

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
DEPARTMENTAL OFFICE OF CIVIL RIGHTS**

**FEDERAL HIGHWAY ADMINISTRATION
OFFICE OF CIVIL RIGHTS**

**BALTIMORE REGIONAL INITIATIVE DEVELOPING GENUINE EQUALITY, INC.,
and EARL ANDREWS, Individually,**

Complainants,

vs.

Docket No.

**STATE OF MARYLAND, MARYLAND DEPARTMENT OF TRANSPORTATION,
MARYLAND TRANSIT ADMINISTRATION, and MARYLAND STATE HIGHWAY
ADMINISTRATION;**

Respondents.

COMPLAINT PURSUANT TO TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

On June 25, 2015, Maryland Governor, Larry Hogan, announced that the State had cancelled construction of the Red Line, a light rail line set to run east-west through the Baltimore region, and that all state funding for it would be redirected to a newly-created Highways, Bridges, and Roads Initiative, focusing on road projects in rural and suburban parts of the state.¹ In doing so, Maryland forfeited \$900 million in federal funds designated for the Line and abandoned a twelve-year planning process on which the State and federal government had expended approximately \$288 million.² A transportation economist, using Maryland's own travel model, found that whites will receive 228 percent of the net benefit from the decision, while African Americans will receive -124 percent. The decision to cancel the Red Line and divert the resources elsewhere was only the latest in the State's long historical pattern of deprioritizing the needs of Baltimore's³ primarily African-American population,⁴ many of whom are dependent on public transportation.⁵

¹ Michael Dresser & Luke Broadwater, *Hogan Says No to Red Line, Yes to Purple*, Balt. Sun (June 25, 2015), available at <http://www.baltimoresun.com/news/maryland/politics/bs-md-hogan-transportation-20150624-story.html>; Ex. 1, Press Release, Office of Governor Larry Hogan, *Governor Larry Hogan Announces \$1.97 Billion in Transportation Funding* (June 25, 2015), available at <http://governor.maryland.gov/2015/06/25/governor-larry-hogan-announces-1-97-billion-in-transportation-funding/>.

² Ex. 2, Office of Policy Analysis, Department of Legislative Services, *Red and Purple Line Updates: Presentation to the Senate Budget and Taxation and House Appropriations Committees*, July 21, 2015 ("DLS Presentation").

³ For a map of the where the Red Line would have run, please see Ex. 3 ("Red Line Map"). For a map of the city of Baltimore's neighborhoods, please see Ex. 5 ("Neighborhood Map"). For a map of the greater Baltimore region, please see Ex. 4 ("Regional Map").

⁴ Nearly half of the residents in the entire State of Maryland reside in the Baltimore-Towson Metropolitan Area: 2.7 million people of the 5.8 million people in the state. Census Table QT-P4 (2010). In the Baltimore area, and Maryland as a whole, African Americans make up approximately twenty-nine percent of the population. *Id.* Baltimore City, however, is predominantly African American. Of the 620,961 Baltimore City residents, 63.7 percent are African American. *Id.* Within Baltimore City, most neighborhoods are racially segregated, with predominantly African-American neighborhoods located on the east and west sides of the city and white neighborhoods located along the harbor and the central north part of the city. Jin Bae Kim, *Map: Legacy of segregation lingers in Baltimore*, Balt. Sun (Dec. 13, 2015), available at

The Baltimore Regional Initiative Developing Genuine Equality, Inc. (BRIDGE), and Earl Andrews (collectively, “Complainants”) bring this Complaint on behalf of themselves and African-American residents of the City of Baltimore and the State of Maryland. Complainants allege that the State of Maryland and the Maryland Department of Transportation and its sub-agencies (“MDOT”) (collectively, “Respondents”) violated Title VI through the cancellation of the Baltimore Red Line and subsequent transfer of state funds to the Governor’s Highways, Bridges, and Roads Initiative. The redirection of funds away from the east-west corridor of the Baltimore region has had and will continue to have a disparate impact on African Americans in Maryland. Respondents cannot demonstrate a substantial legitimate justification for the cancellation of the Red Line, and there are less discriminatory alternatives that would have served any purported budgetary concerns.

I. BACKGROUND

A. The History of the Red Line

a. Early Plans

State, regional, and municipal policymakers have long recognized the need for an east-west transit line in the Baltimore area, but have continuously failed to address it. In 1965, the predecessor to the Maryland Transit Administration (“MTA”) proposed six radial rail lines running from major suburban centers into downtown Baltimore, but plans stalled after a single

<http://www.baltimoresun.com/news/data/bal-baltimore-segregation-map-20150710-htmlstory.html>. Additionally, Baltimore’s African-American residents are more likely than its Caucasian residents to be poor. Alan Berube & Brad McDearman, *Good Fortune, Dire Poverty, and Inequality in Baltimore: An American Story*, Brookings Report: The Avenue Blog (May 11, 2015), <http://www.brookings.edu/blogs/the-avenue/posts/2015/05/11-poverty-inequality-baltimore-berube-mcdearman>.

⁵ In 2010, approximately twenty-five percent of African-Americans in Baltimore relied on public transportation to travel to work, compared to only eight percent of whites. *See* American Community Survey Census Table, attached as Ex. 6 (“Census Table”).

line was built.⁶ Two years later, the Baltimore Regional Planning Council proposed a similar plan consisting of six rapid transit lines, including east-west connections between Bayview, in the east, and Woodmont, in the west; seven subsequent Council Regional Transportation Plans have likewise included an east-west rail line.⁷ The most recent Baltimore City Master Plan, in 1976, included an east-west transit line, as did the 1989 and 2000 Baltimore County Master Plans.⁸ MTA's 1990 Commuter Assistance Studies, an analysis of 24 major travel corridors throughout Maryland, identified the need for an east-west rail line running from Essex, in the east, to Woodlawn, in the west; additionally, its 1997 Statewide Rail Feasibility Study examined two routes connecting downtown to Woodlawn.⁹ In 1998, Baltimore City developed a People Mover Issues Report and conducted an East-West Transit Connector Study, focusing on transit needs within the downtown area; both identified the need for a meaningful transit connection on the east-west axis, connecting Canton, in the east, to the western edge of the downtown area on Martin Luther King Boulevard.¹⁰ None of these plans were acted upon.

In the early 2000s, concrete plans for the Red Line began to take shape. In 2001, the City of Baltimore conducted the Westside Intermodal Corridor Study, which identified a set of preferred transit alternatives to connect the Social Security Administration in Woodlawn to downtown Baltimore.¹¹ In 2001 and 2002, MTA developed the Baltimore Region Rail System Plan, which recommended sixty-three miles of new rail service, including the Red Line, which it proposed would run from the Social Security Administration east to Dundalk through downtown

⁶ Ex. 7, MTA, Red Line Scoping Process Report (2004) ("Scoping Process Report"), at 8.

⁷ *Id.* at 7; Mass Transit Steering Committee, Regional Planning Council, *Baltimore Region Rapid Transit System, Feasibility and Preliminary Engineering* (1968), <http://www.roadstothefuture.com/BRRTS.html>.

⁸ Scoping Process Report, at 5.

⁹ *Id.* at 8-9.

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at 6-7.

Baltimore.¹² In 2003, the mayor of Baltimore and the chief executives of each of the adjoining counties endorsed the need for Red Line planning to begin.¹³

b. Official Planning and Development

Finally, on April 11, 2003, official planning for the Red Line began with the Federal Transit Administration (“FTA”) and the MTA’s joint issuance of a Notice of Intent to prepare a Draft Environmental Impact Statement.¹⁴ Over the course of an eighteen-month scoping process, MTA defined the goals of the Red Line as improving “system wide public transit efficiency,” “transportation choices,” “transit system connectivity,” “mobility” to major employment centers and institutions within the corridor, “community revitalization and economic development,” and “air quality.”¹⁵ Over the next eight years, MTA considered various transit alternatives that would fulfill these functions.¹⁶ MTA eventually selected a plan consisting of light rail from Woodlawn to Bayview, including tunnels under Cooks Lane and downtown Baltimore.¹⁷ In June 2011, FTA agreed to fund the Red Line through its New Starts Capital Investment Program,¹⁸ and approved the project to enter Preliminary Engineering. MTA continued the Red Line planning process, completing a Final Environmental Impact Assessment at the end of 2012 and obtaining a Record of Decision from FTA on February 28, 2013.¹⁹ In July 2013, the Red Line

¹² *Id.* at 10.

¹³ Scoping Process Report, Appendix #1.

¹⁴ Draft Environmental Impact Statement for the Red Line Corridor Transit Project; Baltimore, MD, 68 Fed. Reg. 17,855 (Apr. 11, 2003).

¹⁵ Scoping Process Report, at 4.

¹⁶ *See generally Red Line Corridor Transit Study, Alternatives Analysis Draft Environmental Impact Statement*, Volume I, Chapter 2, September 2008 (considering alternatives to the Red Line).

¹⁷ Ex. 8, Final Environmental Impact Statement (Dec. 2012) (“FEIS”), at ES-5.

¹⁸ 49 U.S.C. § 5309(b)(1).

¹⁹ Ex. 8, FTA, Record of Decision, Baltimore Red Line Project (Feb. 28, 2013) (“Record of Decision”), at 1.

project completed Preliminary Engineering and entered the Final Design/Project Development stage.²⁰

By December 2014, the Red Line was nearing the end of the Project Development process and was scheduled to enter the Engineering phase in mid-2015.²¹ Had the project continued, MTA would have received a New Starts Full Funding Grant Agreement, which would have brought \$900 million in federal funding to the project.²² Additionally, in late 2014, the State pledged \$1.235 billion from its State Transportation Trust Fund for the construction of the Red Line.²³ By this time, nearly all of the requirements for the application for the Engineering phase were complete, with only a Constructability Review yet to be finished.²⁴ By the close of 2014, the State had spent \$167 million on planning and right-of-way acquisitions and had received \$27 million in federal funding for the Red Line planning process.²⁵

c. Cancellation and Transfer of Funds to Highways

In January 2015, Maryland Governor Larry Hogan and Secretary of Transportation Pete Rahn assumed office. The same month, Respondents paused all planning for the Red Line.²⁶ These delays added costs to the project of between \$4.5 and \$9 million per month.²⁷ On March 14, Secretary Rahn met with his staff to discuss the Red Line, announcing that the State would

²⁰ Ex. 10 MTA, Red Line Monthly Progress Report to FTA (Jan. 2015) (“January 2015 Progress Report”), at 1.

²¹ Ex. 11, MTA, New Starts Overview (Dec. 11, 2014) (“New Starts Overview”) (obtained through first PIA Request), at 8.

²² Ex. 12, FTA, Annual Report on Funding Recommendations Fiscal Year 2015 (2014) (“FTA FY2015 Annual Report”) (recommending a \$900 million Full Funding Grant Agreement).

