimore City.

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<sup>19</sup> Zoe Rosenberg, ““East Side Access Delayed until 2023, Over Budget by \$6.5 Billion” (Jan. 28, 2014), available at <http://ny.curbed.com/2014/1/28/10150292/east-side-access-delayed-until-2023-over-budget-by-6-5b> (last visited Mar. 7, 2016).

<sup>20</sup> See, e.g., Exhibit 2, Baltimore Red Line General Engineering Consultant Team, “Technical Memorandum: Excavation Impacts on Adjacent Structures, Downtown Tunnel Segment” (June 29, 2012) at E-II–E-III (preliminary assessments determining tunnel construction would cause “settlements at the ground surface” and potentially damage “registered historic structures which are anticipated to be sensitive to movements,” including “the Bromo Seltzer Tower, the Howard Street Tunnel, and U.S. Customs House,” as well as “many more structures along the DTT [Downtown Tunnel route]” that “are expected to be sensitive to excavation induced settlements,” and cautioning that the amount of settlement, and the resulting damage, could vary “up to several inches” depending on “the quality of the rock” encountered in tunneling under the structures).

<sup>21</sup> See Exhibit 3, “Baltimore Red Line HAZMAT Project Close Out: Status of Work” (Aug. 20, 2015) at 2-3 (summarizing still unresolved environmental concerns relating to the Red Line tunnel, including the need to investigate and develop “a cost estimate to remove, handle and dispose of” soil contaminated by flammable tripropylene, as discovered in April 2015; the fact that the existing contract for the Red Line “did not include” the necessary “work related to removal of COPR [Chromium Ore Process Residue], Chromium-impacted soils or impacted groundwater during construction”; and MTA’s still unresolved concern that the Red Line’s path through an ExxonMobil tank farm would require measures to address “petroleum-impacted groundwater” and the presence of methane, which posed an “explosion hazard during construction and during operations”).

### **C. Improving the Bus System is a Better Transportation Investment for Baltimore City.**

Rail supporters frequently claim that rail transit is “high capacity transit” because individual rail cars have more capacity than individual busses. In reality, capacity is more accurately judged by capacity of vehicles and the number of vehicles that can be moved through the lane in a specified period of time. Dedicated lanes of streets can move 13,000 people per hour by bus, while the light rail can move only 9,000 people per hour.<sup>22</sup> There is no doubt that the cost of highway construction is a fraction of the cost of rail construction.<sup>23</sup>

Where resources are limited, as is the case in Maryland, it is inefficient and impractical to move forward with the construction of a transportation project made risky by the inclusion of tunnels, when buses can provide the same or better service at a much lower cost. Additionally, buses are more flexible given that routes can be changed as needed with considerably less expense to maintain.<sup>24</sup>

Moreover, Baltimore City’s usage is, on a passenger miles per route mile basis, the second worst in the nation for light rail and third worst in the nation for heavy rail.<sup>25</sup> Additionally, Baltimore’s exiting light rail fare box recovery rate (defined as the percentage of operations and maintenance costs covered by fares received) is the second lowest in the country, while Baltimore’s subway has the lowest fare box recovery rate among the Nation’s heavy rail systems.<sup>26</sup> This history of comparatively low ridership on Baltimore’s existing rail lines tends to suggest that the Red Line is not likely to be heavily used and that there are better, less expensive and more flexible alternatives to provide for Baltimore’s transportation needs.

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<sup>22</sup> O’Toole, “Rails” at 15-16.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.* at 15.

<sup>25</sup> See Randal O’Toole, “The Worst of Both: The Rise of High-Cost, Low-Capacity Rail Transit” (June 3, 2014) at 5, Table 2 (citing Federal Transit Administration’s 2012 National Transit Database), available at <http://www.cato.org/publications/policy-analysis/worst-both-rise-high-cost-low-capacity-rail-transit> (last visited Mar. 7, 2016).

<sup>26</sup> *Id.* (citing Federal Transit Administration’s 2012 National Transit Database).



