

1 HANSON BRIDGETT MARCUS VLAHOS & RUDY, LLP
2 KIMON MANOLIUS – 154971
3 WARREN WEBSTER – 209540
4 JULIA H. VEIT – 209207
5 425 Market Street, 26th Floor
6 San Francisco, CA 94105
7 Telephone: (415) 777-3200
8 Facsimile: (415) 541-9366
9 kmanolius@hansonbridgett.com

6 FRANCIS F. CHIN – 059231
7 CYNTHIA E. SEGAL – 179636
8 Metropolitan Transportation Commission
9 Joseph P. Bort Metrocenter
10 101 8th Street
11 Oakland, Ca 94607-4700
12 Telephone: (510) 817-5700
13 Facsimile: (510) 464-7848
14 fchin@mtc.ca.gov

11 Attorneys for Defendant
12 METROPOLITAN TRANSPORTATION COMMISSION

13 UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA

15 SYLVIA DARENSBURG, VIRGINIA
16 MARTINEZ, and VIVIAN HAIN;
17 individuals on behalf of themselves and all
18 others similarly situated;
19 AMALGAMATED TRANSIT UNION
20 192; COMMUNITIES FOR A BETTER
21 ENVIRONMENT,

22 Plaintiffs,

23 v.

24 METROPOLITAN TRANSPORTATION
25 COMMISSION,

26 Defendant.

No. C 05 01597 EDL

**DEFENDANT’S NOTICE OF MOTION
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
AGAINST PLAINTIFFS AND THE
PLAINTIFF CLASS FOR LACK OF
STANDING**

Date: June 24, 2008
Time: 9:00 a.m.
Crtrm: E, 15th Floor
Before: Hon. Elizabeth D. LaPorte

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 24, 2008 at 9:00 a.m. in Courtroom E of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, Defendant Metropolitan Transportation Commission ("Defendant" or "MTC"), through its attorneys, Hanson Bridgett LLP, will and hereby does move this Court for summary judgment in its favor in this action brought by Plaintiffs Sylvia Darensburg and Hain on behalf of the plaintiff class ("Plaintiffs").

This motion is made on the grounds that the Second Amended Complaint fails as a matter of law because Plaintiffs cannot show that they have standing under Article III of the United States Constitution to maintain this action; and MTC is therefore entitled to summary judgment as a matter of law.

This motion will be and hereby is based on this Notice of Motion and Motion (including the supporting Memorandum of Points and Authorities); the Declarations of Julia H. Veit, Therese McMillan, Deborah McClain, Nancy Skowbo, Kathleen Kelly, James DeHart, and Alan Zahradnik filed herewith, all pleadings and papers on file in this action any other matters of which judicial notice may be taken by the Court, and upon such oral argument and documentary evidence as may be presented at or before the hearing.

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I. INTRODUCTION

In filing their First Amended Complaint after this Court dismissed their original, Plaintiffs Darensburg and Hain proffered alleged facts that they promised this Court they could prove. After three long years of litigation, dozens of depositions, hundreds of interrogatories, and the production of massive amounts of paper and electronic data, Plaintiffs are back right where they started. Because they have no facts to demonstrate any possible notion that they have standing under Article III to maintain this action, Defendant MTC brings this motion for summary judgment to dispose of this case once and for all.

To be sure, in bringing this motion, MTC relies heavily on the same evidence that was attached to its motions to dismiss filed three years ago. Then, as now, MTC maintains that neither Plaintiffs nor the class can show the requisite injury, causation or redressability to establish Article III standing. First, neither plaintiff has demonstrated a stigmatic, economic or quality of life injury, sure to be repeated, to establish that they have suffered an injury in fact. There can be no stigma against a class of persons when the class to which they are compared has a similar racial make-up. Nor is there proof of an economic or quality of life injury.

Second, Plaintiffs cannot show that MTC's actions constitute a "substantial factor motivating" AC Transit's decisions regarding service levels or fares. To the contrary, AC Transit is thankful for MTC's efforts to address its funding shortfalls. Finally, due to the complex nature of transportation funding and finance, and the market forces which control the amount of funding available, Plaintiffs can offer nothing more than pure speculation as to whether a favorable ruling would result in a decision by AC Transit to increase its service for minority riders.

II. FACTUAL BACKGROUND

A. The Metropolitan Transportation Commission.

1. MTC's Mission and Statutory Authority

MTC is the regional transportation planning agency for the San Francisco Bay Area. (Declaration of Julia H. Veit ("Veit Decl.") ¶3 Exh. A, p.4.) The California Legislature created MTC in 1970. MTC is a metropolitan planning organization ("MPO") that provides comprehensive transportation planning for the nine Bay Area Counties. Cal. Gov. Code §§ 66500

1 *et. seq.* The region's transportation system includes 101 cities with 3 major airports, 5 public ports,
 2 8 toll bridges, dozens of highways, miles of bicycle and pedestrian routes, thousands of buses,
 3 cable cars, rail cars, and ferries, thousands of miles of local streets and roads, and over two dozen
 4 independently governed transit operators. (*Id.* ¶3, Exh. A, pp.10-15.)

5 **2. MTC's Racially Diverse and Complex Jurisdiction.**

6 MTC is not a transit operator. (Veit Decl. ¶3, Exh. A, pp. 6-7.) Rather, over twenty
 7 independently governed transit agencies provide service in the Bay Area. (*Id.* p.15.) Three transit
 8 operators provide rail service, 16 provide bus service, 1 operates ferry service, 3 operate either bus
 9 and rail or bus and ferry service. (Declaration of Therese McMillan ("McMillan Decl.") ¶3, Exh.
 10 A.) The Municipal Railway ("MUNI"), Santa Clara Valley Transit Authority ("VTA"), San Mateo
 11 County Transit District ("SamTrans"), Peninsula Corridor Joint Powers Board ("Caltrain"), Golden
 12 Gate Bridge Highway and Transportation District ("GGT"), Bay Area Rapid Transit District
 13 ("BART") and Alameda Contra Costa Transit District ("AC Transit") are the seven largest
 14 operators in the region. (*Id.* p. 8.)

15 In its 2006-2007, MTC commissioned a region-wide survey of Bay Area transit ridership.
 16 (*Id.* ¶4, Exh. B.) The Survey showed that Bay Area transit operators have very diverse riderships;
 17 of the 21 operators surveyed, 19 have a minority ridership of 50% or more. (*Id.* pp. 3-95-98.)
 18 While the results of the Survey indicate that AC Transit has among the highest percentage of
 19 minority riders at 78%, 5 of the other 6 largest operators have at least 50% minority ridership: VTA
 20 (70%), SamTrans (70%), MUNI (58%), BART (54%) and Caltrain (51%). (*Id.*) Only GGT, at
 21 38%, does not. (*Id.*) In absolute annual numbers, MUNI, BART, and AC Transit serve
 22 approximately 220 million, 100 million, and 65 million passengers, respectively. (*Id.* ¶5, Exh. A,
 23 pp. 60-63, 26 and 14); Plaintiffs' MSA at p. 5.) BART serves 54 million minority riders, MUNI
 24 serves 127 million minority riders, and AC Transit carries 50.7 million minority riders. (McMillan
 25 Decl. ¶5.)

26 Finally, transportation dollars are scarce. (*Id.* ¶6.) While MTC as the MPO for the region
 27 does seek funding for the region, transportation funding is often a zero sum game and all twenty
 28 plus transit operators have unmet needs. (*Id.*)

1 **3. MTC's Long Range Transportation Planning Activities**

2 MTC adopts a Regional Transportation Plan ("RTP") to help achieve a coordinated and
3 balanced regional transportation system including mass transit, highway, maritime, bicycle,
4 pedestrian, goods movement, and aviation facilities. Cal. Gov. Code §§ 65080, 66513, 29532. The
5 RTP also is the region's long-range transportation plan, a prerequisite for the Bay Area's projects'
6 qualification for federal funds over a 25 year time horizon. 23 U.S.C. § 134(g). The current RTP,
7 adopted in 2005, is entitled *Transportation 2030*. MTC is now preparing the 2009 RTP.