²³ FTA, FY 2016 Baltimore Red Line Profile, *available at* http://www.fta.dot.gov/documents/MD__Baltimore_Red_Line_Profile_FY16.pdf.

²⁴ New Starts Overview (obtained through first PIA Request), at 8.

²⁵ Ex. 13, PPR New Starts, Slide 4 Corrected (obtained through first PIA Request).

²⁶ Ex. 14, Letter from Sen. Catherine Pugh to Sec’y Pete Rahn (Mar. 6, 2015) (“Pugh Letter”) (obtained through first PIA Request), at 2-3.

²⁷ *Id.* at 2; Ex. 15, Dep. Sec’y Dennis Schrader, Baltimore Red Line, Project Status Presentation (Apr. 10, 2015) (“Schrader Status Presentation”) (obtained through first PIA Request), at 64.

go “back to square one on the project rationale and its finances.”²⁸ However, no written or formal reanalysis of the Red Line was ever performed by Respondents,²⁹ let alone the Title VI assessment FTA recommends recipients undertake before such changes.³⁰

On June 25, 2015, Governor Hogan, citing cost concerns, announced the cancellation of the project.³¹ As a result, the State forfeited the \$900 million of committed federal funds.³² In contrast, Respondents did not cancel plans for the Purple Line, a light rail line set to run through Prince George’s and Montgomery Counties near Washington, D.C., but, instead, merely cut part of its budget. Montgomery County has the highest per capita income of any county in the state.³³ Given the timing of both announcements, residents of the Red Line corridor maintained that animus motivated the Respondents’ decision:

[I]n West Baltimore, some residents said they believe[d] the Red Line was being killed, instead of the Purple Line in the Washington suburbs, because the city project would go through poor neighborhoods. For instance, it would have run about 10 blocks south of the Gilmor Homes, where 25-year-old Freddie Gray was arrested. His death from injuries suffered in police custody in April led to widespread unrest in the city.³⁴

²⁸ Ex. 16, Email from Dep. Sec’y Dennis Schrader to Sec’y Pete Rahn (Mar. 12, 2014) (“Schrader Email”), at 1.

²⁹ See 1000 Friends of MD, *MDOT documents fail to show review before Red Line Decision* (Aug. 31, 2015), available at <http://www.friendsofmd.org/index.php/press-and-publications/press-releases/129-press-release-august-31-2015>.

³⁰ Ex. 26, Affidavit of Amber Ontiveros (Dec. 18, 2015) (“Ontiveros Aff.”) ¶¶ 94-96 (explaining the Title VI analysis required by FTA’s Title VI Circular before any major service change).

³¹ *Hogan: State will not proceed with Red Line as currently designed*, WBALTV (June 26, 2015), <http://www.wbalv.com/politics/gov-larry-hogan-to-discuss-transportation-infrastructure/33767876>.

³² Letter from Sec’y Anthony Foxx to Barbara Mikulski (Aug. 4, 2015), available at <http://www.mikulski.senate.gov/newsroom/press-releases/us-secretary-of-transportation-confirms-red-line-federal-funding-in-jeopardy>.

³³ State of Maryland, Maryland at a Glance, Economy, <http://msa.maryland.gov/msa/mdmanual/01glance/economy/html/income.html>.

³⁴ Michael Dresser, *Hogan shifts money to roads, but not everyone’s a winner*, Balt. Sun (July 18, 2015), available at <http://www.baltimoresun.com/news/maryland/bs-md-hogan-highways-20150718-story.html>.

As for the \$736 million portion of the \$1.235 billion in state funds that Maryland had earmarked to the Red Line for the next five years, Governor Hogan announced that it would be redirected from MTA to the Maryland State Highway Administration (SHA) to pay for a number of road and bridge projects as part of the new Highways, Bridges, and Roads Initiative.³⁵ Because SHA does not administer roads in Baltimore City, none of the redirected funds will return to Baltimore and few of the road and bridge projects are near the city.³⁶ When the Maryland legislature attempted to recover some of the savings from the Red Line's cancellation, MDOT confirmed that all Red Line funds had been designated for road projects.³⁷

d. Impact on African-Americans in Baltimore

The cancellation of the Red Line has had and will continue to have significant negative impacts on the Baltimore region. The Red Line was designed to improve transportation times and accessibility in one of the most congested and poorly-served areas of the Baltimore region. Several of the neighborhoods along the Red Line route have the longest commute times in the city, with more than thirty percent of residents spending more than forty-five minutes traveling to work each day.³⁸ Forty-four percent of households in the Red Line corridor lack a vehicle; and in some neighborhoods, a majority of households have no vehicle and are entirely dependent

³⁵ Michael Dresser, *Rahn Says No New Money for Baltimore Transit*, Balt. Sun (July 21, 2015), available at <http://www.baltimoresun.com/news/maryland/politics/blog/bs-md-transportation-hearing-20150720-story.html>.

³⁶ Dresser, *Hogan shifts money to roads*, *supra* at 34; Ex. 17, Office of the Governor, Slideshow, Investing in Maryland's Highways and Bridges (June 25, 2015) ("Governor Slideshow").

³⁷ Ex. 18, Email from Erin Henson to State Legislators (Aug. 12, 2015) ("Henson Email"); see also Dresser, *Rahn Says No New Money for Baltimore Transit*, *supra* at 35 (statement of Secretary Rahn: "The savings from the Purple Line and Red Line have been committed to roads[.]").

³⁸ Baltimore Neighborhood Indicators Alliance, Vital Signs 2013, available at <http://bniajfi.org/indicators/Sustainability/trav45/>.

on buses for travel.³⁹ Despite the significant reliance on them, buses too often run slowly, with speeds from Edmondson Village to downtown of only nine miles-per-hour during peak travel times.⁴⁰ Congestion along the corridor affects private car traffic as well; “traffic speeds downtown range between 6-12 mph on streets posted at 25 mph.”⁴¹ The Red Line would have reduced travel times significantly—for example, cutting the travel time from Security Square Mall to Charles Center in half, while operating more frequently than current buses.⁴²

The Red Line would also have served as the necessary link connecting West Baltimore’s predominantly African-American neighborhoods to job centers. The Red Line corridor is sixty percent African-American and contains forty-three separate Environmental Justice (EJ) areas.⁴³ Unemployment rates in the neighborhoods along Edmondson Avenue are extremely high: 17.5 percent in Poppleton; 17.9 percent in Allendale; 22.7 percent in Edmondson Village and in Harlem Park/Sandtown-Winchester; and 24.1 percent in Greater Rosemont—compared to the city’s overall unemployment rate of 14.2 percent.⁴⁴ Travel poses a barrier for jobseekers in these neighborhoods; less than two percent of jobs within the city of Baltimore, let alone the metropolitan region, are located in these communities.⁴⁵ The regional job centers are located

³⁹ Ex. 19, Draft Environmental Impact Statement (Apr. 11, 2003) (“DEIS”), at 4.

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.* at 118; Ex. 20, MTA, Baltimore Light Rail Red Line Environmental Justice Technical Report (Oct. 2012) (“EJ Technical Report”), at 7-17.

⁴³ The Environmental Impact Analysis (EIA) defines an “Environmental Justice area” as an area in which either more than fifty percent of the population, or a meaningfully greater percentage of the population, were minority and/or low income. The EIA identified forty-three such areas along the course of the Red Line’s planned route. Of these, forty-two were classified as such as a result of the predominantly minority percentage of the population. *See id.* at 3-1, 3-2.

⁴⁴ Baltimore Neighborhood Indicators Alliance, Vital Signs 2013: Community Profiles, *available at* http://bniajfi.org/vital_signs/cprofiles/.

⁴⁵ *Id.*

downtown, in Woodlawn, and in other outlying suburban areas, which are difficult to reach on the public bus routes which are currently the only available form of public transportation.⁴⁶

Accordingly, Red Line planners, through the Red Line Community Compact, took efforts to ensure that the benefits of the Red Line would accrue to the underserved communities along the Red Line's route.⁴⁷ Many West Baltimore communities along the Red Line route have limited commercial development.⁴⁸ Strong transit connections to West Side neighborhoods would attract economic development, and many areas along the Red Line route were rezoned for mixed-use, transit-oriented development in anticipation of the Line's construction.⁴⁹ Station Area Advisory Committees for each proposed station devised plans for how the Red Line would promote economic development in their communities.⁵⁰ For example, as part of the construction process, training was to be provided to local adults and students at the Edmondson-Westside High School so that they would be qualified for jobs in construction, maintenance, and operations of the transit line.⁵¹

Although the demographics of the census tracts containing highway improvements do not necessarily reflect all of the users of the highway, they are nonetheless illustrative of the

⁴⁶ See DEIS at 5; Opportunity Collaborative, *Baltimore Regional Plan for Sustainable Development* (2015), available at http://www.opportunitycollaborative.org/assets/RPSD_Final_June_2015.pdf?ae56d8.

⁴⁷ Baltimore Red Line Community Compact, available at http://www.gobaltimoreredline.com/pdf/community_compact_11_4_09.pdf.

⁴⁸ See Baltimore Neighborhood Indicators Alliance, *Rate of Neighborhood Businesses 2013*, available at <http://bniajfi.org/wp-content/uploads/2015/03/Neibus13map.jpg>.

⁴⁹ See Baltimore City Department of Planning, *Transit Oriented Development*, available at http://rewritebaltimore.org/pdf/TRANSIT_ORIENTED_DEVELOPMENT.pdf.

⁵⁰ See Dena Belzer *et al.*, *Smart Growth America Memorandum to Harlem Park Neighborhood Council Leaders* (June 12, 2014), available at <http://www.smartgrowthamerica.org/documents/next-steps-memo-west-baltimore.pdf>.

⁵¹ Baltimore City Department of Transportation, *The Red Line Community Compact Annual Report 2012* (2012), available at http://gobaltimoreredline.com/pdf/RED_LINE_Community_Compact_ANNUAL_REPORT_2012_FINAL.pdf.

generally discriminatory direction of Respondents' transfer of funds. For the five most expensive road investments in the Highways plan, African-Americans make up merely 14.34 percent of the population of adjoining census tracts.⁵²

B. Transportation and Housing in Baltimore: A History of Discrimination

Maryland's cancellation of the Red Line is the latest chapter in a long history of racially discriminatory decisions regarding the allocation of transportation and housing resources in the State.