Specifically, Baltimore's citizens are better served by the BaltimoreLink System. This System will deliver a unified transit network by improving coordination among Maryland Transit Administration modes – bus, light rail, Metro subway, and mobility paratransit – to create an interconnected transit system for a fraction of the cost of the Red Line. The BaltimoreLink System includes several components: CityLink, LocalLink, Light RailLink, Metro SubwayLink, MobilityLink, Express BusLink and BicycleLink. The BaltimoreLink system will debut when the new bus service starts in summer 2017 with a new and improved network design.<sup>27</sup>

BaltimoreLink is needed to address the needs of African Americans in West Baltimore and other areas of the City; it is a timely and cost-effective alternative to the Red Line. The BaltimoreLink project will improve transit services to transportation dependent populations to a much greater degree than the Red Line. By transforming the bus system, BaltimoreLink will increase the frequency of bus service to areas all across the City, and the new high-frequency lines will help reduce overcrowding and improve reliability. In addition, City residents will benefit from those improvements within the 2 years needed for the BaltimoreLink project rather than the 8 to 10 years needed to complete the Red Line. BaltimoreLink is also an improvement over the prior administration's Bus Network Improvement Project ("BNIP"), which had an 18 year timeline for completion. Reflecting the Governor's commitment to addressing transportation quality and opportunity issues for the African American and other communities of Baltimore, the Hogan Administration plans to complete the BaltimoreLink project within 2 years. The fact that it will cost far less than \$2.9 billion to make this substantial improvement in service, dependability and reliability, does not make the outcome any less meaningful. BaltimoreLink will provide measurable improvement of service to transportation dependent populations and other citizens in Baltimore, and will achieve this objective on an accelerated basis and at a lower cost.<sup>28</sup>

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<sup>27</sup> See "Consolidated Transportation Program 2016-2021" at 4, available at [http://www.mdot.maryland.gov/newMDOT/Planning/CTP/Final\\_CTP\\_16\\_21/Documents/2016\\_Final\\_CTP\\_020216.pdf](http://www.mdot.maryland.gov/newMDOT/Planning/CTP/Final_CTP_16_21/Documents/2016_Final_CTP_020216.pdf) (last visited Mar. 8, 2016); "Baltimore Link: A Transformative Vision for the Future of Transit in Baltimore," available at [http://mta.maryland.gov/sites/default/files/BaltLinkBrochure\\_0.pdf](http://mta.maryland.gov/sites/default/files/BaltLinkBrochure_0.pdf) (last visited Mar. 8, 2016).

<sup>28</sup> The complaint generally conflates dollars spent with efficiency and service. This is not about dollars spent. If it were, it would be worth noting that over the next 6 years, the State's Consolidated Transportation Program will allocate more than \$1.28 billion in

The complaint also asserts that the Red Line alignment could have been changed without cancelling the project and that the tunnel could have been eliminated. Those statements do not reflect a clear understanding of the FTA processes regarding New Starts Projects. If MDOT had opted for the project changes suggested by the complainants, the ridership numbers needed to support the New Starts Federal Funding formulas would not have been met. *See* 49 U.S.C. § 5309. MDOT looked at alternatives, including not building a tunnel, and the number of riders in other scenarios would not have met the New Starts formula. In any case, a significant change in the Red Line's alignment effectively would have required that the planning process begin anew, thereby potentially delaying the project for many additional months and perhaps years.

## II. Title VI Analysis

### A. Title VI Prohibits Only Intentional Discrimination and Does Not Authorize a Disparate Impact Claim.

The complaint does not allege any intentional discrimination but instead raises a claim that the State of Maryland and the Maryland Department of Transportation ("MDOT") "violated Title VI" by causing a "disparate impact on African Americans," which allegedly will result from the cancellation of further planning and construction of the Red Line and redirecting State funds to other transportation projects. Complaint at 3; *see id.* at 24-28 (setting forth disparate impact analysis). The complaint's allegations do not state a claim of Title VI violation, as a matter of law, because Supreme Court precedent makes clear that Title VI "prohibits only intentional discrimination," and the statute does not authorize a disparate impact claim, whether based on the statute itself or regulations promulgated under Title VI. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Though the complaint is replete with citations to case law purporting to demonstrate how courts analyze a Title VI claim, the complaint does not acknowledge the most significant applicable precedent – *Sandoval* – nor does the complaint cite any post-*Sandoval* court decision that applies disparate impact analysis to a Title VI claim.<sup>29</sup>

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transportation funding, including federal funds, to transportation projects benefitting the Baltimore Region, including Baltimore City. *See* 2016 CTP, *supra* note 7, pp. MTA-9, MTA-11 through 20, MTA-31 through MTA-34 (allocating funds to various transit-system preservation activities and improvements).