8 **4. MTC's Annual Funding Activities**

9 MTC programs certain transportation funds, and allocates others. Different rules govern
10 each funding source. Transportation funds fall into two broad categories, operating and capital,
11 and come from two major sources, federal and non-federal. (McMillan Decl. ¶10.) In almost all
12 cases, operating funds come from non-federal sources; most capital funds come from federal
13 sources. Except where operational maintenance expenses can be capitalized, "capitalized
14 maintenance," transit operators generally cannot use capital funds for operational expenses. (*Id.*)

15 **a. AC Transit Receives All Operating funds to Which It is Entitled.**

16 Plaintiffs' chief complaint revolves around AC Transit's alleged lack of operating funds.
17 There are three significant state and local transit funding sources for *operations*. First,
18 Transportation Development Act ("TDA") funds (Cal. Pub. Util. Code § 99200 *et seq.*) are
19 generated by a ¼ cent general sales tax, apportioned by county. Although BART is eligible for
20 TDA funds, MTC does not allocate any of these funds to it. (McMillan Decl. ¶13.) From 1998-
21 2006, AC Transit received all available TDA funds to which it was entitled, including that which
22 could have been allocated to BART. (*Id.*; Veit Decl. ¶5, Exh. C, pp. 27-30). Plaintiffs' expert did
23 not recommend any changes to MTC's policy with regard to allocating TDA funds. (*Id.* ¶4, Exh. B,
24 pp. 254:22-255:18, 259:15-25, 260:8-263:12.)

25 Second, State Transportation Assistance ("STA") funds (Cal. Pub. Util. Code § 99313.6 *et*
26 *seq.*) are a relatively small source of capital and operating funds generated by a sales tax on fuel.
27 The State distributes STA funds based on both population and revenues. (McMillan Decl. ¶11.)
28 Plaintiffs' expert recognized that MTC had discretion over population based funds and did so in a

1 “legal” manner. (*Id.* pp. 266:3-12.) MTC has no discretion in the distribution of revenue-based
2 funds; there is no claim that AC Transit should receive more. (*Id.* pp. 264:17-265:8.)

3 Finally, AB 1107 funds (Cal. Pub. Util. Code § 29142.2) come from a ½ cent sales tax
4 originally imposed to build BART. State law dedicates 75% of AB 1107 to BART; the remaining
5 25% may go to AC Transit, BART or MUNI. MTC allocates the 25% share equally to AC Transit
6 and to MUNI, even though BART is eligible and MUNI’s ridership is more than 3 times AC
7 Transit’s. (McMillan Decl. ¶13.) Plaintiffs’ expert testified that MTC’s allocation of AB 1107 was
8 more than acceptable. (Veit Decl. ¶2, Exh. B. pp. 46:20-49:15) In addition, there are several
9 sources of transit operating funds generated at the *local level* the vast majority of which are not
10 controlled in any way by MTC. (McMillan Decl. ¶14.) Finally, MTC has no control over the
11 disposition of funds generated by transit fares. (*Id.*)

12 **b. AC Transit Receives All Capital Funds For Which it is Eligible.**

13 MTC has direct programming authority for federal capital funds that flow by statutory
14 formula, mainly from 49 U.S.C. §§ 5307 and 5309. In most cases, operators may not use these
15 capital funds for operations. MTC has no authority to redirect federal funds earmarked by
16 Congress for specific transportation projects. (*Id.* ¶15.) The Federal Transit Administration
17 (“FTA”) administers formula §§ 5307 and 5309 funds and distributes them based on urbanized
18 areas defined by census data. Bus, rail and ferry systems are eligible for § 5307 funds. There are
19 three categories of § 5309 funds. First, rail, ferry, and limited bus projects are eligible for “Fixed
20 Guideway Modernization” funds. AC Transit did not submit an eligible project between FY 1998-
21 2006. (*Id.* ¶16.) Second, Congress makes funding decisions regarding “New Starts” funds,
22 dedicated to new rail or bus rapid transit projects, and “Bus Discretionary,” for bus and bus
23 facilities. (Veit Decl. ¶4, Exh. B, pp. 152:10-154:8.)

24 MTC’s advocacy on behalf of AC Transit for “New Starts” or “Bus Discretionary” projects
25 is undisputed. For “New Starts” funding, MTC included all projects proffered by AC Transit in its
26 “wishlist” as part of its Regional Transit Expansion Plan. (*Id.* pp. 162:10-164:7.) For “Bus
27 Discretionary funds,” MTC listed all requests from all operators in its “Annual Reports to
28 Congress,” the publication by which MTC advocates for federal funding for all operators in the

1 region. (McMillan Decl. ¶17.) Per AC Transit, MTC does “not rule” and is not involved in the
2 § 5309 discretionary funds process. (Veit Decl. ¶5, Exh. C, pp. 56-57.)

3 **c. AC Transit Has Received All “Capitalized Maintenance” Requested.**

4 Congress phased out completely federal transit operating assistance in FY 1998-99. 23
5 U.S.C. §§ 133, 149. MTC may capitalize maintenance expenses, which are normally operating
6 expenses, with § 5307 capital funds. *Id.* Federal regulations limit preventive maintenance money.
7 (Veit Decl. ¶4, Exh. B, pp. 109:12-110:1.) Inexplicably, although neither Plaintiffs nor their expert
8 can quantify AC Transit’s eligibility, requests, or receipt of preventive maintenance funds, (*id.* ¶3,
9 Exh. A, pp. 162-176, 240-248, 251-253, ¶4, Exh. B, pp. 120:17-121:7), Plaintiffs claim that MTC
10 has not provided these funds to AC Transit.

11 By consensus with its transit operator partners, MTC has historically scored preventive
12 maintenance lower than projects like capital rehabilitation or replacement. Reliance on these funds
13 for operating purposes diminishes the objective of maintaining the region’s capital plant. (*Id.* ¶3,
14 Exh. A, p. 162; McMillan Decl. ¶20, Exh. H, p. 13.) AC Transit supports MTC’s policy and
15 confirms it was created through consensus. (Veit Decl. ¶5, Exh. C, pp. 98:12-102:2, 95:18-96:4)
16 (“if [MTC] did [score preventive maintenance higher], BART could bankrupt the whole
17 system...because their [and MUNI’s] maintenance needs ... exceed everybody in the region...if
18 you made that a top scoring project, they would get all the money.”)

19 MTC has enabled operators to utilize these funds for operations by making exceptions to its
20 scoring policy. (McMillan Decl. ¶19, Exh. G, ¶23, Exh. K, ¶24, Exh. L.) In particular, MTC has
21 approved every request received from AC Transit for preventive maintenance since 1999. (Veit
22 Decl. at ¶3, Ex. A, pp. 151-154, 162-172.) In FY 2000-01, MTC approved AC Transit’s request
23 (\$49,272,738) for preventive maintenance money to free up operating dollars that could be used to
24 buy busses that did not meet federal “Buy America” requirements. (McMillan Decl. ¶21, Exh. I,
25 *e.g.*, p. 5.) In FY 2001-02 and FY 2002-03, MTC approved AC Transit’s requests, for \$4,900,000
26 and \$10,832,392 respectively. (*Id.* ¶22, Exh. J. at pp. 11, 68, 101 and 195.)

27 In FY 2003-04, in response to the recession and budget shortfalls, MTC allowed the
28 distribution of preventive maintenance funds to help address this crisis. (*Id.* ¶23, Exh. K.) AC

1 Transit requested and received \$17,192,896 in preventive maintenance funds for FY 2003-04. (*Id.*
 2 ¶44, Exh. CC, p. 4.) Again, in FY 2004-05, MTC programmed \$34,673,834 in these funds to AC
 3 Transit, \$16,235,595 of which was for operating purposes. (*Id.* p. 7.) AC Transit thanked MTC for
 4 its “considerable effort...with revenue shortfalls, primarily by allowing expenditure of preventive
 5 maintenance funds to keep bus service running throughout AC Transit’s service area.” (Decl. of
 6 Nancy Skowbo ¶__, Exh. E.) These sentiments remain true today. (*Id.*)

7 In FY 2005-06, MTC, again by consensus, adopted a new policy regarding the use of
 8 § 5307 funds whereby an operator could use these funds for preventive maintenance two out of
 9 every 12 years. (McMillan Decl. ¶19, Exh. G.) Under the 2005 policy, MTC programmed AC
 10 Transit’s request in preventive maintenance funds (\$13,776,000) for FY 2005-06. (*Id.* ¶20, Exh. H,
 11 p. 5.) AC Transit, however, did not use all of the money that year. (*Id.*) AC Transit is the largest
 12 recipient of preventive maintenance funds since 1999, receiving over \$130 million. (*Id.* p. 4.)