1. African-American Communities Have Not Benefitted From the Development of Rail Projects in Maryland.

The initial 1965 plan for Maryland's rail system consisted of a seventy-one-mile network. In 1972, the Maryland legislature approved the first phase of this plan, which consisted of the northwest and southern lines of the six-line plan. These lines were designed to connect the predominantly African-American neighborhoods near downtown Baltimore with employment and housing opportunities in the northwest and southern suburbs.⁵³ After the project was approved, however, the State ran into budget issues, and white residents in suburban Anne Arundel County vocally opposed funding a transportation project that would enable residents of predominantly African-American, northwest Baltimore to travel to their communities:

When it became obvious that there w[ere] not enough local funds to finance the entire 28-mile line, subway opposition in Anne Arundel County gained influence. Racial arguments that appealed to [the] predominately white, middle-class population gained notoriety. Bob Pascal, the new Anne Arundel County

⁵² The five most expensive projects in the Highways Plan are projects involving US 50, the Greenbelt Interchange, Interstate 270 in Montgomery County, MD 85, and the MD 175 and MD 295 Interchange. Ex. 21, New 1.35 Million for Highway Projects (2015) ("New 1.35 Million for Highway Projects") (obtained through first PIA Request), at 1. Information from the 2010 US Census Summary File, Plan 1 was used to determine the race of individuals living in the census tracts adjacent to these projects.

⁵³ Roberto Gutierrez *et al.*, *Baltimore Metro: An Initiative and Outcome in Rapid Public Transportation* 19 (Johns Hopkins University, 1990).

Executive, listened closely to a vocal group of Linthicum residents when they complained that the Metro would enable poor, inner-city blacks to travel to the suburbs, steal residents' T.V.s and then return to their ghettos in Baltimore.⁵⁴

This opposition to the building of a rail line connecting Baltimore's African-American neighborhoods to its white suburbs is believed to have spawned the term "Loot Rail", a reference to "light rail" with the implication that criminals without cars from the inner city would ride the subway to and from the suburbs to commit crimes.⁵⁵ As a result of the protests by Anne Arundel residents, the entire south line – which, again, would have connected African-American communities in northwest Baltimore to predominantly white suburban communities and job centers – was eliminated from Phase I of the rail project.⁵⁶

Community opposition to transportation improvements that sought to enhance African-American mobility continued beyond the 1970s. Baltimore's Central Light Rail,⁵⁷ which opened in 1992 and followed the northern and southern radial spokes of the 1965 plan, does not include a stop that serves the affluent, white neighborhoods of Ruxton and Riderwood because community opposition vetoed the station.⁵⁸ As former Baltimore Sun editor Gwinn Owens noted, "beneath some of this opposition is a tinge of racism. One young woman told me, 'It will

⁵⁴ *Id.* at 30.

⁵⁵ Scott M. Kozel, *Baltimore Metro Subway*, Roads to the Future (Oct. 13, 2002), available at http://www.roadstothefuture.com/Baltimore_Metro.html.

⁵⁶ Edward Coltman, *Arundel rail link shelved*, Balt. Sun (Nov. 1, 1975), at B1.

⁵⁷ The Central Light Rail currently runs from Baltimore/Washington International Thurgood Marshall Airport in Anne Arundel County through downtown to Hunt Valley in northern Baltimore County.

⁵⁸ Paul W. Valentine, *Baltimore's Light Rail Chugs Along Despite Complaints*, Wash. Post (Nov. 2, 1992), available at <https://www.washingtonpost.com/archive/local/1992/11/02/baltimores-light-rail-chugs-along-despite-complaints/22f42169-600a-4714-89ef-86cdabf5b213/>.

bring the wrong element into our community.’”⁵⁹ This opposition has been characterized as “clearly illustrative of [the residents’] elitism and racism.”⁶⁰

2. The State of Maryland, including the City of Baltimore, Has Discriminated Against African Americans in Highway Construction.

Maryland, including the City of Baltimore, has exhibited a preference for its white residents over its African American residents in highway construction decisions since at least the 1930s. In the late 1930s, Baltimore city officials determined that there was a need for an east-west expressway, purportedly to accommodate increasing cross-town traffic and to revive downtown Baltimore, but also as an effective means of “blight removal.”⁶¹ The original plan for an east-west expressway was abandoned, but not before white homeowners living along the planned highway path sold their homes and fled to the suburbs, moving into neighborhoods that explicitly excluded African Americans, either through restrictive covenants or discriminatory real estate practices.⁶²

Plans for highways across Baltimore reemerged with the enactment of the Federal-Aid Highway Act of 1956. Congress did not include relocation assistance funds in the Act; accordingly, highway planners regularly displaced African-American residents without providing any relocation assistance.⁶³ Between 1951 and 1964, approximately ninety percent of

⁵⁹ Gwinn Owens, *Down by the station (but not in Ruxton)*, Balt. Sun (May 14, 1998), available at http://articles.baltimoresun.com/1992-05-14/news/1992135170_1_ruxton-light-rail-rail-coalition.

⁶⁰ *Light rail choice proved Ruxton’s elitism, racism*, Balt. Sun (Apr. 28, 2011), available at http://articles.baltimoresun.com/2011-04-28/news/bs-ed-ruxton-light-rail-20110428_1_light-rail-ruxton-elitism.

⁶¹ Joseph F. Dimento *et al.*, *Changing Lanes: Visions and Histories of Urban Freeways* 147-48 (MIT Press, 2013).

⁶² Jessica Elfenbein *et al.*, *’68: Riots and Rebirth in an American City* 57 (Temple University Press, 2011).

⁶³ Raymond A. Mohl, *The Interstates and the Cities: Highways, Housing, and the Freeway Revolt* 16-17 (PRRAC, 2002).

all housing displacements for urban renewal, highway construction, and code enforcement were in low-income African-American neighborhoods.⁶⁴

In the 1960s, government officials devised new expressway proposals, all of which planned to use at least a portion of the predominantly African-American Franklin-Mulberry corridor in Baltimore's Harlem Park neighborhood.⁶⁵ As a result, Harlem Park residents stopped investing in their homes, and the neighborhood became filled with deteriorating and abandoned buildings.⁶⁶ The plans similarly cut through the middle-class African-American community of Rosemont in Baltimore.⁶⁷ Despite community protests, the City condemned land in the path of the proposed expressway, resulting in condemnation of the entire Franklin-Mulberry/Rosemont corridor.⁶⁸ Consequently, when federal law began requiring relocation assistance, the "fair value" of property owned by African Americans in that area had dropped significantly.⁶⁹ To accommodate for displacing homeowners, the city built 15,000 public housing units between 1951 and 1971, but ultimately more than 75,000 people were displaced – most of them African American and low income.⁷⁰

The east-west highway project was cancelled in 1981.⁷¹ Yet the impact of the failed project on the African-American community remained, evidenced by the degradation of primarily African-American neighborhoods where the expressway was planned and by the forced displacement of African-American families into inadequate and overcrowded housing:

⁶⁴ Mark H. Rose *et al.*, *Interstate: Highway Politics and Policy Since 1939*, at 127-28 (3d ed. 2012).

⁶⁵ Dimento *et al.*, *supra*, at 148.

⁶⁶ *Id.*

⁶⁷ Elfenbein *et al.*, *supra*, at 57.

⁶⁸ *Id.* at 61.

⁶⁹ *Id.* at 62.

⁷⁰ George Lipsitz, *How Racism Takes Place* 103 (Temple University Press, 2011).

⁷¹ FHWA, *Why Does I-70 End in Cove Fort, Utah* (2015), <http://www.fhwa.dot.gov/infrastructure/covefort.cfm>.

When policy makers and highway engineers determined that the new interstate highway system should penetrate to the heart of the central cities, they made a fateful decision, but also a purposeful one. Indeed, the interstate system's urban expressways, or freeways, not only penetrated the cities but they ripped through residential neighborhoods and leveled wide swaths of urban territory, ostensibly to facilitate automobility. In retrospect, it now seems apparent that public officials and policy makers, especially at the state and local level, used expressway construction to destroy low-income and especially black neighborhoods in an effort to reshape the physical and racial landscapes of the postwar American city.⁷²

3. African-American Communities in West Baltimore Have Been Subject to Governmental and Private Housing Discrimination.

The City of Baltimore has long been segregated by race, due to both private discrimination and the *de jure* segregation of public housing that was not eliminated until 1954.⁷³ Until the 1950s, Baltimore's African-American population was confined to two pockets—one to the east of downtown and one to the west.⁷⁴ Even as the population of the City grew by sixty percent, housing construction in those neighborhoods did not keep up, leaving many African Americans living in older, overcrowded buildings.⁷⁵ When African Americans moved beyond the boundaries of their neighborhoods, they were met with vandalism and, later, white flight.⁷⁶

As African Americans began to move outside of segregated neighborhoods, they were often exploited by real estate speculators that engaged in “blockbusting.” This was particularly true in Edmondson Village, a rowhouse neighborhood on the western edge of Baltimore that would have contained two Red Line stops. In Edmondson Village, real estate agents manipulated white racial animus to induce white homeowners to sell at artificially low prices and

⁷² Mohl, *The Interstates and the Cities*, *supra*, at 1.

⁷³ *Thompson v. U.S. Dept. of Housing and Urban Dev.*, 348 F. Supp. 2d 398, 443 (D. Md. 2005) (describing the segregative public housing system in the city).

⁷⁴ W. Edward Orser, *Blockbusting in Baltimore* 2, 66 (1994).

⁷⁵ *Id.* at 66.

⁷⁶ *Id.* at 68.

subsequently re-sold the homes to incoming African-American homeowners at higher prices.⁷⁷ The real estate agents often enrolled African-American newcomers in exploitative financing schemes, such as land installment contracts, which all but completely prevented the new residents from acquiring equity in their homes and building wealth.⁷⁸ A 1970 report found that the average markup for sales in Edmondson Village was double that of a comparator neighborhood, with later analyses showing markups of up to eighty percent.⁷⁹ Although Edmondson Village continues to have majority rates of homeownership, commercial investment on Edmondson Avenue has faded as more African Americans have moved in, and housing prices have failed to keep up with regional averages.⁸⁰

The Baltimore region continues to struggle to achieve full integration, as exemplified by the *Thompson v. HUD*,⁸¹ litigation and subsequent consent decree. In *Thompson*, the court found that the United States Department of Housing and Urban Development had perpetuated segregation by concentrating its public housing efforts “almost exclusively on building . . . brick-and-mortar housing within Baltimore City” and failing to take a regional approach to public housing.⁸² After years of litigation, a 2012 settlement established designated vouchers that allow

⁷⁷ *Id.* at 89-90, 96.

⁷⁸ *Id.* at 91-92.

⁷⁹ *Id.* at 134-35.

⁸⁰ *Id.* at 175-76.

⁸¹ No. MJG 95-309 (D. Md. 1995)

⁸² Orser, *supra*, at 462-63.

public housing residents to move to suburban areas of the region.⁸³ Once there, however, voucher holders continue to be impeded by the inadequate MTA transit system.⁸⁴

II. PARTIES

A. COUNSEL

Complainants in this case are represented by the NAACP Legal Defense and Educational Fund, Inc., the Civil Rights Education and Enforcement Center, Covington and Burling LLP, and the American Civil Liberties Union of Maryland.⁸⁵

B. COMPLAINANTS

Complainants are an African-American resident of the City of Baltimore and the State of Maryland and a group that represents African-American residents of the City of Baltimore and the State of Maryland who are being and will be harmed by Maryland's cancellation of the Red Line and transfer of state-allocated funds to the Governors' Highways, Bridges, and Roads Initiative.