<sup>29</sup> The only post-*Sandoval* court decision cited in the complaint is *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011), which the complainants cite as authority for "a *prima facie* case of disparate impact under Title VI and its implementing

To the extent the complaint seeks to rely on regulations adopted pursuant to § 602 of Title VI, “[l]anguage in a regulation . . . may not create a right that Congress has not.” *Sandoval*, 532 U.S. at 291. The language of § 602, which authorizes the adoption of regulations “to effectuate the provisions” of § 601 of the Title VI, “limits agencies to ‘effectuat[ing]’ rights already created by § 601.” *Sandoval*, 532 U.S. at 288-89. In the post-*Sandoval* era, federal courts of appeals have rejected attempts to pursue disparate impact claims based on federal agencies’ Title VI regulations, including those adopted by the Department of Transportation. *See Save Our Valley v. Sound Transit*, 335 F.3d 932, 944 (9th Cir. 2003) (Department of Transportation’s “disparate-impact regulation cannot create a new right; it can only ‘effectuate’ a right already created by § 601 [of Title VI]. And § 601 does not create the right . . . to be free from racially discriminatory effects.” (citing *Sandoval*, 532 U.S. at 280)); *South Camden Citizens in Action v. New Jersey Department*, 274 F.3d 771, 788 (3rd Cir. 2001) (“Since the time of the Supreme Court’s decision in *Sandoval*, it hardly can be argued reasonably that the right alleged to exist in the EPA’s regulations, namely to be free of disparate impact discrimination in the administration of programs or activities receiving EPA assistance, can be located in either section 601 or section 602 of Title VI.”); *see also Coalition for the Advancement of Regional Transport v. Federal Highway Admin.*, 576 Fed. Appx. 477, 484, 493-95 (6th Cir. 2014) (rejecting plaintiffs’ Title VI claims for failure to show intentional discrimination in case where Federal Highway Administration conceded that a bridge construction project it approved was “likely to cause a disproportionately high and adverse impact on low income and minority populations”).

As the Supreme Court has further emphasized in its recent decisions, an administrative agency must act “within the scope of its lawful authority,” and, in construing and applying governing statutes, “agencies must operate within the bounds of reasonable interpretation.” *Michigan v. Env. Prot. Agency*, 135 S. Ct. 2699, 2707 (2015) (quoting *Utility Air Reg. Group v. Env. Prot. Agency*, 134 S. Ct. 2427, 2442 (2014)). An agency’s regulations “must always ‘give effect to the unambiguously expressed intent of

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regulations.” Complaint at 25 n.127. However, *Darensburg* did not involve any disparate impact claim under Title VI. The district court there granted summary judgment to the government defendants on claims of *intentional discrimination* brought under Title VI and the Equal Protection Clause. *Darensburg*, 636 F.3d at 518; *see Darensburg v. Metro. Transp. Comm’n*, 611 F. Supp.2d 994, 998-99 (N.D. Cal. 2009). The case proceeded to a bench trial solely on a state law claim of disparate impact based on a California statute. *Darensburg*, 636 F.3d at 518. The trial resulted in a finding that the plaintiff had not established a claim of disparate impact. *Id.* The Ninth Circuit affirmed. *Id.* at 523.

Congress,” *Utility Air Reg. Group*, 134 S. Ct. at 2442, and in the case of Title VI, Congress has “unambiguously expressed” its “intent,” *id.*, to “reach[] only instances of intentional discrimination,” *Sandoval*, 532 U.S. at 281 (quoting *Alexander v. Choate*, 469 U.S. 287, 293 (1985)). Regulations imposing a disparate impact standard for violation of Title VI do not “give effect” to Congressional intent, *id.*, and cannot be “within the bounds of reasonable interpretation,” *Michigan v. Env. Prot. Agency*, 135 S. Ct. at 2707, because such regulations do not “effectuate” or “apply § 601,” but instead go beyond the reach of the statute to “forbid conduct that § 601 permits,” *Sandoval*, 532 U.S. at 288, 285; *see Save Our Valley v. Sound Transit*, 335 F.3d at 944 (Because “[a] regulation may not serve to amend a statute, nor add to the statute ‘something which is not there,’” a “regulation cannot ‘effectuate’ a statutory right by creating a new and different right.” (citations omitted)).