13 **B. Specific MTC Programs.**

14 **1. Lifeline Transportation Network Report.**

15 As part of MTC’s 2001 Regional Transportation Plan (“2001 RTP”), MTC included the
 16 Lifeline Transportation Network Report (“LTN”). The LTN assessed the ability of the fixed route
 17 transit system to serve low-income communities. About half (43%) of the region’s existing transit
 18 routes met the criteria for lifeline service. (McMillan Decl. ¶25, Exh. M.) In the 2005 RTP, MTC
 19 dedicated \$216 million in new funds to supplement already existing lifeline services and programs
 20 -- in addition to MTC’s core investment in basic transit service, which is funded primarily by
 21 public subsidy. (*Id.* ¶8, Exh. C, pp. 52-55.) More recently, MTC committed an additional \$143
 22 million. (*Id.* ¶28, Exh. N.) Even though MTC has already committed \$359 million to this
 23 program, Plaintiffs still cry foul.

24 MTC has been aggressive in implementing the Lifeline Program. MTC has initiated a grant
 25 program, called the Community Based Transportation Plan (“CBTP”) process, by which
 26 communities apply for funds to pay for planning to best address transit gaps. Plaintiffs’ expert
 27 testified that community based organizations are a good way to go. (Veit Decl. ¶6, Exh. D, pp.
 28 47:11-22.) MTC identified five “areas of concern” in AC Transit’s District, out of 25 in the region

1 (Skowbo Decl. ¶11, Exh H.) “AC Transit staff has been an active participant in the development of
 2 all the CBTPs in the service area,” which are managed by the Alameda County Congestion
 3 Management Agency. (*Id.*)

4 **2. Richmond Bus Project and Free Bus Passes**

5 Although Plaintiffs refer to a letter sent to MTC by 39 Ministers demanding that MTC fund
 6 a specific Richmond bus program in 2001, the letter contains no such request. (McMillan Decl.
 7 ¶29, Exh. O.) Nor did AC Transit ever request funding for that program. (*See id.* ¶30, Exh. P; Veit
 8 Decl. ¶3, Exh. A, pp. 186-187.) Instead, another operator, WestCAT, *requested and received*
 9 funding for an “Intra West Contra Costa Rapid Bus,” ranked as the most cost-effective project in
 10 the Blueprint Project Notebook referenced in the SAC. (McMillan Decl. ¶33, Exh. S.)

11 With regard to AC Transit’s free bus pass program, MTC provided AC Transit \$1 million
 12 to fund a pilot program. (*Id.* ¶34, Exh. T.) MTC did not fund the program a second year because it
 13 was unsuccessful. AC Transit testified that the program lost money and was a “disastrous idea.”
 14 (Veit Decl. ¶5, Exh. C, pp 71:16-25, 76:18-24; ¶8, Exh. F, pp.49:12-14.) Finally, no other
 15 operator receives such funding. (McMillan Decl. ¶34.)

16 **C. The Alameda Contra Costa Transit District**

17 AC Transit runs busses in Alameda and Contra Costa counties, as well as Transbay service.
 18 (Veit Decl. ¶3, Exh. A, pp. 91-92.) AC Transit connects with nine other bus systems, 21 BART
 19 stations, six Amtrak stations, and three ferry terminals. (*Id.* pp. 92-94.)

20 **1. AC Transit Controls Its Operating Revenues.**

21 AC Transit is a creature of statute. Cal. Public Utilities Code §24561 *et seq.* AC Transit’s
 22 Board of Directors is “the legislative body of the district and determines all questions of policy.”
 23 *Id.* §24883; see also §§24884-5, 24885, 24506. The Board, of course, is “responsible for the
 24 budget...They set fares and they decide on service levels.” (Veit Decl. ¶4, Exh. B, pp. 33:23-34:6.)
 25 “They have ultimate responsibility, acting...on recommendations of staff as to what service will be
 26 provided,” including routes and frequency. (*Id.* 34:7-19.) The elected Board is very independent.
 27 (*Id.* at pp. 33:2-22; *see also* Cal. Pub. Util. Code §§24646 *et seq.*, 24823 *et seq.*, and 24830 *et seq.*)
 28 FTA agrees with this sentiment: “[t]here is no evidence to suggest that MTC has had a significant

1 controlling affect on AC Transit's regular bus operations....MTC's role is principally that of an
 2 oversight and transfer agent that is not directly responsible for AC Transit's operating decisions.
 3 AC Transit does . . . have substantial latitude in determining how its funds are allocated."

4 (McMillan Decl. ¶31, Exh. V.)

5 **2. AC Transit's Service Cuts and Ridership Gains.**

6 MTC in no way has caused AC Transit's service cuts. AC Transit cut service between June
 7 2003 and June 2004 by about 14% (Veit Decl. ¶8, Ex. F, pp. 12:19-13:9), Declaration of Deborah
 8 McClain ("McClain Decl.") at ¶2, Ex. A p. vi.), but Plaintiffs' expert believes that the cuts were
 9 closer to 10%. (Veit Decl. ¶4, Ex. B, pp. 184:15-185:3.) Since June 2004, AC Transit has only
 10 added service. (*Id.* ¶8, Ex. F, pp. 12:19-23.)

11 AC Transit's Board Policy 550, "Service Standards and Design Policy," governs the
 12 allocation and distribution of service, including the December 2003 cuts. (Skowbo Decl. ¶9, Exh.
 13 F, ¶5 Exh. B; Veit Decl. ¶8, Exh. F.) "Geographic equity is a consideration, but it is not as
 14 important as providing more frequency when such service is warranted." (Skowbo Decl. ¶5, Exh.
 15 F, pp. 20:17-21:11.) Route productivity is important when looking at cuts. (Veit Decl. at ¶8, Exh.
 16 F, pp. 19:25-20:9.) This is sound policy. (*Id.* ¶4, Exh. B, pp. 57:4-59:1.) Moreover, it "places
 17 more emphasis on income than on ethnicity because the...[entire AC Transit service] area is
 18 mixed." (*Id.* ¶8, Exh F, pp.19:25-20:9.) AC Transit's FY 2003-04 cuts were due to the recession.
 19 (Skowbo Decl. ¶7, Exh. D, Ch.1.) The recession battered transit operations because of the heavy
 20 reliance on sales tax revenues, which comprise 40% of operating revenues. (McMillan Decl. ¶41,
 21 Exh Z.) AC Transit's SRTP for FY 2003-2012, echoes this:

22 [m]ost of AC Transit's operating program revenue originates from fuel,
 23 sales, property, or other related taxes and fares...the recession...
 24 increased unemployment and stalled consumer spending [and]
 25 decreases in sales tax revenue. Ridership declined by 10% between FY
 26 2001-02 and FY 2002-03, and fare collections are down. The current
 27 economic downturn has had a significant negative impact on District
 28 funding. According to MTC, anticipated tax generations for FY 2002-
 03 reflect a precipitous drop compared to the actual receipts of FY
 2001-02. The region relies heavily on sales tax revenues for transit
 operations, and economic indicators do not forecast a strong recovery
 for the San Francisco Bay Area for FY 2003-04 or FY 2004-05.

(Skowbo Decl. ¶7, Exh. D.) As to the December 2003 and June 2004 cuts, AC Transit:

1 protected the trunks. We protected the low income areas. We *mostly*
 2 *cut service up in the hills*, and we had done analysis previous to that
 3 that basically said if we protected the trunks, we were protecting
 4 most of the low income riders. We were also protecting most of the
 riders anyway....[w]e mostly cut low priority lines....we have a list
 of performance by routes, and we just started at the bottom up and
 worked our way up.

5 (Veit Decl. ¶8, Exh. F, pp. 22:2-23, 23:7-11) (emphasis added).) With the cuts, ridership increased
 6 4% in FY 2003-04 and fare box recovery increased as well. (*Id.* ¶8, Exh. F, pp. 33:19-24),
 7 McMillan Decl. ¶2, Ex. A.) AC Transit reported that:

8 we cut service in places where very few people were taking the bus
 9 and we protected it where they were....I think the economy started
 10 taking an upturn, and so where we protected the service, people were
 able to keep riding the bus or start riding it some more....My
 recollection is that ridership did start creeping up..