1. Baltimore Regional Initiative Developing Genuine Equality, Inc.

BRIDGE is a nonprofit, interfaith organization of geographically, racially, and economically diverse congregations from Baltimore City and the surrounding area. BRIDGE seeks to reverse regional and state policies that create, promote, or perpetuate social, racial, and economic inequities, including those that have a disparate impact on African Americans.

⁸³ Doug Donovan, *Housing policies still pin poor in Baltimore, but some escape to the suburbs*, Balt. Sun (Dec. 13, 2015), available at <http://www.baltimoresun.com/news/maryland/bs-md-housing-segregation-20151212-story.html> (recounting the story of an individual who desired to continue to visit her doctor in the city and attend classes at the Baltimore City Community College, but could not once her car broke).

⁸⁴ Donovan, *supra*.

⁸⁵ As Complainants are represented by Counsel in this case, Complainants respectfully request that Counsel be included in or copied on all communications directed towards Complainants regarding this case.

BRIDGE's work includes efforts to combat deep regional disparities in numerous areas, such as housing, employment, and transportation. Among other successes, BRIDGE has won victories in inclusionary housing in Howard County and in Baltimore City and secured the passage of a transportation job training bill in the Maryland General Assembly.⁸⁶ BRIDGE participated in the Red Line planning process by, for example, spearheading a march for jobs, civil rights, and equitable development along the Line's future path.⁸⁷

As a result of the Line's cancellation, the constituents of BRIDGE's congregations, as well as the African-American residents of Baltimore and the Red Line corridor on whose behalf BRIDGE advocates, will lose access to transportation and employment opportunities that the Line would have otherwise made accessible to them.

2. Earl Andrews

Earl Andrews is a sixty-year-old African-American resident of the City of Baltimore⁸⁸ who has been and will be directly harmed by the Red Line's cancellation.

Mr. Andrews does not own a car and thus relies heavily on public transportation.⁸⁹ He travels to several parts of the city for school and work. He lives in the Claremont neighborhood

⁸⁶ Community Organizers Job Announcement, BRIDGE (Jan. 10, 2013), *available at* <http://www.cmtalliance.org/uploads/file/news/JobDescriptionsBRIDGE2013.pdf>; *see also* Obituary, Rev. David C. Casey, BWCUMC (Apr. 30, 2015), *available at* <http://bwcumc.org/april-30-2015-rev-david-c-casey/> (for his work with BRIDGE, Casey was presented with an award citing the organization's "victories in inclusionary housing, education, equity financing, and access to jobs for low-income citizens"); Andrew German, *A BRIDGE over Troubled Water*, Balt. Chronicle (Aug. 30, 2007), *available at* <http://baltimorechronicle.com/2007/080307German.html>; *Who We Are*, Innovative Housing Institute, <http://www.inhousing.org/who-we-are/> (last visited Dec. 12, 2015).

⁸⁷ *See Pilgrimage for Jobs and Justice*, First Unitarian Baltimore, *available at* <http://www.firstunitarian.net/index.php/component/k2/item/83-pilgrimage-for-jobs-and-justice?tmpl=component&print=1> (last visited Dec. 12, 2015) (describing BRIDGE's march for jobs, civil rights, and fair development along the path of the future Red Line); *accord* Maurice Morales, *BRIDGE Maryland announces Pilgrimage for Jobs and Justice*, Youtube (uploaded Oct. 16, 2011), https://www.youtube.com/watch?v=20bd_m4TFYA.

⁸⁸ Ex. 23, Affidavit of Earl Andrews ("Andrews Aff.") ¶ 1.

of East Baltimore, works in the downtown Harbor East neighborhood, and goes to school in North Baltimore's Roland Park.⁹⁰ While these neighborhoods are only eight miles apart, each trip is burdensome given Mr. Andrews' dependence on public transit.

As a result of traffic-related delays, it takes Mr. Andrews as long as an hour to commute to work by bus.⁹¹ Buses along his route are frequently crowded.⁹² It is not unusual for Mr. Andrews to be one of twenty individuals waiting to board a bus.⁹³ The buses are particularly overcrowded during the school year when students use the public bus system to commute to school.⁹⁴ When a bus is crowded and several individuals are waiting at a stop, bus drivers sometimes simply skip the stop.⁹⁵ When that happens, Mr. Andrews must wait at least fifteen minutes for the next scheduled bus to arrive.⁹⁶ However, on some days, scheduled buses simply do not appear.⁹⁷ Had the Red Line been constructed, it would have significantly reduced the amount of time it takes Mr. Andrews to commute to and from his job, eased the underlying traffic congestion that lengthens his commute, and offered regular, predictable service for that part of his commute.⁹⁸

To get to and from St. Mary's Seminary, where he is working towards a Master's Degree in Theology on evenings and weekends, Mr. Andrews must take an even more circuitous route.⁹⁹ The most direct bus to take him home from St. Mary's Seminary stops running before his

⁸⁹ *Id.* ¶ 2.

⁹⁰ *Id.* ¶¶ 1, 3, 11.

⁹¹ *Id.* ¶ 4.

⁹² *Id.* at ¶ 6.

⁹³ *Id.*

⁹⁴ *Id.* ¶ 4.

⁹⁵ *Id.* ¶ 7.

⁹⁶ *Id.* ¶ 9.

⁹⁷ *Id.* ¶ 8.

⁹⁸ *Id.* ¶¶ 2, 10-11.

⁹⁹ *Id.* ¶¶ 14-16.

weeknight classes finish, so Mr. Andrews has to take one bus east, and walk as many as seven blocks to transfer to a southbound bus.¹⁰⁰ The seven-block walk is tiring after a long day, particularly in inclement weather.¹⁰¹ The Red Line would have eased Mr. Andrews's trips to and from the Seminary.¹⁰²

C. RESPONDENTS

The Respondents – the State of Maryland and MDOT and its components – are recipients of grant funding from the Federal Transit Administration and Federal Highway Administration (FHWA) and are thus subject to the requirements of Title VI of the Civil Rights Act of 1964.¹⁰³ The Respondents' role in the cancellation of the Red Line and redirection of those funds to the Governor's Highways, Bridges, and Roads Initiative violates Title VI.

The State of Maryland received at least \$8.69 billion in federal assistance in 2014. The United States Department of Transportation provided \$861 million of those funds, \$519 million of which were provided by FHWA.¹⁰⁴

MDOT is a principal department of the Executive Branch of the State of Maryland.¹⁰⁵ It is composed of the Transportation Secretary's Office (TSO) and "modal" business units, each

¹⁰⁰ *Id.* ¶ 15-16.

¹⁰¹ *Id.* ¶ 16.

¹⁰² *Id.* ¶ 17.

¹⁰³ 23 C.F.R. § 200.5(p)(1); 49 C.F.R. § 21.3(a).

¹⁰⁴ Complainants calculated these numbers from the USASpending.gov federal spending database, examining all federal grants, loans, and other assistance made to recipients in the state of Maryland marked as "state government," and removing those that were miscategorized and not actually state government. Some state agencies, including MTA, were otherwise classified, so this number is likely lower than the full amount of federal assistance.

¹⁰⁵ Md. Code, State Gov't § 8-201(b)(18).

addressing a different mode of transportation.¹⁰⁶ The relevant subcomponents for the purposes of this complaint are TSO, MTA, and the Maryland State Highway Administration (SHA).

TSO coordinates planning across the modal business units and develops the annual Consolidated Transportation Program, which is the six-year capital budget for all transportation initiatives in the state.¹⁰⁷ MDOT, as distinguished from its sub-units, received \$12,649,467 in federal assistance in Fiscal Year 2014, all of which came from the United States Department of Transportation.

MTA was established in 1971, initially serving as a local bus operator for the Baltimore region.¹⁰⁸ MTA now provides public transportation in the Baltimore region through local bus routes, the Metro Subway heavy rail system, the Central Light Rail, and the Mobility ADA paratransit service. MTA also contracts for the MARC commuter rail service and commuter buses and distributes FTA funding to agencies in other parts of the state, with the exception of those in the Washington, D.C. metropolitan area.

Marylanders took 114 million trips on MTA services in FY 2014, with most of them made on the local bus service and other Baltimore-oriented services.¹⁰⁹ MTA is the sole provider of school transportation services to the middle- and high-school students in the Baltimore City

¹⁰⁶ Maryland Department of Transportation Homepage, <http://www.mdot.maryland.gov/index.html> (last visited Dec. 15, 2015).

¹⁰⁷ MDOT, Maryland's Draft FY 2016-2021 Consolidated Transportation Program, at 1, *available at* http://www.mdot.maryland.gov/Office_of_Planning_and_Capital_Programming/CTP/Index.html

¹⁰⁸ Ex. 23, The DMP Group, *Final Report, Title VI Compliance Review of the Maryland Transit Administration* (Oct. 2010) ("DMP Final Report"), at 5.

¹⁰⁹ Ex. 24, MTA Annual Report 2014 ("MTA, Annual Report 2014"), at 2.

Public Schools, amounting to approximately 30,000 students per day.¹¹⁰ MTA received more than \$226 million in federal funding in FY 2014.¹¹¹

SHA operates, maintains, and rebuilds the numbered, non-toll roads in Maryland—except those roads located within Baltimore City.¹¹² SHA received \$621 million in federal funding in FY 2014.¹¹³ According to federal spending records, SHA and MTA together received \$796,178,039 from the U.S. Department of Transportation (USDOT), of which \$518,927,440 was provided by the FHWA.¹¹⁴

III. JURISDICTION

The USDOT Office of Civil Rights has jurisdiction over complaints of discrimination in “any program for which Federal financial assistance is authorized under a law administered by [USDOT].”¹¹⁵ The FHWA Office of Civil Rights likewise has jurisdiction over complaints of discrimination from programs receiving funds administered by FHWA.¹¹⁶ A program includes “all of the operations of” “[a] department, agency, special purpose district, or other

¹¹⁰ Jonna McKone, *No Yellow Buses Here*, WYPR (Feb. 27, 2015), <http://wypr.org/post/no-yellow-buses-here-one-students-mta-commute>.

¹¹¹ MTA, Annual Report 2014, at 22. As recipients of federal funds, MDOT and MTA are also required to have a Title VI program that is compliant with 49 C.F.R. § 21 and FTA’s Title VI Circular 4702.1B. However, MDOT’s and MTA’s Title VI programs are deficient in numerous areas. *See generally* Ontiveros Aff. For example, MDOT’s program does not list public-transportation related Title VI investigations. *Id.* ¶¶ 33-34. It does not provide data regarding the disparate impact of MDOT’s programs. *Id.* ¶¶ 43-46, 57-58, 66-69, 70-73. MTA’s program does not meet the requirement that it sample and assess the performance of non-minority vs. minority routes. *Id.* ¶¶ 94-97. These deficiencies demonstrate the total lack of regard Maryland’s transportation agencies have for the requirements of Title VI.