It is true that the Supreme Court has recognized that disparate impact claims may be brought under certain statutes other than Title VI, including Title VII, 42 U.S.C. § 2000e-2(a), *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (plurality opinion); the Age Discrimination of Employment Act (“ADEA”), 29 U.S.C. § 623(a), *see Smith v. City of Jackson*, 544 U.S. 228 (2005); and the Fair Housing Act, 42 U.S.C. §§ 3604(a), 3605(a), *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015). But as the Court recently emphasized, disparate impact claims are available under those statutory schemes only because of certain distinguishing features of the statutory text, features that Title VI lacks. *See id.*, 135 S. Ct. at 2518 (A statute will be deemed to “encompass disparate-impact claims” only if (1) the statutory language “focuses on the effects of the action” on those subjected to discrimination “rather than the motivation for the action” and (2) “that interpretation is consistent with statutory purpose.” (quoting *Griggs*, 401 U.S. at 436)). As the Supreme Court made clear in *Sandoval*, the language of Title VI cannot be deemed to “encompass disparate-impact claims,” *Inclusive Communities*, 135 S. Ct. at 2518, since “it is beyond dispute . . . that § 601 prohibits only intentional discrimination,” *Sandoval*, 532 U.S. at 280. Therefore, disparate impact decisions cited by the complainants, which either predated *Sandoval* or applied statutes other than Title VI, cannot serve as authority for the proper application of Title VI, which does not authorize disparate impact claims.

#### **B. The Complaint Does Not Present a Valid Disparate Impact Claim.**

Even if a disparate impact claim under Title VI were not precluded by Supreme Court precedent, the complaint in this case does not allege facts that would establish an actionable claim of discrimination under disparate impact case law. To pursue a disparate impact claim, the complainant “first must show by a preponderance of the evidence that a

facially neutral practice has a racially disproportionate effect, whereupon the burden shifts to the defendant to prove a substantial legitimate justification for its practice.” *Georgia State Conference of Branches of NAACP v. State of Ga.*, 775 F.2d 1403, 1417 (11th Cir. 1985). If the defendant makes that showing, then the burden shifts back to the complainant to “prove its case by demonstrating that other less discriminatory means would serve the same objective.” *New York City Env’tl. Justice All. v. Giuliani*, 214 F.3d 65, 72 (2d Cir. 2000) (citations omitted). Although the basic burden-shifting scheme of a disparate impact case is easily summarized, each part of the process involves substantial “constraints that operate to keep that analysis within its proper bounds,” *Watson*, 487 U.S. at 994, a necessity imposed by constitutional considerations. That is, “disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise . . . if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.” *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015) (quoting *Griggs*, 401 U.S. at 431). These constraints demand rejection of the complaint in this case.

**1. The Complainants Cannot Make Out a Prima Facie Case of Disparate Impact Discrimination.**

A prima facie case of disparate impact discrimination requires a sufficient showing of (1) “a significantly discriminatory impact,” *Connecticut v. Teal*, 457 U.S. 440, 446 (1982) (Title VII case), and (2) “a defendant’s policy or policies causing that disparity,” *Inclusive Communities*, 135 S. Ct. at 2523 (Fair Housing Act case). Because the Supreme Court has instructed that not “all disparate-impact showings constitute prima facie cases,” assessing the first element of the prima facie case involves “determin[ing] whether the disparate effect of which [plaintiffs] complain is the sort of disparate impact that federal law might recognize.” *Alexander v. Choate*, 469 U.S. at 299 (holding that “the effect of Tennessee’s reduction in annual inpatient coverage is not among” those disparate-impact claims reached by the federal Rehabilitation Act). Establishing the first element also “requires that plaintiffs employ an ‘appropriate measure’ for assessing disparate impact.” *New York City Env’tl. Justice All. v. Giuliani*, 214 F.3d 65, 70 (2d Cir. 2000) (quoting *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1038 (2d Cir.1995)). To satisfy this burden, it “is simply not enough” to show that most of the population and facilities affected “are in minority neighborhoods.” *New York City Env’tl. Justice All.*, 214 F.3d at 71.