11 (Veit Decl. ¶8, Exh. F, pp. 33:19-34:12) Thus, service cuts do not “weaken” the system. (*Id.*
 12 51:11-23.) (“Sometimes it’s a good opportunity to get rid of the dead wood. It’s a political
 13 decision, and it’s a lot easier for the policymakers to cut service when they have a funding crisis,
 14 and it just gets rid of stuff that they should have got rid of a long time ago.”)¹

15 Other operators were not so fortunate. SamTrans, a San Mateo bus operator, cut its VRM
 16 by some 8.5% and lost 12% of its ridership over the same period. (DeHart Decl. ¶¶ 3-8.) GGT, a
 17 bus operator in Marin County, cut its service by a whopping 32% and lost 12% of its ridership.
 18 (Zahradnik Decl. ¶¶ 2-6)² Most transit operators cut service and lost riders.(McMillan Decl.¶3, A)

19 **D. Plaintiffs’ Injuries**

20 Plaintiffs Hain and Darensburg allege injuries not tied to service cuts or MTC actions.

21 **1. Plaintiff Hain**

22 Hain lives in Berkeley, some 4 blocks from the Berkeley BART station. (Veit Decl. ¶G,
 23 Exh. 9, pp. 5:22-24; 112:11-13.) From February 2002 through July 2006, she lived in east Oakland
 24 (*Id.* at 14:24-15:4), and before that she lived on San Pablo near 20th Street. (*Id.* 13:13-16.) She
 25 has 3 daughters and owns a 1986 BMW 325E, which she acquired in 2006. (*Id.* 9:9-14, 64:19-25,
 26

27 ¹ AC Transit conducted a Title VI report on the cuts it made in this period. (Skowbo Decl. ¶6,
 Ex.C.)

28 ² SamTrans’ ridership is 70% minority. GGT’s ridership is 38% minority. (McMillan Decl. ¶2,
 Exh. A.)

1 65:19-22.) Since 2001, Hain has owned a car for most of the time. (*Id.* 78:24-79:5, 74:8-15, 72:
 2 15-22, 70:13-71:12; 79:10-80:1.) When her car is in the shop, Hain uses AC Transit. (*Id.* 64-79.)
 3 Since March 2002, Hain has had an unlimited bus pass, free bus tickets, or a gas allowance of up to
 4 \$70 per month. (*Id.* 48:4-51:10; 69:14-70:9.)

5 **a. Jobs and Volunteer Positions**

6 Hain used AC Transit to get to work for a 2 month position. (*Id.* 21-24.) Since 2001, Hain
 7 has volunteered with various organizations. She volunteered: to obtain cash assistance for a
 8 “welfare to work” program (*Id.* pp. 34:17-24) for 10-15 hours a week for 5 months and used AC
 9 Transit Route 51A even though she had a car (*Id.* 34:9-16; 78:24-79:5; 36:12-15); to get food
 10 assistance for 20 to 30 days for 3 hours per day at a Food Bank and used AC Transit to get there
 11 (*Id.* 41:5-42:14; 43:23-44:4; 45:25-46:16); and, to obtain help with Welfare to Work requirements
 12 once a week at LIFETIME (*Id.* 54:17-20, 55:5-13) and used the 82 or 82L bus, even though she
 13 owned a car. (*Id.* 55:15-16; 57:12-13; 74:8-15.)

14 **b. Education Opportunities for Hain and her Children.**

15 Hain currently attends college. (*Id.* 81:18-20.) Even though she had a car, she dropped her
 16 classes in Spring 2005 because “[transportation] became an issue, a problem with getting home at
 17 night. [She] was missing too much class. [She] had night classes, and [she] was on the bus during
 18 that time. (*Id.* at 85:15-20.) Hain used AC Transit lines 82, 40, 40L, and 56. (*Id.* at 86:23-25.)
 19 Currently, Hain has no problems getting her children to school. In the past, after AC Transit line 6
 20 was cut around 2003-2004, Hain claims there was “no public transportation access to her
 21 daughter’s school” even though she had a car. (*Id.* at 108:2-6.)

22 **c. Public Safety.**

23 Finally, while Hain claims that AC Transit Routes 43, 46, 56, and 82 were reduced in 1998,
 24 she claims no harm apart from “worsened public safety” with respect to the 82, 82L and the 43
 25 lines. (*Id.* at 117:9-12.) Hain’s only claim is that there are longer walks to and waits for buses in
 26 the evening and early morning hours. (*Id.* at 116:12-117:3.) Because Hain had a car and a free bus
 27 pass, there is no evidence that AC Transit cuts or fare increases have harmed her.
 28

1 **2. Plaintiff Darensburg.**

2 Sylvia Darensburg lives in Oakland and has three children in their late teens or early
3 twenties. (Veit Decl. ¶10, Exh. H, pp. 15:4-5, 25:1-6.) Darensburg's son and one of her daughters
4 each has a car. After losing access to a car in 2001, she relies on her children, co-workers, and
5 public transit. (*Id.* 37:6-14; 84:14-85:7; 92-93, 217:4-23.) Before living in Oakland, Darensburg
6 lived in within 5 to 7 blocks from and used Hayward BART. (*Id.* 100:2-10; 102:18-103:3; 105:7-
7 16.) Since then, Darensburg has lived either on MacArthur Boulevard or 96th Avenue, within
8 walking distance of AC Transit lines: 57, 40, 46, and NL (Transbay). (*Id.* 117:14-25, 118:9-13.)
9 She estimates that she takes BART 5 to 7 times per week in connection with riding AC Transit. (*Id.*
10 ¶11, Exh. I, p. 14-15.)

11 From December of 2001 until Jan. 2003, she used AC Transit, BART, other bus service,
12 and rides from co-workers to access her various jobs. (*Id.* ¶10, Exh. H, pp. 59:7-9, 59:24-60:7,
13 62:2-8, 90:21-25, 91:6-8, 92:4-23, 93:17-24; 136-139.) While she was aware of proposed cuts,
14 she did not notice any actual AC Transit cuts until August of 2003. (*Id.* 31:20-25, 136:2-19.)
15 Darensburg claims that changes to the 57, 58, and 58X bus routes, which run along MacArthur
16 between east Oakland and downtown Oakland, have had an impact on her. (*Id.* at 36-139, 195-
17 197; Skowbo Decl. ¶4, Exh. A, p. 2.) She rode the 57 bus daily and claims that AC Transit's
18 changes added travel time. (Veit Decl. ¶10, Exh. H, pp. 129:9-15; 136:22-137:8.) She now used
19 the 40L, then transfers to the 57. (*Id.* 165:8-14.) Because of changes to the 58 line, she has to walk
20 an extra 3 or 4 blocks "from where the 57 let [her] off" to visit her daughter. (*Id.* 195:10-15.) She
21 alleges changes to the 58X made her the trip to downtown Oakland for job searches and legal
22 appointments take "twice as long," *id.* at 139:7-12, even though other AC Transit alternatives are
23 available. (*Id.* 160:11-15.)

24 AC Transit streamlined its service on MacArthur in Dec. 2003: it merged the 58 and the
25 58X (a peak period service) with the NL into one limited stop line running between Eastmont
26 Transit Center and Emeryville; it shortened the 57 to run every 12 minutes as of June 2004; and the
27 50 operated every 15 minutes on weekdays. (Skowbo Decl. ¶4, Exh. A, p. 2-3.) Darensburg now
28 catches a 40L bus to Eastmont Transit Station, where she then transfers to the 57, headed towards

1 downtown Oakland. (Veit Decl. ¶10, Exh. H, pp. 165:8-14.) She claims that these changes added
2 a single transfer to her downtown Oakland commute.

3 Moreover, according to a 2004 AC Transit study on the impacts of these changes and
4 determined that the “changes appear successful.” (Skowbo Decl. ¶4, Exh. A, p.3.) The MacArthur
5 corridor changes did not have a negative impact on minority neighborhoods. (Kelly Decl. ¶4, Exh.
6 I.) None of the routes identified: 57, 58, or 58X were among those AC Transit listed as cut. (*Id.*)

7 **a. Employment.**

8 AC Transit’s 2003-2004 cuts did not affect Darensburg’s work. She worked in Concord for
9 one month in late 2003. (Veit Decl. ¶10, Exh. H, pp. 60:2-9.) She rode the 40L bus to the
10 downtown Oakland BART, rode BART to Concord, then connected to CCCTA. (*Id.* at 69:18-24.)
11 She worked until 5:30 p.m. at the latest, and she arrived home in the evening at about 7:30. (*Id.*
12 70:6-7, 72:15-17.) Although she stated that the 40L stopped running early, it runs to 7:45 p.m. (*Id.*
13 139:13-17; *id.* ¶11, Exh. I, pp. 35:22-23.) Between 2003 and 2005, Darensburg volunteered at
14 LIFETIME; she got paid there from April 2005 until May 2006. (Veit Decl. ¶10, Exh. H, pp.74:13-
15 75:4.) She attended classes after work and admits no impact from AC Transit cuts as the change to
16 the 92 Route was absorbed by the 77 and 84 bus. For a week in 2006, she worked in Berkeley.
17 (*Id.* 38:10-39:1, 39:17-20.) Darensburg claims that the 40L was cut, but admits that this was the
18 slowest of three options available to her. (*Id.* 41:7-42:3, 53:24-54:8, 52:22-53:3.)