¹¹² Ex. 25, Maryland State Highway Administration, FY14 Annual Report (“SHA FY14 Annual Report”), at 2.

¹¹³ *Id.* at 3.

¹¹⁴ MTA and SHA use the same Data Universal Number System (DUNS) number, so the federal spending database does not accurately distinguish between them as grant recipients.

¹¹⁵ 49 C.F.R. § 21.3(a).

¹¹⁶ 23 C.F.R. §§ 200.5(k), (l) & (p)(1).

instrumentality of a State,” “any part of which is extended Federal financial assistance.”¹¹⁷ MDOT, SHA, and MTA all receive federal financial assistance administered by USDOT and/or FHWA, including but not limited to, assistance for planning the Baltimore Red Line and for many of the projects in the Highway, Bridges, and Roads Initiative. All of their operations are therefore subject to the Title VI jurisdiction of the USDOT and FHWA Offices of Civil Rights.¹¹⁸

IV. THE STATE OF MARYLAND’S CANCELLATION OF THE RED LINE AND RE-ALLOCATION OF FUNDS FOR THE GOVERNOR’S HIGHWAYS, BRIDGES, AND ROADS INITIATIVE VIOLATES TITLE VI OF THE CIVIL RIGHTS ACT AND ITS IMPLEMENTING REGULATIONS.

Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹¹⁹

USDOT and FHWA have promulgated rules implementing Title VI that prohibit not only intentional discrimination, but also actions that have a disparate impact on members of a protected class. Recipients of federal funds (Recipients) are prohibited from utilizing “criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race.”¹²⁰ Further, Recipients may not, when determining the site or location of facilities “make selections with the . . . effect of excluding persons from, denying them the benefits of, or

¹¹⁷ 42 U.S.C. § 2000d-4a; 49 C.F.R. § 21.23(e).

¹¹⁸ *See also Ass’n of Mexican-American Educators v. State of Cal.*, 195 F.3d 465, 479 n.14 (9th Cir. 1999), *rev’d in part on other grounds by* 231 F.3d 572 (9th Cir. 2000) (en banc) (“The plain language of Title VI demonstrates that a State agency or department may be covered by Title VI. 42 U.S.C. § 2000d-4a(1). To the extent that one would bring suit against the State for violations by such an agency or a department, the State would be the proper defendant.”).

¹¹⁹ 42 U.S.C. § 2000d.

¹²⁰ 49 C.F.R. § 21.5(b)(2); 23 C.F.R. § 200.5(p)(1).

subjecting them to discrimination under any” transportation program “on the grounds of race, color, or national origin.”¹²¹ Finally, Recipients are “expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin.”¹²²

To establish a *prima facie* case of disparate impact under Title VI, a plaintiff must show that a recipient of federal funding utilized a facially neutral practice that had a disproportionate impact on a protected group.¹²³ If the evidence demonstrates a *prima facie* case, the recipient must then articulate a “substantial legitimate justification” for the challenged practice.¹²⁴ If the recipient can make such a showing, the inquiry then turns to whether (a) there are any equally effective alternative practices that would result in less racial disproportionality or (b) whether the justification proffered by the recipient is actually a pretext for discrimination.¹²⁵

A. The Cancellation of the Red Line and the Reallocation of Funding to Road Projects in Other Parts of the State Disproportionately Harms African Americans in Maryland.

Complainants can readily demonstrate that the cancellation of the Red Line and the reallocation of its funding have a disparate impact on African Americans in Maryland.

¹²¹ 49 C.F.R. § 21.5(b)(3).

¹²² *Id.* § 21.5(b)(7).

¹²³ *See, e.g., Lucille P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

¹²⁴ *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985), *abrogated on other grounds by Pitts v. Freeman*, 887 F.2d 1438 (11th Cir. 1989).

¹²⁵ *Id.* (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *see also Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 754 n.3 (5th Cir. 1989).

In order to establish a *prima facie* case of disparate impact in the Title VI context, a complainant must first show that the proposed federally-funded action results in “some definite, measurable disparate impact” on a group protected by Title VI.¹²⁶

Courts frequently look to the Title VII context in determining what constitutes a sufficiently disproportionate effect to establish a *prima facie* case of disparate impact under Title VI and its implementing regulations.¹²⁷ The Supreme Court has made clear that, under Title VII, a plaintiff must demonstrate that a disparity is “sufficiently substantial” to raise an inference that the challenged practice caused the disparity.¹²⁸

The Court has emphasized that there is no rigid mathematical threshold of disproportionality that must be met to show disparate impact.¹²⁹ Nevertheless, the Court has

¹²⁶ *NAACP v. Medical Ctr., Inc.*, 657 F.2d 1322, 1332 (3d Cir. 1981) (en banc); *Ferguson v. City of Charleston*, 186 F.3d 469, 480 (4th Cir. 1999) (quoting *Elston*, 997 F.2d at 1407), *rev'd on other grounds*, 532 U.S. 67 (2001).

¹²⁷ *See, e.g., Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011) (“We look to Title VII disparate impact analysis in analyzing Title VI claims.”); *accord New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Elston*, 997 F.2d at 1407 & n.14; *GI Forum, Image De Tejas v. Texas Educ. Agency*, 87 F. Supp. 2d 667, 677 (W.D. Tex. 2000); *cf. City of Chicago v. Lindley*, 66 F.3d 819, 829 (7th Cir. 1995) (assuming that Title VII disparate impact principles were applicable in a Title VI case).

¹²⁸ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988) (plurality opinion). “In *Griggs*, for example, [the Supreme Court] examined ‘requirements [that] operate[d] to disqualify [African Americans] at a substantially higher rate than white applicants.’” *Id.* at 995 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971)). “Similarly, [the Court] said in *Albemarle Paper Co.* that plaintiffs are required to show ‘that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.’” *Id.* (quoting *Albemarle*, 422 U.S. at 425). “Later cases have framed the test in similar terms.” *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 246-47 (1976) (“hiring and promotion practices disqualifying substantially disproportionate numbers of blacks”); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (employment standards that “select applicants for hire in a significantly discriminatory pattern”); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979) (“statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities”); *Connecticut v. Teal*, 457 U.S. 440, 446 (1982) (“significantly discriminatory impact”).

¹²⁹ *Watson*, 487 U.S. at 994-95.

acknowledged that disparate impact cases “usually focus[] on statistical disparities.”¹³⁰ In calculating disparities, several courts have applied a standard deviation analysis, measuring the probability that the difference between an actual result and a predicted result is random: the greater the number of standard deviations between the actual and predicted result, the less likely that the disparity reflects chance or error and the more likely that the disparity reflects an actual disparate impact.¹³¹ Other courts have held that even where a standard deviation calculation is not available or, if available, does not demonstrate a disparity, a complainant may nonetheless establish a *prima facie* case by relying on other relevant evidence, including, but not limited to the respondent’s admissions¹³² and other relevant statistical data.¹³³

¹³⁰ *Id.* at 987.

¹³¹ *Castaneda v. Partida*, 430 U.S. 482, 495-96, 496 n.17 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977); *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999), *rev’d on other grounds*, 532 U.S. 67 (2001); *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 568-69 & n.13 (4th Cir. 1985); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 973 (9th Cir. 1984); *GI Forum, Image De Tejas v. Texas Education Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000). This approach has likewise been used by administrative agencies to assess disparate impact. *U.S. v. Life Generations Healthcare, Inc.*, 11 OCAHO 1227, 2014 WL 4955643, at *18 (OCAHO Sept. 11, 2014) (applying *Castaneda* analysis to disparate impact claim); *In the Matter of Brian W. Ray*, CFTC No. 03-1, 2011 WL 639921, at *12 (CFTC Feb. 18, 2011) (accepting expert testimony that relied in part on *Castaneda* analysis); *In the Matter of: Office of Federal Contract Compliance Programs, United States Dept. of Labor*, 1997-OFC-16, 2010 WL 10838227, at *63 (DOL Adm. Rev. Bd. Jan. 21, 2010) (applying *Castaneda* analysis to disparate impact claim); *Thomas v. Dept. of Health & Human Servs.*, EEOC DOC 01811717, 1982 WL 621599, at *4 (EEOC May 14, 1982) (noting that *Castaneda* analysis is one of “[t]wo approaches frequently employed” to establish disparate impact).

¹³² *Cureton v. Nat’l Collegiate Athletic Assn.*, 37 F. Supp. 2d 687 (E.D. Pa. 1999), *rev’d on other grounds*, 198 F.3d 107 (3d Cir. 1999) (concluding that Defendant’s “admissions and the bare statistics themselves plainly evince[d] that African-Americans [we]re being selected by [the initial eligibility rules] at a rate disproportionately lower than whites”).

¹³³ *South Camden Citizens in Action v. New Jersey Dep’t of Environmental Protection*, 145 F. Supp. 2d 446 (D.N.J. 2001) (concluding that a *prima facie* case of disparate impact under Title VI was shown where, among other things, “ZIP codes with higher than the state-wide average of 20.6% non-white residents had an average of 13.7 [EPA-regulated] facilities per ZIP code, or 105% more [such] facilities, than those with a below-average number of non-white residents, which had an average of 6.7 facilities per ZIP Code); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110 (S.D. Ohio 1984) (concluding that a proposed highway would

Complainants retained ECONorthwest (ECONW), an economics firm with over three decades of experience in assessing the impact of transportation changes, including prior work with USDOT and FHWA,¹³⁴ to “determine the extent of racial disparity in the realization of benefits” from the Highways, Bridges, and Roads Initiative compared to the expected benefits that would have resulted from the construction of the Red Line.¹³⁵ ECONW’s analysis, consistent with widely adopted methods for measuring the costs and benefits of transportation changes, was geared toward measuring “user benefits”¹³⁶ and relied on the State’s own travel model – the computer program the State uses to conduct transportation planning.¹³⁷

have a disparate impact on minorities because, of those displaced by the construction, 75% were minorities); *cf. Watson*, 487 U.S. at 995 n.3 (cautioning that “a consensus” has not “developed around any alternative mathematical standard” and agreeing that, “[a]t least at this stage of the law’s development, . . . such a case-by-case approach properly reflects our recognition that statistics ‘come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances’” (quoting *Teamsters v. United States*, 431 U.S. 324, 340 (1977))).

¹³⁴ ECONorthwest is an economics firm that specializes in economics, finance, and planning. *Id.* at 1. Since 1974, ECONW has completed more than 3,000 projects, concerning business economics and modeling, natural resources economics, fiscal and economic impact analysis, land use planning, policy analysis, and urban and regional planning. *Id.* ECONW has provided expert testimony on more than 100 occasions. *Id.* ECONW regularly participates in Regional Transportation Planning efforts for various metropolitan areas, including Environmental Justice studies and assessments of disparate impact. *Id.* ECONW has worked on studies with USDOT and is on several teams that have contracted to work with FHWA. *Id.* ECONW has authored three editions of the *User and Non-User Benefit Analysis for Highways Manual*, which is used by the American Association of State Highway and Transportation Officials. *Id.* Additionally, ECONW has authored a Transit Benefit Cost Manual for the National Academy of Sciences. *Id.*

¹³⁵ Ex. 28, ECONW Report, at 4.