The second element includes both the need for the complainant to “identify[] the specific . . . practice that is challenged,” *Watson*, 487 U.S. at 994, and “[a] robust causality requirement,” which cannot be satisfied unless the complainant shows that the identified practice is actually “causing that disparity,” *Inclusive Communities*, 135 S. Ct. at 2523; see *Walls v. City of Petersburg*, 895 F.2d 188, 191 (4th Cir. 1990) (“Speculation as to the potential for disparate impact cannot serve as evidence of such impact itself.”). This element “ensures that ‘[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact’ and thus protects defendants from being held liable for racial disparities they did not create.” *Id.* (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e–2(k)).

Here, the complaint does not satisfy the first element of the prima facie case for at least two reasons. Most significantly, the type of impact alleged is not “the sort of disparate impact that federal law might recognize.” *Alexander v. Choate*, 469 U.S. at 299. Among the multitude of annotations and citations in the complaint, not one of them refers to a finding of disparate impact discrimination in a situation that was at all close to the scenario at issue here: a decision not to proceed with engineering of a costly construction project and the speculative effect of the decision on Baltimore residents who might or might not have chosen to travel on the Red Line upon its previously scheduled completion, eight to ten years into the future. Instead, this is the kind of circumstance that courts have deemed not susceptible to a disparate impact challenge, and for good reason. If such a decision were subject to attack on disparate impact grounds, it “would provide a powerful disincentive to government initiatives designed to benefit minority communities,” because “the law would effectively penalize those who take steps specifically designed to benefit minorities: once a program aimed at improving a minority community was begun, its curtailment . . . would, without more, establish a prima facie case of disparate impact.” *New York City Env'tl. Justice All.*, 214 F.3d at 71.

The complaint also fails to fulfill the obligation to “employ an ‘appropriate measure’ for assessing disparate impact.” *New York City Env'tl. Justice All.*, 214 F.3d at 70. At best, the complaint uses statistics to show that most of the population and facilities affected “are in minority neighborhoods,” but that showing “is simply not enough,” *id.* at 71, to establish the “significantly discriminatory impact” demanded by the case law, *Connecticut v. Teal*, 457 U.S. at 446. Actually, the complaint falls somewhere short of even that inadequate showing. “The basis for a successful disparate impact claim involves a comparison between two groups—those affected and those unaffected by the facially neutral policy,” *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003), but in this case the complaint identifies no group that is “unaffected by the facially

neutral policy” in question. Although the complaint recites that “[t]he Red Line corridor is sixty percent African-American,” Complaint at 9, the complainants’ own study purports to show that the negative consequences of the challenged decision will mostly be borne by non-African Americans, *see id.* at 30 (stating that in the model analysis conducted by ECONW, an estimated “61.3 percent of negatively affected trips were taken by whites.”).

The second element of the prima facie case is also lacking, because the complainants cannot plausibly maintain that the poverty and alleged inadequacy of existing transportation alternatives described in the complaint were *caused* by “the specific . . . practice that is challenged,” *Watson*, 487 U.S. at 994, that is, the State’s decision not to proceed with engineering of a light-rail line that would have been unavailable for service until its completion eight to ten years hence, or its decision to redirect funds to needed highway and bridge projects. The complainants appear to be attempting to accomplish precisely what the Supreme Court has said cannot be done, which is to hold defendants “liable for racial disparities they did not create.” *Inclusive Communities*, 135 S. Ct. at 2523.

Therefore, the allegations in the complaint do not add up to a prima facie case of disparate impact discrimination.

**2. The Unprecedented Cost of the Red Line and the Pressing Need to Fund Other Transportation Requirements Constitute Substantial Legitimate Justification.**

Even if the complainants could satisfy the elements of a prima facie case, the imperative need to balance the State’s transportation requirements with fiscal reality constitutes ample “substantial legitimate justification.” *Georgia State Conference of Branches of NAACP*, 775 F.2d at 1417.

Derived from the “business necessity” standard under Title VII case law, the substantial justification defense provides “[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited,” by giving defendant government authorities “leeway to state and explain the valid interest served by their policies.” *Inclusive Communities Project, Inc.*, 135 S. Ct. at 2522. Like the “zoning officials” recently referenced by the Supreme Court, State officials who oversee the transportation system “must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective . . . ; [t]hese factors contribute to a community’s quality of life and are legitimate concerns for

[government] authorities.” *Id.* at 2523 (parentheses in original). In this context, establishing the requisite “substantial justification” does not demand a showing of strict necessity. As stated in one of the decisions cited in the complaint, “an overly strict requirement of establishing transportation necessity . . . is not appropriate for judging the complex policy decisions and tradeoffs . . . in allocating funds that are always too scarce among competing legitimate needs to achieve the myriad goals for the region.” *Darensburg v. Metro. Transp. Comm’n*, 611 F. Supp.2d 994, 1054 (N.D. Cal. 2009), *aff’d*, 636 F.3d 511 (9th Cir. 2011).