19 **b. Additions to AC Transit’s Service**

20 Darensburg has enjoyed new service since the 2003-2004 service changes, including the
21 72R; the M route, added in 2003, to get from Hayward BART to Chabot College for classes; the
22 NX3 route, a Transbay route servicing MacArthur corridor and running past the Eastmont Transit
23 Station; and a new all-nighter service to which she has access from her home in Oakland added in
24 2006. (*Id.* 198:24-199:7, 197:18-198:8, 166:6-167:13, 145:20-146:7.)

25 **c. Public Safety and Bus Conditions**

26 Darensburg claims that AC Transit’s public safety has “worsened.” Due to route changes,
27 she walks in unsafe neighborhoods; since the 58 was cut in 2003, she had to walk three to four
28 blocks in an unsafe neighborhood to see her daughter. (*Id.* 195:1-15.) She also notes however that

1 the 57 was "a pretty clean bus." (*Id.* 126:2-5.)

2 III. PROCEDURAL BACKGROUND

3 Plaintiffs allege that MTC has violated: (1) Title VI of the Civil Rights Act of 1964, 42
4 U.S.C. § 2000d; (2) the Equal Protection Clause; and, (3) California Government Code § 11135.
5 Without identifying any funding decision, Plaintiffs seek a declaration that MTC has violated each
6 of these three laws. (SAC Prayer at ¶¶2-4.) Plaintiffs seek injunctive relief to enjoin MTC from:

7 (1) making any funding decision that has an unjustified disproportionately adverse impact
8 on AC Transit riders of color, including decisions that cause an inequitable subsidy per
9 passenger trip and/or inequitable quality or quantity of service for AC Transit riders as
compared to Caltrain or BART passengers; and,

10 (2) supporting the funding of or funding any improvement or expansion in service that
11 detracts from the equitable funding of services that benefit AC Transit riders.

12 (*Id.* at ¶¶ 5,6) MTC moved to dismiss the Complaint on standing grounds. (Docket No. 5.) The
13 Court granted the motion with leave to amend on September 19, 2005. ("Order I" Docket No. 33.)
14 In its Order, the Court recognized that only intentional discrimination is actionable under the
15 federal claims. (Order I at p. 14.) MTC again moved to dismiss, but the Court denied that motion
16 on January 20, 2006. ("Order II") Docket No. 66.) Plaintiffs filed the operative Second Amended
17 Complaint ("SAC") on November 1, 2007, Docket No. 137, which MTC answered.

18 III. LEGAL ARGUMENT

19 A. Legal Standard

20 When jurisdiction is challenged, it is axiomatic that the party invoking the jurisdiction of
21 the court bears the burden of demonstrating the existence of jurisdiction throughout the litigation.
22 *See Warth v. Seldin*, 422 U.S. 490, 518 (1975). Standing is not a mere pleading requirement, "but
23 rather an indispensable part of the plaintiff's case, each element must be supported in the same way
24 as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and
25 degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of*
26 *Wildlife*, 504 U.S. 555, 561 (1992). Indeed, "in response to a summary judgment motion, the
27 plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other
28 evidence 'specific facts,'" demonstrating standing. *Id.*; *see also Spencer v. Kemna*, 523 U.S. 1, 10

1 (1998) (It is not sufficient for standing to be inferred from arguments and averments in the
2 pleadings, but must affirmatively appear in the record.) Thus, where, as here, the moving party
3 demonstrates the absence of jurisdiction, "the party opposing the motion must furnish affidavits or
4 other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *See Safe*
5 *Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

6 **B. Because the Representative Plaintiffs Lack Standing To Bring This Action In Federal**
7 **Court, so Does the Class They Represent.**

8 Standing is "an essential and unchanging part of the case-or-controversy requirement of
9 Article III," *Lujan*, 504 U.S. at 560, which itself "defines with respect to the Judicial Branch the
10 idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468
11 U.S. 737, 750 (1984). "No principle is more fundamental to the judiciary's proper role in our
12 system of government than the constitutional limitation of federal-court jurisdiction to actual cases
13 or controversies." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). Standing,
14 unlike other jurisdictional doctrines, "focuses on the party seeking to get his complaint before a
15 federal court and not on the issues he wishes to have adjudicated." *Id.* at 38.

16 In a class action, standing is satisfied if the plaintiff class shows that at least one named
17 plaintiff has standing. *See Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001). "That a suit
18 may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who
19 represent a class 'must allege and show that they personally have been injured, not that injury has
20 been suffered by other, unidentified members of the class to which they belong and which they
21 purport to represent.'" *Simon*, 426 U.S. at 40, n. 20.

22 The Ninth Circuit follows the *Lujan* standing test: (1) the plaintiff suffered an injury in
23 fact, i.e., one that is sufficiently "concrete and particularized" and "actual or imminent, not
24 conjectural or hypothetical," (2) the injury is "fairly traceable" to the challenged conduct, and (3)
25 the injury is "likely" to be "redressed by a favorable decision." *Bates v. UPS*, 511 F.3d 974 (9th
26 Cir. 2007) (citing *Lujan*, 504 U.S. at 560-61).

27 According to *Bates*, the standing formulation for a plaintiff seeking prospective injunctive
28 relief is simply one implementation of *Lujan's* requirements. *Bates*, 511 F.3d at 985. Plaintiffs

1 must show that they have suffered or are threatened with a "concrete and particularized" legal
 2 harm, *Lujan*, 504 U.S. at 560, coupled with "a sufficient likelihood that he will again be wronged
 3 in a similar way." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). As to the second inquiry,
 4 they must establish a "real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S.
 5 488, 496 (1974). "[P]ast wrongs do not in themselves amount to [a] real and immediate threat of
 6 injury necessary to make out a case or controversy." *Lyons*, 461 U.S. at 103. In addition, the
 7 claimed threat of injury must be likely to be redressed by the prospective injunctive relief. *Graham*
 8 *v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir. 1998).

9 **1. Plaintiffs Cannot Show That They Suffered An Injury In Fact.**

10 First, Plaintiffs must demonstrate a "concrete and particularized" legal harm, *Lujan*, 504
 11 U.S. at 560, coupled with "a sufficient likelihood that he will again be wronged in a similar way."
 12 *Lyons*, 461 U.S. at 111. "The nature of the . . . remedy is to be determined by the nature and scope
 13 of the constitutional violation"; harm from one particular inadequacy in government administration
 14 does not authorize a remedy as all inadequacies in that administration. *Missouri v. Jenkins*, 515
 15 U.S. 70, 88-89 (1995). In Orders I and II, while the Court determined that Plaintiffs had alleged
 16 injuries to withstand a pleading challenge, Plaintiffs have failed to prove up their allegations.

17 **a. There is No Evidence of Stigmatic Injuries**

18 "[S]tigmatic injuries may satisfy "injury in fact." (Order II). As the Court explained:

19 [t]he rationale holding that the stigma arising from overtly
 20 discriminatory schemes is a sufficiently concrete, actual injury to
 21 confer standing, however, is that the very classification by itself is
 22 inherently degrading, so eliminating the classification will eliminate
 the stigma, even if the plaintiffs do not otherwise benefit. (citations
 omitted.)

23 (Order I at pp. 5-6.) In Order II, the Court held that facially neutral government policies and
 24 practices may -- or may not -- be administered in such a plainly skewed way against a disfavored
 25 group as to inflict a sufficient stigmatic injury. (Order II at p. 7 (citing *Yick Wo v. Hopkins*, 118
 26 U.S. 356, 373 (1886); *Keyes v. School Dist. No. 1 Denver, CO*, 413 U.S. 189, 201 (1973).) So,
 27 while Plaintiffs sufficiently pled a stigmatic injury, there is no evidence that MTC's facially neutral
 28 policies or practices have been "administered in such a plainly skewed way."