¹³⁶ *Id.* User benefits are defined “in the transportation context” as “savings in travel time (in various forms), fares, tolls, and operating costs.” *Id.* “Travel cost entails both monetary costs, such as the cost of gasoline, and various non-monetary costs, such as time spent driving in the car.” *Id.* at 7. Accordingly, to the extent that a person’s user benefits decrease, i.e., his or her trip becomes lengthier and/or more expensive, an individual can be said to have been negatively affected by a transportation change. Conversely, to the extent that a person’s user benefits increase, i.e., his or her trip becomes shorter and/or cheaper, it can be said that an individual was positively affected by a transportation change. For the purpose of this analysis, ECONW measured increases and decreases in user benefits under two different scenarios: (1) the Red Line scenario, in which the State proceeded only with construction of the Red Line; and (2) the

Comparing the results of the user benefit analysis for the Red Line with those for the Highways, Bridges, and Roads Initiative, ECONW found that the cancellation of the Red Line and the subsequent transfer of funds for the Line to the Highways Initiative has had and will continue to have a substantial, disparate impact on African Americans.¹³⁸ This is the case regardless of whether DOT and FHWA: 1) compare the percent of African-American trips harmed to the percent of trips they will take; 2) apply MTA's disparate impact policy; or 3) compare the effect of the cancellation of the Red Line and funding of the Highways Initiative on African-Americans and whites.

African-Americans will account for roughly 26.18 percent of all trips that the Travel Model estimates will occur annually in 2030. Accordingly, one would expect that if trips by all racial groups were affected equally by the cancellation of the Red Line and the funding of the Highways Initiative only 26.18 percent of trips taken annually by African-Americans, or 6.833 million trips, would have been lengthened or made more expensive. Yet, ECONW found that

Highway Scenario, in which the State proceeded only with the Governor's Highways, Bridges, and Roads Initiative. *Id.* at 3-4.

¹³⁷ To calculate benefits accruing from each, ECONW used the Maryland State Travel Model – a computer-based model developed and used by the Maryland State Highway Administration to measure different travel times, costs, and user volumes, across multiple modes of travel, including automobile, bus, and rail. *Id.* at 5. Using the Travel Model, ECONW is able to produce travel data between every point of origin and destination in the State. *Id.* The Travel Model can account for time of day, as well as trip purpose, *id.* at 7, and then disaggregate data based on both of these considerations. *Id.* Additionally, the Travel Model can be set to take account for future population shifts and demographic changes. For this case, ECONW incorporated projected demographic data for the year 2030, when the Red Line would have been and the Highway Improvements will be completed. *Id.* This method is consistent with that used by several major Metropolitan Planning Organizations to assess “impacts on different neighborhoods and protected classes.” *Id.* at 4. All told, the Travel Model produced 400 million data elements for this case. *Id.* at 7. Once ECONW had used the Travel Model to calculate user costs for the millions of trips that occur annually in the State of Maryland, ECONW attributed race to the results by using data from the 2010 Census' American Community Survey and Geographic Information Systems mapping techniques. *Id.* at 9.

¹³⁸ *Id.* at 13-14.

over 7.9 million trips made annually by African Americans in the State of Maryland will be lengthened or made more expensive as a result of the cancellation of the Red Line and the transfer of funding to the Highways Initiative.¹³⁹ This is a disproportionately large number as compared to the number of trips taken by African-Americans, representing a difference of 1.093 million trips, or 487 standard deviations, from the expected number.¹⁴⁰ There is virtually no chance this disparity could be the result of random chance.¹⁴¹ Any court would find this sufficient to constitute disparate impact.¹⁴²

Conversely, although white travelers took 64.8 percent of trips in the model, only 61.3 percent of negatively affected trips were taken by whites.¹⁴³

¹³⁹ *Id.* at 13.

¹⁴⁰ *Id.*

¹⁴¹ *See id.* (“The probability of the observed difference in this case being the result of random chance in this case is essentially zero (zero to more than 14 decimal places).”).

¹⁴² *Castaneda v. Partida*, 430 U.S. 482, 495-96, 496 n.17 (1977) (jury selection case suggesting two to three standard deviation limit); *Hazelwood*, 433 U.S. at 311 n.17 (noting in a Title VII case that “a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race”); *Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1556 (11th Cir. 1994) (finding an inference of race-based discrimination in an Equal Protection case where calculated disparity was 17.6 standard deviations); *Waisome v. Port Auth. of New York & New Jersey*, 948 F.2d 1370, 1376 (2d Cir. 1991) (finding in a Title VII case that two to three standard deviations can strongly indicate discrimination, but refusing to establish a minimum threshold for statistical significance); *Emanuel v. Marsh*, 897 F.2d 1435, 1443 (8th Cir. 1990) (finding in a Title VII case that disparity of 4.9 standard deviations was statistically significant and, considering the additional evidence of past discrimination, established the plaintiffs’ *prima facie* case); *EEOC v. Am. Nat’l Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981) (noting in a Title VII case that “with standard deviations of more than three, the analysis may perhaps safely be used absolutely to exclude chance as a hypothesis, hence absolutely to confirm the legitimacy of an inference of discrimination based upon judicial appraisals that disparities are, to the legally trained eye, ‘gross’”).

¹⁴³ *See* ECONW Report, at 13 (finding 27.8 million daily trips by white travelers and 16.0 million negatively affected daily trips by white travelers). The percentage of negatively affected daily trips that were taken by whites is derived by dividing the number of negatively affected daily trips by white travelers (16.0 million) by the total number of negatively affected daily trips (26.100 million). The percentage of total trips taken by whites was derived by dividing the total number of trips taken by whites (27.8 million) by the sum of the total numbers of daily trips (11.2 million by blacks, 27.8 million by whites, and 3.9 million by people of other ethnicities).

An application of MTA’s own Disparate Impact Threshold, as defined in MTA’s Title VI Equity Analysis Policies and Procedures, likewise supports a finding of disparate impact. MTA’s policy provides that a “[disparate impact] occurs if the absolute difference between 1) the percentage of minority population affected by a service reduction in one of the markets and 2) the percentage of minority population in that market is 15 points or greater.”¹⁴⁴ In this case, the Highways Initiative will negatively affect 70.5 percent of trips by African Americans in 2030, despite the fact that only 29 percent of Maryland residents are African American – a disparity that far exceeds the 15 percent threshold MTA has established.¹⁴⁵

ECONW’s tools allow it to assess not only the number of individuals harmed, but also the degree of harm, which is likewise substantial. Overall, in 2030, African Americans in the state of Maryland will receive \$19 million less annually in user benefits under the Highways Initiative than they would have had the Red Line been built.¹⁴⁶ Meanwhile, white residents in Maryland annually will gain more than \$35 million in user benefits than they would have had if the Red Line had not been cancelled and been replaced with the Highways, Bridges, and Roads Initiative.¹⁴⁷ “These results clearly show a disparate impact on blacks and other racial minorities,” as “more than 100 percent of net benefits [from the change] flow to whites and less than zero percent flow to blacks and other minorities.” Specifically, “whites receive 228 percent of net benefits from the policy change[;] in contrast, blacks receive -124 percent.”¹⁴⁸

¹⁴⁴ Ex. 27, MTA, Title VI Equity Analysis Policies and Procedures (Aug. 5, 2014) (“MTA Title VI Equity Analysis”), at 79.

¹⁴⁵ ECONW Report, at 13.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* Appendix B to ECONW’s report lists the differences in benefits resulting from the cancellation of the Red Line and the construction of the specified highway improvements in dollars – by county, by race, and by benefit source.

The Red Line, by comparison, “would [have] produce[d] benefits to [B]lack residents who travel by auto in addition to those who use transit. Of the \$19 million per year by which black residents would be better off with the Red Line, over \$7.5 million [would have been] derived from reduced congestion on highways parallel to the route of the Red Line.”¹⁴⁹

Respondents’ findings, as well as those of USDOT, buttress ECONW’s conclusions. As noted by both, the Red Line’s benefits to African Americans would have gone far beyond those that would have accrued to transit riders. The State’s own Environmental Justice Analysis – drafted in reliance on USDOT’s Order to Address Environmental Justice in Minority Populations and Low-Income Populations 5610.2(a) (May 2012); the FTA’s Circular 4703.1 Environmental Justice Policy Guidance for Federal Transit Administration Recipients (FTA 2012); and the Federal Transit Administration’s Record of Decision for the Red Line – confirm that African-American bus riders, drivers, and residents would have benefited from the Red Line’s construction.¹⁵⁰

The Red Line’s construction would have benefited bus riders in the predominantly minority areas surrounding the Red Line.¹⁵¹ These benefits would have been significant. Four of the top ten bus routes in the Baltimore metropolitan area, based on average number of daily

¹⁴⁹ *Id.* at 14.

¹⁵⁰ EJ Technical Report, at 2-1. The Report was composed pursuant to Executive Order 12,898, which requires all federal agencies to “develop an agency-wide environmental justice strategy that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” The Order also directs agencies, including FTA, to ensure that there is no discrimination based on race, color, or national origin, and that communities are given the opportunity to provide input on the planning and design of a project, as well as potential effects and mitigation measures. As the Red Line would have received federal funds, Ex. 29, FTA, New Starts Project Development, Assessment of Baltimore Red Line Light Rail Project (“FTA Assessment”), at 1, it was subject to Executive Order 12,898.

¹⁵¹ *Id.* at 7-16-17 (“Overall improved transit connectivity is a major benefit to [Environmental Justice] populations throughout the project study corridor who tend to be transit-dependent compared with the general population.”).

riders, operate within the Red Line's corridor.¹⁵² Headways¹⁵³ during peak periods for transit trips from CMS to the Bayview MARC station via the existing transit network would have decreased from ten minutes to seven minutes, and off-peak headways would have decreased from twenty or thirty minutes to ten minutes by 2035.¹⁵⁴

The Red Line also would have benefited drivers in predominantly minority neighborhoods. The Red Line would have eased congestion at several intersections. “[Thirty-one] intersections in the AM peak period and 20 intersections in the PM peak period would [have] improved under the MTA’s Locally Preferred Alternative when compared with the No-Build condition. All but ten of these improved intersections [would have been] located in EJ areas[.]”¹⁵⁵ Additionally, “the project would [have] resulted in an increase in parking spaces in many EJ areas.”¹⁵⁶ The easing of road surface congestion would have had several consequences for individuals living in these communities, including, importantly, “improve[d] emergency response times[.]”¹⁵⁷

Conversely, because the Red Line will not be built, “the overall traffic levels of service w[ill] worsen from the existing conditions throughout the entire project study corridor, including those within EJ areas, as a result of traffic volume growth . . . between 2011 and 2035.”¹⁵⁸ Travel times will increase and mobility will decrease for persons living within the project study’s

¹⁵² *Id.* at 7-16.