### **3. The Complainants Cannot Show that Other Alternatives Would Suffice.**

Since the State unquestionably has a substantial legitimate justification, the complainants cannot overcome that showing unless they can identify “less discriminatory means [that] would serve the *same objective*” that the State is achieving by avoiding the cost of Red Line and addressing the need for highway and bridge improvements. *New York City Env’tl. Justice All.*, 214 F.3d at 72 (emphasis added). The complainant’s burden cannot be met by mere “conclusory statements about the assumed availability of other” means of achieving the objective. *Id.* at 72. “Factors such as the cost or other burdens” must be considered in determining whether the complainants’ proposed alternative “would be *equally effective* as the challenged practice in serving the employer’s legitimate business goals,” that is, the goals of cost-saving and making funds available for highway and bridge improvements. *Watson*, 487 U.S. at 998 (emphasis added). Although the complaint offers two suggested alternatives, *see* Complaint at 39, neither alternative purports to address cost-saving of a magnitude that even approaches the savings to be achieved by cancelling the Red Line, and neither alternative acknowledges the objective of improving highways and bridges. Instead, the complainants suggest either (1) an above-ground version of the Red Line with no tunnel, Complaint 39, which would subject the Red Line to the same inner-city traffic delays that buses encounter but at much higher cost-per-passenger-mile than can be achieved by buses without the Red Line, or (2) redirecting the full amount of state funds “marked to the Red Line” and devoting them to the bus system, *id.* Thus, the complainants offer no alternative that will be equally effective at achieving the objectives of the Governor’s plan, which are to meet Baltimore City’s transit needs while simultaneously achieving necessary cost-savings and addressing the need for highway and bridge improvements.



**C. The State's Transportation Decisions are Made in Accordance with FTA Title VI Requirements.**

**1. MTA has an Approved Title VI Plan.**

In addition to applying the Title VI statute (42 U.S.C. 2000d) and USDOT implementing regulations (49 C.F.R. Part 21) to programs receiving financial assistance, FTA has issued guidelines to assist recipients in carrying out the Title VI requirements. These guidelines, which are set forth in the 2012 FTA Circular 4702.1B (the "FTA Circular"), require that recipients submit a complete Title VI program every three years.

FTA approved the current MTA Title VI 2014-2017 Implementation Plan (the MTA Title VI Plan") in 2014. By letter dated October 15, 2014, Christopher C. MacNeith, Regional Civil Rights Officer, informed MTA that the FTA had determined that the MTA Title VI Plan met the requirements set out in the FTA Circular and thanked the MTA for its ongoing cooperation in meeting all of the FTA civil rights program requirements.

**2. The Decision Regarding the Red Line Project Does Not Constitute a Major Service Change under the MTA Title VI Plan.**

Complainants suggest that unless a disparate impact analysis is conducted, a jurisdiction is irrevocably bound to move forward with a construction project under Title VI once it has been initiated. There is no such requirement under the Title VI statute, regulations, or FTA guidance. Indeed, applicable regulations and the FTA Circular 4702.1B do not contemplate the application of disparate impact analysis to proposed projects that never come into being. The discontinuation of such projects while in the planning stage involves no change, implementation, or commencement of revenue operations that can be measured for adverse effects.

Under the FTA Circular, as a large transit provider, MTA is required to conduct service equity analyses in accordance with its Title VI Plan to evaluate "prior to implementation" any and all service changes that exceed the MTA's "major service change" threshold, to determine whether those changes will have a discriminatory impact based on race, color, or national origin. FTA Circular Chap. IV, § 7, p. 11. Although the FTA Circular provides guidance for defining major service changes, and notes that such thresholds are "typically presented as a numerical standard," each transit provider is authorized to develop its own definition of "major service change" suitable to the specific services it provides. FTA Circular Chap. IV, § 7(a)(1)(A), p. 12 ("[T]he transit provider

must first identify what constitutes a ‘major service change’ for its system, as only ‘major service changes’ are subject to a service equity analysis. The transit provider must conduct a service equity analysis for those service changes that meet or exceed the transit provider’s ‘major service change policy.’”).