1 (1) **There is No Evidence of a Two Tiered Approach to Funding.**

2 Plaintiffs allege that: “MTC systematically discriminates against low-income people of
3 color in the selection of transit projects, with an *explicit two-tiered approach* to transit projects that
4 benefit minority passengers and white passengers, fully funding the latter, but leaving an unfunded
5 shortfall...for the former.” (SAC ¶ 49 (emphasis added)(Order II at p.7.)³

6 But Plaintiffs have failed to show what this “two-tiered approach” is that benefits white
7 passengers at the expense of minority passengers. The Bay Area is diverse. Nineteen of 21 transit
8 operators -- rail, bus and ferry -- have a minority ridership of 50% or above. (See II.A.2.)
9 Moreover, some operators, including BART, serve more minority riders than AC Transit. (*Id.*)
10 Accordingly, almost any funded project benefits a majority of minority riders. Second, there is no
11 evidence that MTC rejected any of AC Transit’s requests for capital projects. (See II.A.4.b.) And
12 there is no claim that MTC failed to provide AC Transit with operating funds to which it was
13 entitled. (II.A.4.a.) If Plaintiffs are referring to RTP “projected shortfalls,” which span a 25 year
14 time period, there is no evidence that these “projected shortfalls” ever become actual, or have any
15 actual effect on a transit operators’ budgets. Nor is there evidence that MTC has “failed” to fund
16 the shortfalls, or give AC Transit every bit of operating money it could.⁴

17 (2) **There is No Evidence That More Money Goes to**
18 **“Disproportionately White Riders”**

19 Plaintiffs allege that pursuant to MTC’s “pattern or practice” of discriminatory funding,
20 MTC “channels more money and support to projects...that benefit the *disproportionately white*
21 *riders of Caltrain and BART* than to projects...that benefit the disproportionately minority riders of
22 AC Transit.” (SAC ¶ 67.) MTC also allegedly “intentionally engages in its policy, pattern, or
23 practice of favoring projects...that benefit the *disproportionately white riders of Caltrain and*
24 *BART* at the expense of projects...that benefit the disproportionately minority riders of AC Transit
25 because of ... race and national origin...” (*Id.*(emphasis added)(Order II at p.7.)

26 Unfortunately, Plaintiffs have no evidence. First, Plaintiffs admit that Caltrain and BART’s

27 ³ Order II referred to allegations in the First Amended Complaint. Because Plaintiffs subsequently
28 amended the complaint, the paragraph references are to the same allegations located in the SAC.

⁴ See also MTC’s Opposition to Plaintiffs’ Motion for Summary Adjudication which discusses this
point in great detail.

1 ridership are not made up of “disproportionately” white riders, but that Caltrain’s ridership is 51%
 2 minority, BART’s ridership is 54% minority, and AC Transit’s ridership is 78% minority.
 3 (Plaintiffs’ MSA at p.5.) Considering absolute numbers or riders, BART actually carries more
 4 minority riders (54 million) than AC Transit (50.7 million). (See II.A.2.) There is no evidence that
 5 MTC favors an operator that is “disproportionately minority” by allegedly favoring BART or
 6 Caltrain. Second, Plaintiffs cannot show that MTC channels more money to BART or Caltrain or
 7 that it favors the projects of these operators at the expense of AC Transit. MTC has not rejected a
 8 request from AC Transit for funds to which it would be entitled. (See generally II.A.4.)

9 (3) MTC Helps The Transit Dependent

10 Plaintiffs also allege that “MTC...fails to provide equal treatment to projects...for ‘transit
 11 dependent’ riders and AC Transit riders, *treating these classifications of riders as code words for*
 12 *riders of color.*” (SAC ¶ 67 (emphasis added)(Order II at p. 7).) This is unfounded. First, even if
 13 MTC did treat “transit dependency” as a classification for riders of color, there is no evidence that
 14 MTC does not treat these programs equally. To the contrary, MTC itself initiated the LTN in 2001,
 15 specifically to address the needs of the poorest residents in the region. It has committed \$359
 16 million to begin to fund the gaps in service it identified. (II.B.1.) It initiated the CBTP program to
 17 allow communities to obtain grants to pay for planning to best address transit gaps. (*Id.*) While
 18 Plaintiffs may argue that MTC should have done more for this effort, it cannot be disputed that
 19 MTC has specifically sought to address the needs of the Bay Area’s poorest residents.

20 (4) There is No Evidence of Unequal Treatment.

21 And finally, Plaintiffs allege that: MTC’s “unequal treatment” of Plaintiffs “on the basis of
 22 their race sends the message that, in the eyes of the government, they are not equal participants in
 23 the community and are worth less than their white counterparts on Caltrain and BART.” (SAC ¶
 24 72.) AC Transit has been treated more than equally. Moreover, there is no proof that MTC treats
 25 the riders of AC Transit differently because of race: Caltrain and BART each have a ridership that
 26 is over 50% minority; and, BART serves more minorities than AC Transit. (II.A.2.)

27 Based on these undisputed facts, there is no proof of a “stigmatic” injury. There is no
 28

1 evidence regarding “alleged discrimination” in the SAC “so immediately apparent as to
 2 *automatically confer* a brand of inferiority upon people of color who use AC Transit” and no proof
 3 that “Plaintiffs were denied equal benefits based on a discriminatory classification.” (Order I at
 4 p.6.) To the contrary, it is undisputed that any alleged discrimination “flows from a facially
 5 neutral, complicated funding scheme, not an obviously demeaning classification,” *id.*, and there is
 6 no evidence that any MTC practice is administered in a “plainly skewed way against a disfavored
 7 group as to inflict stigmatic injury sufficient to confer standing.” This is especially true, where as
 8 here, MTC’s decisions affect AC Transit and do not directly affect the riders of AC Transit.
 9 Additionally, Plaintiffs have failed to show that there is “a sufficient likelihood” that Plaintiffs will
 10 again be wronged in a similar way. *Lyons*, 461 U.S. at 111. There is no stigmatic injury here.

11 **b. There is No Proof of Economic and Quality of Life Injuries**

12 “To establish economic injury, Plaintiff must show ...personal economic harm such as
 13 excessive fares or reduced property values.” (Order II at p. 8.) Quality of life injury requires a
 14 “concrete injury” to one’s well-being. (Order I at p. 7.) Plaintiffs fail because there is no requisite
 15 showing of a quality of life injury or a likelihood of being wronged again. (II.D.1.c, II.D.2.c.)

16 **(1) Increased Fares**

17 First, Plaintiffs allege that: “[t]he practices of...MTC have repeatedly forced AC Transit to
 18 increase the fares Plaintiffs and Plaintiff Class members pay for bus service,” and that
 19 “Plaintiffs...are non-discretionary transit riders with low incomes who have no alternative but to
 20 rely on AC Transit bus service” with the higher fares. (SAC ¶ 53.(Order II at p. 8.) There is no
 21 evidence that MTC has engaged in any practices that have “forced” AC Transit to increase fares.
 22 Its Board determines all questions of policy, including setting fares and setting service levels.
 23 (II.C.1.) Moreover, there is no evidence of harm from “increased fares.” Hain has received a
 24 transit subsidy since 2002, see II.D.1, and although Darensburg claims an increase in the price of a
 25 monthly AC Transit pass from \$55 to \$70, does this increase outpace inflation? (II.D.2.)

26 **(2) Free Bus Pass**

27 Next, although Plaintiffs allege that MTC failed to fund a free student bus pass program,
 28 (SAC ¶¶ 54, 61), there is no evidence that AC Transit riders are entitled to such a program. First,

1 no other operator has such a program; MTC's decision to allocate \$1,000,000 to fund AC Transit's
 2 pilot program is really preferential treatment. (II.B.2.) Second, AC Transit staff testified that its
 3 program "lost money" and was a "disastrous idea." (*Id.*) Plaintiffs cannot show they were injured.

4 **C. Plaintiffs Cannot Prove That MTC Caused Their Injuries.**

5 Plaintiffs' asserted injuries arise from "the government's allegedly unlawful regulation (or
 6 lack of regulation)" of third parties that are not before this Court. *Lujan*, 504 U.S. at 562. In such a
 7 case, "when the plaintiff is not [it]self the object of the government action or inaction [it]
 8 challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."
 9 *Id.* Plaintiff has the burden "to adduce facts showing that th[e] choices of [the intervening
 10 independent actors] have been or will be made in such a manner as to produce causation" *Id.*;
 11 *see also Nat'l Wrestling Coaches v. Dep't of Educ.*, 366 F.3d 930, 941 (D.C. Cir. 2004) ("the record
 12 [must] present[] substantial evidence of a causal relationship between the government policy and
 13 the third-party conduct, leaving little doubt as to causation and the likelihood of redress"). Thus,
 14 MTC's actions must constitute a "substantial factor motivating" AC Transit's decision that directly
 15 cause the injuries, *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir.
 16 2001), and a real and immediate threat of repeated injury.