¹⁵³ A headway is the average interval of time between vehicles moving in the same direction on the same route.

¹⁵⁴ *Id.* at 7-17.

¹⁵⁵ *Id.* at 7-10.

¹⁵⁶ *Id.* at 7-16 (“An additional 1,134 parking spaces would [have] be[en] located at the Security Square Mall, I-70 and Brewers Hill/Canton Crossing park-and-ride lots, which would [have] be[en] constructed as part of the Locally Preferred Alternative. In addition, the planned expansion of park-and-ride lots at the West Baltimore and the Bayview MARC stations [were] programmed and would [have] add[ed] another 985 parking spaces.”).

¹⁵⁷ *Id.* at 7-22.

¹⁵⁸ *Id.* at 6-1.

corridor, including in EJ areas. “Under the No-Build Alternative, EJ populations w[ill] not benefit from [the] enhanced access to transit that would [have] be[en] associated with the implementation of the [Red Line]. As such, transit dependent EJ populations will continue to endure long commutes in the east-west direction and increased headways for transit trips.”¹⁵⁹

B. Respondents Cannot Demonstrate a Substantial Legitimate Justification for the Cancellation of the Red Line.

Where, as here, a complainant has demonstrated that a practice has a disparate impact on a protected group, the burden shifts to the Recipient to demonstrate a substantial, legitimate justification for the challenged practice.¹⁶⁰ In order to establish a substantial, legitimate justification, a Recipient must show that the practice was “necessary to meeting a goal that is legitimate, important, and integral to [its] institutional mission.”¹⁶¹ It is not enough that the Recipient identify a legitimate justification. Any justification must bear a “manifest, demonstrable relationship” to the practice.¹⁶²

Maryland cannot establish such a justification. Since the cancellation of the Red Line Project, Governor Hogan and Secretary Rahn have expressed concern that the Project was too expensive and, in particular, that the plan for a tunnel under downtown Baltimore was ill-conceived.¹⁶³ Neither of these justifications holds up under scrutiny.

¹⁵⁹ *Id.*

¹⁶⁰ *Georgia State Conference*, 775 F.2d at 1417.

¹⁶¹ *Elston*, 997 F.2d at 1413.

¹⁶² *Id.* at 1412.

¹⁶³ Michael Dresser, *With Red Line Canceled, \$288 Million May Be Gone*, Balt. Sun (June 25, 2015), available at <http://www.baltimoresun.com/news/maryland/bs-md-sun-investigates-transit-20150627-story.html> (“Hogan announced Thursday that he would not move forward with construction. He said the project was too expensive and ‘made no sense whatsoever.’”); Dresser *et al.*, *Hogan Says No to Red Line*, *supra* at 1 (“Rahn said Thursday the ‘fatal flaw’ of the Red Line project was the plan for a \$1 billion tunnel under downtown, Harbor East and Fells Point.”); *Hogan: State will not proceed with Red Line as currently designed*, *supra* at 31 (“‘Actually, I’ve heard a lot of alternatives to the Red Line. I’ve heard pro and con, but none of the issues have

First, the facts and circumstances show that Respondents' decision to cancel the Red Line Project was not made out of budgetary necessity. While the total cost of the Red Line was estimated to be \$2.9 billion, the federal government had committed to providing grants totaling \$900 million, and Baltimore City and Baltimore County had committed to cover \$230 million and \$50 million of its cost, respectively.¹⁶⁴ Private entities were to provide additional funding in return for future contracts "to operate and maintain the line."¹⁶⁵ This left Maryland to cover approximately \$1.235 billion of the cost.¹⁶⁶ Meanwhile, on the same day that Governor Hogan announced the State was cancelling the Red Line, he also announced a \$1.87 billion highway improvement plan, with \$1.35 billion of that coming from new funding.¹⁶⁷ The joint cancellation and announcement was not a coincidence, as most of the "new" money for the highway plan was cannibalized from funds that would have been expended on the Red Line.¹⁶⁸ In other words, at the same time Respondents determined that it would be "wasteful" for Maryland to spend \$1.235 billion on what they had previously described as a much needed, but yet non-existent, public transportation solution for Baltimore, Respondents committed to spending nearly as much on improvements to already existing roads in other parts of the state. Given these facts, the

been able to address this billion-dollar tunnel in the same project, and that's the fatal flaw for this proposal,' Transportation Secretary Pete Rahn said.").

¹⁶⁴ Kevin Rector *et al.*, *City, County Agree to Help Pay for Red Line as Cost Rises to \$2.9 Billion*, Balt. Sun (Aug. 26, 2014), available at http://articles.baltimoresun.com/2014-08-26/news/bs-md-red-line-contributions-20140826_1_woodlawn-to-east-baltimore-red-line-cost-rises.

¹⁶⁵ *Id.*

¹⁶⁶ FTA Assessment, FY 2016 Baltimore Red Line Profile, *supra*.

¹⁶⁷ Dresser *et al.*, *Hogan Says No to Red Line*, *supra* at 1; see also Transcript of Testimony at the Transit in the State of Maryland, Joint Hearing before the H. Comms. on Appropriations and Transp. and the Env't, 2015 Leg., 432nd Sess. (Md. 2015) (statement of Sec'y Pete Rahn, Md. Secretary of Transportation), at *7 (indicating that funding for the Red Line had been redirected to various highway projects: "On June 25th, the Governor announced a transfer of roughly \$1.3 billion to highways from transit[.]"), also available at Maryland.gov, 00:27:16, (Nov. 17, 2015).

¹⁶⁸ See DLS Presentation at 5.

cancellation of the Red Line Project, rather than being a cost-saving measure, was simply a naked transfer of resources from the project corridor's primarily African-American population to other rural and suburban parts of the state, several of which have predominantly white populations.¹⁶⁹

Second, the Respondents' cancellation of the Red Line cost the state future funding and rendered null the previous expenditures on the project. As noted above, the Red Line Project was one of a limited number of transit projects nationwide to receive approval for federal funding, with the federal government having committed to providing grants of up to \$900 million to assist in the project.¹⁷⁰ Moreover, at the time the Red Line Project was cancelled, federal, state, and local authorities had already invested upwards of \$288 million into planning for the project.¹⁷¹ This included necessary activities such as environmental assessment reports and property purchases along the project corridor.

Third, despite Governor Hogan's unsubstantiated remark that the Red Line Project was a "boondoggle"¹⁷² and Secretary Rahn's characterization of the project as "fatally flawed," the Red Line was well-planned and practicable. As detailed above, recognizing the abysmal state of Baltimore's public transportation infrastructure, state officials began considering improvements in 2001.¹⁷³ Over the course of the next fourteen years, the Red Line Project underwent serious, thoughtful, and careful planning and scrutiny, eventually gaining approval at all levels of government. This scrutiny included consideration of various transit alternatives – including

¹⁶⁹ See *supra* note 52 (discussing the racial demographics of the adjoining census tracts to the five most expensive projects in the Initiative).

¹⁷⁰ FTA Assessment at 1.

¹⁷¹ DLS Presentation at 5.

¹⁷² Dresser, *Hogan Says No to Red Line*, *supra* at 1 ("We are opposed to wasteful boondoggles," the governor said.).

¹⁷³ Ex. 30, Baltimore Region Rail System Plan Advisory Committee, Final Report (2002) ("Baltimore Region Rail System Plan Report").

maintaining the status quo, rapid bus transit systems, and other rail transit systems of different forms and configurations.¹⁷⁴ The current plan was selected only after meticulous assessment of its costs and benefits vis-à-vis other alternatives.¹⁷⁵ Once that configuration was selected, even more painstaking planning took place, and Respondents continued to carefully examine the costs and benefits of the Red Line Project.¹⁷⁶ This thorough planning and exacting scrutiny were vindicated when the federal government agreed to provide \$900 million in funding, a significant and relatively rare achievement that constituted a substantial vote of confidence in the Red Line Project.¹⁷⁷

By contrast, when Respondents cancelled the Red Line, Governor Hogan and Secretary Rahn had been in office for approximately six months, hardly enough time to fully consider the decision, particularly the cancellation's ramifications on Baltimore's infrastructure. Respondents have yet to provide any documentation or evidence supporting this choice.¹⁷⁸ In the past, USDOT has rejected inconsistent and unsubstantiated justifications like those offered by Respondents in support of the Red Line's cancellation.¹⁷⁹

¹⁷⁴ See Ex. 31, Citizens' Advisory Council for the Baltimore Corridor Transit Study, Red Line Annual Report (2009) ("CAC 2009 Annual Report"), at 3.

¹⁷⁵ *Id.* at 5.

¹⁷⁶ See EJ Technical Report (weighing environmental impact of the Red Line Project against its benefits); Ex. 32, Review of Right Rail Coalition Alternative (analyzing alternative to Red Line Project proposed by Red Line opponents).

¹⁷⁷ Dresser *et al.*, *Hogan Says No to Red Line*, *supra* at 1

(noting that the Red Line Project "was one of only six transportation projects nationwide . . . that had gone through the U.S. government's rigorous process to qualify for federal aid").

¹⁷⁸ Ex. 33, Letter from Kevin C. Reigrut, Assistant Secretary of Operations, Maryland Department of Transportation, to Ajmel Quereshi, NAACP Legal Defense and Educational Fund, Inc., Sept. 24, 2015 ("Reigrut Letter") (requesting all documents relating to the decision to cancel the Red Line).

¹⁷⁹ For example, in 2013, USDOT found that Beavercreek, Ohio had violated Title VI where it failed to justify properly its decision to refuse to build a series of bus stops in a predominantly white neighborhood unless additional security measures were implemented at those stops. Ex. 34, FHWA, *Leaders for Equality and Action in Dayton v. City of Beavercreek, Ohio* (June 26,

Furthermore, as discussed below, to the extent that Respondents were concerned about potential cost overruns from the tunnel planned to run under downtown Baltimore, Respondents could have chosen one of several less discriminatory alternatives not involving the tunnel, instead of cancelling the Red Line and diverting the entirety of the funding from Baltimore.

C. There are Less Discriminatory Alternatives That Would Have Satisfied the State's Interest.

Under Title VI, even if the Respondents are able to present a substantial legitimate justification for the challenged practice, Complainants may nonetheless prevail if they can demonstrate that there is a less discriminatory alternative that is “equally effective” at accomplishing Respondents’ interest.¹⁸⁰ “Under Title VI, ‘equally effective’ means equivalent, comparable, or commensurate, rather than identical.”¹⁸¹

As noted above, Respondents do not have a substantial, legitimate justification for the reallocation of the funding for the Red Line to the Highways, Bridges and Roads Initiative. In the event that Respondents, for the first time, now proffer such a justification, Complainants

2013) (“Beavercreek Decision”), at 11-14. As in this case, the locality offered justifications that were directly contradicted by the facts. *Id.* at 12-13.