The approved MTA Title VI Plan defines a “major service change” as follows:

#### DEFINITION OF A MAJOR SERVICE CHANGE

(a) Establish or abandon any bus or rail route listed on a published timetable;

(b) Change bus or rail route alignment listed on a published timetable, unless the change is needed because of temporary construction or changes in the road network;

(c) Reduce the frequency, number of days, or days of service for a commuter bus or commuter rail route without substituting a comparable level of service, unless the reduction is temporary or a result of:

a. A natural disaster;

b. Weather or other emergency conditions;

c. Schedule adjustments required by third party that operates service on the same right-of way; or

d. Other circumstance beyond the control of the Administration; or

(d) Establish or abandon a rail transit station.

MTA Title VI Plan at 75.

MTA’s Plan further explains that “because existing statutes already regulate in what circumstances MTA must conduct public hearings prior to service or fare change implementation, the Title VI major service change definition was established to incorporate these existing elements, but to also include other elements that are in the spirit of the protections afforded under Title VI.” MTA Title VI Plan at 76. Therefore, the MTA Plan includes Title VI equity analyses for “major service changes” and “modifications to service availability (span and/or service days),” “service quantity (frequency and/or revenue miles or hours)” and “geographic alignment.”

None of the above equity analysis requirements were triggered by the decision not to proceed with Red Line engineering and construction, because it did not fit within MTA's approved definition of a "major service change." The decision did not qualify as a "major service change" under paragraphs (a) and (b) of MTA's definition, because each of those paragraphs would apply only to a change affecting a bus or rail route "listed on a published timetable"; no such published timetable has ever existed for the Red Line. Paragraph (c) of the definition would not apply because it pertains only to a change that would "[r]educe" already existing service, which obviously would not include the nonexistent Red Line. Finally, paragraph (d) of the definition would not apply because the cancellation of the Red Line project did not constitute a decision to "[e]stablish or abandon a rail transit station."

Arguably, if the Red Line had proceeded to completion, because it was a New Starts Project, the FTA Circular would have required MTA to conduct a service and fare equity analysis "six months prior to the beginning of revenue operations, whether or not the proposed changes to existing service rise to the level of 'major service change' as defined by the transit provider." FTA Circular Chap. IV, § 7(c), p. 21, "Service and Fare Equity Analysis for New Starts and Other New Fixed Guideway Systems." However, the requirement for an "equity analysis" arises at a future date that is "six months prior to the beginning of revenue service," and that circumstance does not apply to the Red Line, which was cancelled more than 8 years prior to its projected "start of revenue service in late 2023."<sup>30</sup> The MTA followed its approved Title VI Plan, and complainants cannot seek redress for something that the MTA was not required to do.

We are continuing to review pertinent information and reserve the opportunity to supplement this response. Thank you for the opportunity to respond.

Sincerely,

A handwritten signature in black ink that reads "Pete K. Rahn". The signature is written in a cursive style with a large initial "P" and "K".

Pete K. Rahn  
Secretary, Maryland Department of Transportation

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<sup>30</sup> Federal Transit Administration, "Baltimore Red Line, Baltimore Maryland, New Starts Project Development (Rating Assigned November 2014)" at 2, available at [http://www.fta.dot.gov/documents/MD\\_Baltimore\\_Red\\_Line\\_Profile\\_FY16.pdf](http://www.fta.dot.gov/documents/MD_Baltimore_Red_Line_Profile_FY16.pdf) (last visited Mar. 3, 2016).

March 9, 2016

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cc: Nichole McWhorter, Division Manager  
Federal Highway Administration Office of Civil Rights

### **EXHIBITS**

- Exhibit 1. Press Release, "Governor O'Malley Announces Red Line Locally Preferred Alternative" (Aug. 4, 2009)
- Exhibit 2. Baltimore Red Line General Engineering Consultant Team, "Technical Memorandum: Excavation Impacts on Adjacent Structures, Downtown Tunnel Segment" (June 29, 2012)
- Exhibit 3. "Baltimore Red Line HAZMAT Project Close Out: Status of Work" (Aug. 20, 2015)