17 Plaintiffs must show substantial evidence that AC Transit would act differently if the
 18 requested relief were granted to prove a sufficient causal relationship. In *Tozzi*, the court relied on
 19 affidavits that "demonstrat[ed]" that the third parties had acted "as a direct result of the
 20 [government's] decision." *Nat'l Wrestling Coaches*, 366 F.3d at 941 (discussing *Tozzi*). Similarly,
 21 in *Block v. Meese*, 793 F.2d 1303, 1308 (D.C. Cir. 1986), the plaintiffs submitted "several
 22 declarations and affidavits detailing specific instances in which" the government action motivated
 23 the third parties' conduct. *Id.* (discussing *Block*). There is no evidence from AC Transit that its
 24 actions are motivated by MTC's conduct. Plaintiffs can point to no statement to meet their high
 25 burden. *See Nat'l Wrestling Coaches*, 366 F.3d at 941 (plaintiffs must adduce "substantial
 26 evidence" that leaves "little doubt as to causation and the likelihood of redress").

27 Although Plaintiffs allege that MTC's practices cause their injuries, in the form of increased
 28 fares, service cuts, or public safety, Plaintiffs have failed to point to a single decision that MTC has

1 made that AC Transit believes is unfair or that serves as a nexus with these alleged injuries. To the
 2 contrary, AC Transit testified time and time again that the requests that it made to MTC have
 3 systematically been granted. (II.A.4, C.2.) Plaintiffs have no evidence to support their claims.

4 **1. AC Transit Agrees With MTC's Preventive Maintenance Policy And Has**
 5 **Received Preventive Maintenance Funding For the Past Eight Years.**

6 Plaintiffs allege that MTC's preventive maintenance practices caused a reduction in
 7 services. This is fantasy. As described in Section II.A.4.c, since 1999, MTC has approved every
 8 AC Transit request for preventive maintenance. This was particularly important during the
 9 recession. (II.C.2.) Neither Plaintiffs nor their expert could quantify AC Transit's eligibility,
 10 requests, or receipt of preventive maintenance funds. (II.A.4.c.) The policy alluded to that MTC
 11 "recently" adopted was agreed to by the consensus of all stakeholders in the region. (*Id.*) AC
 12 Transit supports this lower priority, because the alternative would mean that BART and MUNI
 13 with their greater needs would bankrupt the system. (Veit Decl. ¶10, Exh. H, pp. 95:18-96:4.)

14 Consequently, the evidence shows that: (1) MTC's policy was reached by consensus of all
 15 transit operators; (2) AC Transit staff believes that the current scoring policy is appropriate; and,
 16 (3) MTC has provided AC Transit with preventive maintenance funds each year for the past seven
 17 and AC did not use all that was provided in FY 2006-07. (II.A.4.c.)

18 **2. AC Transit Never Requested Funding for a "Richmond Bus Project."**

19 Additionally, Plaintiffs claim that AC Transit would have provided different service if
 20 MTC had funded a certain Richmond bus project. The only evidence of a Richmond Bus Project,
 21 however, is that a different operator, WestCat, requested and received funding for it. (II.B.2.) AC
 22 Transit never requested this funding; thus, there can be no causation.

23 **3. MTC Does Not Improperly Channel Capital Funds to Rail.**

24 Plaintiffs also allege that by channeling disproportionate sums of available capital funds to
 25 rail projects, "which have alternative fund sources for which they are eligible," MTC "limits the
 26 pool of funds available to improve bus service through new projects." (SAC ¶ 62.) First, most
 27 capital funds are formula based; AC Transit has received its appropriate share. (II.A.4.b.) Second,
 28 MTC has assisted AC Transit in getting all its capital projects funded. (*Id.*) Moreover, AC Transit

1 is not eligible for federal rail capital project funds, a significant portion of which is earmarked by
2 Congress by the “New Starts” program. (*Id.*)

3 **4. MTC Is Not Responsible For Funding AC Transit’s “Strategic Vision.”**

4 Finally, Plaintiffs allege that to the extent that MTC does not provide “additional funds” to
5 AC Transit so that it can implement its Strategic Vision plan, part of its SRTP, AC Transit will be
6 unable to implement its plan, and Plaintiffs will not receive these benefits. (SAC ¶ 57.) Yet, there
7 is no evidence that MTC has not given or helped AC Transit obtain what it wants. (II.A.4-C.)
8 Also, AC Transit already protects the “trunk lines” in its service district. And its demonstrated
9 policy regarding service is to prioritize demand over geographic equity. (II.C.2.)

10 In short, Plaintiffs have failed to adduce “substantial evidence” leaving little doubt that
11 MTC caused Plaintiffs injuries. *Nat’l Wrestling Coaches*, 366 F.3d at 941. AC Transit is an
12 independent body that decides its service levels and determines its fare policy. And there is no
13 evidence that MTC’s action had a “determinative” or “coercive” effect on AC Transit’s decisions
14 regarding provision of transit service to Plaintiffs’ disadvantage. *See Bennett v. Spear*, 520 U.S.
15 154, 168 (2000); *see also Nat’l Wrestling Coaches*, 366 F.3d at 941. Nor is there evidence of a
16 “real and immediate threat of repeated injury.” *O’Shea*, 414 U.S. at 496. Plaintiffs fail again.

17 **D. This Court Cannot Redress Plaintiffs’ Injuries.**

18 For redressability, a plaintiff must show that “absent the [challenged policy], there is a
19 substantial probability that . . . if the court affords the relief requested, the asserted [injury] will be
20 removed.” *Warth v. Seldin*, 422 U.S. 490, 504 (1975). “Relief that does not remedy the injury
21 suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability
22 requirement.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 98 (1998). Redressability
23 requires “that prospective relief will remove the harm” and plaintiffs must show that they “would
24 benefit in a tangible way from the court’s intervention.” *Lujan* at 508; *Graham*, 149 F.3d at 1003.

25 Here, Plaintiffs seek an order enjoining MTC from “making any funding decision that has
26 an unjustified disproportionately adverse impact on AC Transit riders of color...” and “supporting
27 the funding of or funding any improvement or expansion in service that detracts from the equitable
28 funding of services that benefit AC Transit riders.” (SAC Prayer ¶¶ 5-6.) At the pleading stage,

1 Plaintiffs alleged that the amount of service that AC Transit provides to Plaintiffs “would grow if [

2 MTC provided AC Transit with additional operating funds and flexibility,” SAC ¶ 47, and that if

3 MTC “ceased its discriminatory...practices, AC Transit would provide improved services and/or

4 reduced fares that would directly benefit Plaintiffs...,” SAC ¶ 56. Yet, Plaintiffs have failed to

5 identify a link between MTC’s funding practices and what AC Transit’s riders experience. Thus,

6 there is no evidence of a practice that MTC should “cease” that would result in benefits to Plaintiff

7 First, it is undisputed that AC Transit is an independently governed organization, which has

8 its own policies regarding service deployment, and there is no likelihood that the Court could

9 redress Plaintiffs’ specific injuries. (II.C.) Second, there is no evidence of a practice that MTC

10 should “cease.” It is undisputed that MTC has granted all requests from AC Transit to which it

11 was entitled and eligible. (II.A.4, B.) Third, the amount of transportation funding available is

12 dependent on the economy and government decisions outside of MTC’s control.

13 **1. AC Transit Controls its Service And There Is No Evidence That Service Cuts**

14 **Harmed Plaintiffs.**

15 Even if the Court ordered MTC to “cease” its practices, Plaintiffs’ condition would not

16 change. AC Transit has the final say on how it spends funds received from MTC as well as other

17 sources. (II.C.) AC Transit might reinstate service that it actually cut “in the hills” away from the

18 trunk lines or in areas benefiting other residents of Alameda and Contra Costa counties.