¹⁸⁰ *See, e.g., Georgia State Conference*, 775 F.2d at 1417; *EEOC v. Joe’s Stone Crab, Inc.*, 969 F. Supp. 727, 740-41 (S.D. Fla. 1997) (holding restaurant liable where “the identical [hiring] process with cost-free adjustments could have achieved the same goals without resulting in an adverse disproportionate impact on women”), *vacated on other grounds*, 220 F.3d 1263 (11th Cir. 2000); *see also Rudder v. District of Columbia*, 890 F. Supp. 23, 46 (D.D.C. 1995) (in Title VII suit alleging content and administration of fire department’s examination discriminated against African-American firefighters, plaintiffs failed to produce less discriminatory alternative that did not suffer from serious shortcomings, including increased cost), *aff’d*, 99 F.3d 448 (D.C. Cir. 1996) (per curiam); *Stutts v. Sears, Roebuck & Co.*, 855 F. Supp. 1574, 1581 (N.D. Ala. 1994) (in Title VII case alleging compensation package had disparate impact on older workers, plaintiff failed to satisfy burden under third prong because he offered “no supporting evidence for his contention that a different pricing strategy would have been effective in the context of [the employer’s] overall financial structure”).

¹⁸¹ *Cureton v. Nat’l Collegiate Athletic Assn.*, 37 F. Supp. 2d 687, 713 (E.D. Pa. 1999) (citing *Alexander v. Choate*, 469 U.S. 287, 294 (1985)), *rev’d on other grounds*, 198 F.3d 107 (3d Cir. 1999).

respectfully request that USDOT and FHWA, consistent with the authorities cited, permit them the opportunity to demonstrate the availability of less discriminatory alternatives that would satisfy the Respondents' purported interest.

While Complainants need not respond to every conceivable justification, in the event that Respondents are able to present sufficient evidence that potential cost overruns related to the tunnel under downtown Baltimore motivated their decision, equally effective less discriminatory alternatives existed. Namely, Respondents could have invested the \$1.235 billion allocated for the Red Line to creating a more robust public transportation system in Baltimore, in another form. Instead, Respondents diverted the entirety of the funding from the City. There is no evidence that Respondents considered the discriminatory impact of their decision, let alone considered any less discriminatory alternative. Respondents' apparent failure to conduct any Title VI analysis – including a consideration of less discriminatory alternatives – not only contradicts Title VI guidance from FTA, but undermines any post-hoc rationalizations Respondents may make in this case.

D. The Baltimore LINK Program Does Not Absolve Respondents of Liability Under Title VI.

Presumably recognizing the illegality of its decision, Respondents have attempted, since cancelling the Red Line, to defuse criticism brought on by their decision by planning to re-route several current bus routes, a program which they have termed the “Baltimore LINK Program.”¹⁸² Given the fact that the Baltimore LINK Program is still in its most nascent stages, it would be inappropriate to include it in a Title VI analysis of Respondents' decision to cancel the Red Line. Furthermore, the LINK is irrelevant to the cancellation of the Red Line, as many of the changes

¹⁸² Brittany Britto, *Public Questions Proposed BaltimoreLink bus system*, Md. Rep. (Nov. 5, 2015), <http://marylandreporter.com/2015/11/05/public-questions-proposed-baltimorelink-bus-system/>.

were being considered prior to the Red Line’s cancellation and little or no funding for the LINK was tied to the Red Line’s cancellation. Additionally, preliminary indications suggest the LINK is insufficiently funded to have any meaningful impact.

1. The Baltimore LINK Program is Too Preliminary to Assess.

As Kevin Quinn, MTA’s Director of Planning, recently admitted at a Joint Hearing of the Maryland House of Delegates’ Appropriations and Transportation Committees, the Baltimore LINK Program is still in “draft, very much in draft form.”¹⁸³ As it has repeatedly emphasized, the State has yet to even finalize the routes that will make up the program.¹⁸⁴ Respondents do not expect to finalize the LINK’s express routes until “[r]oughly the middle of 2016” or present them for public comment until sometime early in 2017.¹⁸⁵

Because Respondents have yet to finalize the routes for the LINK, much less import the information into Maryland’s Travel Model, it is currently unsuitable for assessment under Title VI.¹⁸⁶ Although Respondents alleged for the first time during a legislative hearing on November 17, 2015, that they have done some modeling to assess the LINK’s impact, they have yet to release the results of any such modeling or the guidelines they used to conduct it.¹⁸⁷ Furthermore, Respondents have admitted that they do not intend to conduct a Title VI analysis of the plan until sometime in 2016, when they finalizes the routes.¹⁸⁸

2. The Creation of the LINK Program is Largely Unrelated to the Cancellation of the Red Line.

¹⁸³ Ex. 35, Transcript of *Transit in Maryland Joint Hearing* at 12, also available at 00:44:45.

¹⁸⁴ *Id.* at 13 (“So next year, we will be doing much more of analysis as we finalize our route planning. We should know the majority of where the routes are going to go next springtime[.]”).

¹⁸⁵ *Id.*; see also Ex. 36, MTA, Slideshow, Baltimore Link: A Plan to Connect Baltimore (Nov. 16, 2015) (“MTA Slideshow”), at 21.

¹⁸⁶ ECONW Report, at 3-4.

¹⁸⁷ Transcript of *Transit in Maryland Joint Hearing* at 49.

¹⁸⁸ *Id.* at 13 (Kevin Quinn: “We also have to undergo a good bit of Title VI analysis from an equity perspective[.]”), also available at 00:46:46.

Even if the LINK were sufficiently finalized such that a Title VI analysis of the program could be conducted, it is not clear that the LINK would be relevant to this case. As Respondents and their representatives have continuously and repeatedly stated, the vast majority of state funding that would have gone towards the Red Line was transferred to the Highways, Bridges, and Roads Initiative.¹⁸⁹ Accordingly, the nexus between the Highways, Bridges, and Roads Initiative and the Red Line is readily apparent. In contrast, Respondents' recent attempts to justify cancelling the Red Line on account of the Baltimore LINK program are not only unsubstantiated, but are directly contradicted by the facts.

During their recent appearance before the Maryland legislature, Secretary Rahn and Paul Comfort, Administrator and Chief Executive Officer of MTA, admitted that many of the changes that constitute the LINK program were being considered before the cancellation of the Red Line and were expected to be implemented along with the construction of the Line as part of a program known as the Bus Network Improvement Project (BNIP).¹⁹⁰

Likewise, although MDOT asserted that the cancellation of the Line allowed the BNIP recommendations to be implemented sooner than they would have been otherwise, it is not clear why this would have been the case.¹⁹¹ First, by Respondents' own written presentation to the legislature, none of the funds for the LINK came from the cancellation of the Red Line, but

¹⁸⁹ Henson Email; *see also Rahn Says No New Money for Baltimore Transit, supra* (Secretary Rahn: "The savings from the Purple Line and Red Line have been committed to roads[.]").

¹⁹⁰ *See* Transcript of *Transit in Maryland Joint Hearing* at 21-22 (discussing BNIP and its relationship to the Red Line); What is BaltimoreLink, How was the Plan Developed?, <http://mta.maryland.gov/baltimorelink> (last visited Dec. 16, 2015).

¹⁹¹ *See* Transcript of *Transit in Maryland Joint Hearing* at 21 ("And so, that's indicative of how much, how much of the resources for transit in Baltimore were being diverted to the construction of the Red Line when BNIP was going to be implemented over 18 years. Obviously an 18 year plan is not a plan."), also available at 1:10:35.

instead came from a variety of other sources.¹⁹² Second, given the relative size of each project, it is unlikely that the cancellation of one project had any relation to the other. Although Respondents were set to expend approximately \$1.235 billion in capital expenditures on the Red Line, they have pledged merely \$65 million in capital expenditures towards the LINK program.¹⁹³

3. The Baltimore LINK Program Is Insufficiently Funded.

Finally, even if the Red Line were sufficiently finalized such that a Title VI assessment could be conducted and Respondents were able to show that the creation and implementation of the LINK were a direct product of the Red Line's cancellation, the fact remains that Respondents have insufficiently funded the LINK program. As currently funded, the program will not be able to deliver the benefits that it promises.

Respondents admitted as much during the Secretary of Transportation's recent appearance before the Maryland legislature. As the Secretary stated, an important aspect of the program is transit-only ways – thoroughfares dedicated solely to the twelve new bus routes that are the heart of the program.¹⁹⁴ However, the LINK program allocates a mere \$6 million for these thoroughfares, enough only for “engineering for possible construction of east-west and north-south dedicated lanes.”¹⁹⁵ The Secretary indicated that it would be the City's responsibility to provide the necessary funding to construct the thoroughfares.¹⁹⁶ If the City

¹⁹² MTA Slideshow, at 19 (indicating that \$57 million came from federal surface transportation funds, \$48 million came from a state port dredging project that was cancelled, and \$30 million came from MTA Practical Design Savings).

¹⁹³ *Id.*

¹⁹⁴ Transcript of *Transit in Maryland Joint Hearing* at 24, also available at 01:14:22 (Paul Comfort begins answering).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 35.

chooses not to allocate funds, there is no guarantee that these changes will be implemented any sooner than they would have been before the Red Line was cancelled.

CONCLUSION

The cancellation of the Red Line and the transfer of funds that would have gone towards it to the Governor's Highways, Bridges, and Roads Initiative violates Title VI of the Civil Rights Act. The disparate effect of the decision on African Americans in Maryland, as well as Respondents' lack of a substantial legitimate justification, is clear, and fits a long pattern of discriminatory decisions impacting African-Americans in Baltimore.

For the reasons stated above, Complainants respectfully request that

- a. the United States Department of Transportation and the Federal Highway Administration find the State of Maryland and the Maryland Department of Transportation and its subagencies in violation of Title VI of the Civil Rights Act of 1964; and
- b. the United States Department of Transportation and the Federal Highway Administration take all necessary steps to ensure that the State of Maryland and the Maryland Department of Transportation and its subagencies achieve compliance with Title VI of the Civil Rights Act of 1964, including, but not limited to: discontinuing all present and future funding to the State and/or the Maryland Department of Transportation unless it agrees to resume construction of the Red Line or adopt a less discriminatory alternative; requiring the State and/or Maryland Department of Transportation to consult with a transportation expert, approved by Complainants, to develop a suitable alternative use for funds allocated to the Red Line within the City of Baltimore; launching an on-site investigation of the State's cancellation of the Red

Line and the diversion of state funds for it to the Governor's Highways, Bridges, and Roads Initiative; referring this matter to the United States Department of Justice, 49 C.F.R. § 21.13; and taking all other necessary steps pursuant to the Federal Highway Administration's powers under 23 C.F.R. § 200.11.

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