19 Plaintiffs have failed to specify which funds that MTC allocates fund the service that

20 Plaintiffs use. According to AC Transit, the cuts during FY 2003-04⁵ totaled 14%. (II.C.2.) Since

21 June 2004, however, AC Transit has only added service. (Veit Decl. ¶8, Exh. F at 12:19-23.) And

22 aside from asserting that three or four routes of the Plaintiffs were changed, Plaintiffs have not set

23 forth evidence that the 14% cuts actually harmed them, let alone the class of minority riders of AC

24 Transit. In fact, ridership for FY 2003-04 increased 4% since FY 2002-03. (II.C.2.)

25 Moreover, Plaintiffs have no evidence that MTC’s funding practices have a determinative

26 effect on how AC Transit actually allocates its funds. Rather, in making cuts during FY 2003-04,

27 ⁵ Because the alleged discrimination of which Plaintiffs complain must have occurred in within two

28 years from when the Complaint was filed on April 19, 2005, the actionable time period dates back to April 19, 2003. No alleged cuts or decisions that pre-date this time period are relevant.

1 AC Transit cut the least productive service. It preserved the trunk lines, which are the most heavily
 2 traveled routes through Berkeley and Oakland, and cut service in areas in which the Plaintiffs do
 3 not reside. (Veit Decl. ¶8, Exh. F at 22:2-23, 23:7-11.) “AC Transit will allocate service primarily
 4 on the basis of *demand...over geographic equity.*” (II.C.2.) AC Transit is guided by Board Policy
 5 550 in making service changes and not AC Transit’s Strategic Vision Plan, on which Plaintiffs
 6 rely, SAC ¶ 54. The goals in the Strategic Vision cannot support Plaintiffs claim of redressability.

7 Similarly, AC Transit is not basing its future plans solely on MTC. In fact, the Strategic
 8 Vision seeks to obtain funding from several different entities, only one of which is MTC. (Skowbo
 9 Decl. ¶7 Ex. D.) Moreover, AC Transit staff has not taken issue with any specific funding practice
 10 by MTC; to the contrary, they are grateful for MTC’s efforts in bailing them out of a budgetary
 11 crisis using § 5307 funds, sentiments which remain true today (*Id.* ¶8, Exh. E, *see generally* II.C.2.)
 12 Plaintiffs cannot prove that this Court can redress Plaintiffs’ alleged harms.

13 **2. There is No Evidence That MTC Has Failed To Fund Projects Supporting AC**
 14 **Transit’s Minority Riders.**

15 Next, Plaintiffs claim that if MTC refrained from its discriminatory funding practices, it
 16 would instead and has repeatedly declined to support and fund projects and programs that improve
 17 transit for the transit dependent and inner city/urban dwellers is off the mark. This is precisely
 18 what MTC does in focusing its efforts in the urban core. There is also no evidence that MTC has
 19 ever declined to support programs or projects for transit dependent and inner city/urban dwellers.

20 **a. MTC Initiated the Lifeline Transportation Network.**

21 In fact, the evidence shows just the opposite. MTC itself initiated the Lifeline
 22 Transportation Network Report in 2001, specifically to address the needs of the transit dependent
 23 in the region. It has committed \$359 million to begin to fund the gaps in service it identified.
 24 (II.B.1.) The riders of AC Transit are indeed being served by MTC’s efforts.

25 **b. MTC Funded The Richmond Bus Project.**

26 Plaintiffs’ other “example” is the allegation that MTC failed to fund AC Transit’s bus
 27 project in the Richmond area. (SAC ¶ 52.) The project that MTC identified as most cost-effective
 28 in the 2001 RTP was the 30Z Route run by WestCat, another bus operator in Richmond, which

1 MTC funded. (II.B.2.) Thus, this decision cannot be “redressed.”

2 **c. MTC’s Policy Regarding Preventive Maintenance Does Not Harm**
3 **Plaintiffs.**

4 Finally, Plaintiffs cannot prove up their allegations that AC Transit previously used federal
5 § 5307 funds flexibly to benefit Plaintiffs, that any alleged curtailment of these funds harmed
6 Plaintiffs, or that the restoration of flexibility would improve services. Indeed, MTC has
7 continuously made exceptions to its consensus-based policies to provide flexible § 5307 formula
8 funds to AC Transit. (II.A.4.c.) In fact, AC Transit was the leading recipient from FY 2001-2006.
9 (*Id.*) Moreover, even if MTC permitted AC Transit to continue to use § 5307 for preventive
10 maintenance, these funds would not flow to improve the service on which Plaintiffs depend. For
11 example, even though MTC programmed \$13 million to AC Transit in § 5307 funds in FY 2005-
12 2006 through MTC Resolution No. 3714, AC Transit did not use all the funds for operations. (*Id.*)

13 **3. Redressability is Too Speculative For the Court To Grant the Relief Sought.**

14 Plaintiffs lack standing here because redressability is too speculative. *Allen*, 468 U.S. at
15 758; *Simon*, 426 U.S. at 43; *Warth*, 422 U.S. at 490. There is only a specific amount of
16 transportation funds that come to the region each year. It is undisputed that this amount depends on
17 market economic forces outside of MTC’s control. Specifically, operating funds, like TDA, STA
18 and A.B. 1107 funds, on which AC Transit relies, come from state sales tax revenues. (II.A.4.c, C.)
19 Thus, these funds are inherently uncertain, as was seen during the 2002 recession. (II.C.2.) This
20 amount is also dependent on how much money the federal government appropriates to federally
21 funded projects. (II.A.4.) These factors alone render the relief sought too speculative.

22 In addition, while MTC is required by statute to carry out the transportation planning
23 process, 23 U.S.C. § 134, Congress gave MTC wide discretion to implement funding decisions.
24 According to a federal guidance, federal agencies largely defer to state and local governments with
25 respect to the requirements, like fiscal constraint, in long range planning. *See* 23 C.F.R. §§
26 450.322(b)(11) FHWA/FTA Fiscal Guidance dated July 26, 2005.) MTC creates policies
27 regarding funding decisions built on consensus of all stakeholders in the region. For example,
28 MTC’s “Fix it First” policy prioritizes the most critical capital in the region for all operators based

1 on a uniform criteria based on the life-cycle of assets and agreed to by a consensus of participating
2 operators, including AC Transit. (McMillan Decl. at ¶7.)

3 Obviously, this process was not designed to harm bus operators, including AC Transit, but
4 to provide a measure of consistency in setting investment priorities for limited funds that must be
5 shared. (*Id.*) And while MTC's processes and policies may seem to emphasize funding capital, this
6 is only reflective of the sources of available dollars. There is a shortage of operating dollars.
7 Transportation funding is a "zero sum game," meaning that any additional money that MTC gives
8 to AC Transit would need to be taken from another stakeholder in the region. (*Id.* ¶__.)

9 Moreover, courts are not the proper forum to address complex social issues like
10 transportation funding. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Like welfare benefit
11 policies in *Dandridge*, public transportation planning presents a myriad of "intractable economic,
12 social, and even philosophical problems." *Id.* Indeed, the very complexity of the problems of
13 planning, financing and managing the Bay Area's transportation network system suggests that
14 "there will be more than one constitutionally permissible method of solving them," *San Antonio*
15 *Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973). An order from this Court directing MTC
16 to be *more* fair or *more* equitable, thus, will do little to alleviate AC Transit's difficulties.

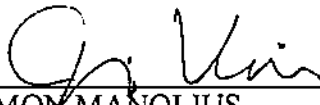
17 With no identified funding decision showing that MTC has not been "fair" or "equitable,"
18 the Court would have no basis from which to determine what to change. This is especially true
19 given the incredibly complex and diverse landscape of interests MTC serves. "Plaintiffs cannot
20 establish standing by requesting relief that the Court lacks the authority to grant, as well as any
21 means for monitoring defendants' compliance, and then insisting that such a purely hypothetical
22 and unrealistic remedy would redress their injuries." *Long Term Care Pharmacy Alliance v.*
23 *Leavitt*, 530 F.Supp.2d 173 (D. D.C. 2008).

24 Suits like this one, which challeng[e] not specifically identifiable Government violations of
25 law[] but the particular programs agencies establish to carry out their legal obligations" present
26 "obvious difficulties insofar as proof of causation or redressability is concerned, "and they are
27 therefore "rarely if ever appropriate for federal-court adjudication." *Lujan*, 504 U.S. at 568. This
28 case falls squarely within the purview of this rule.

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HANSON, BRIDGETT, MARCUS,
VLAHOS & RUDY, LLP

By: 
KIMON MANOLIUS
JULIA H. VEIT
Attorneys for Defendant
METROPOLITAN TRANSPORTATION
COMMISSION