

No. 09-15878

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SYLVIA DARENSBURG, ET AL.,

*Plaintiff-Appellants,*

vs.

METROPOLITAN TRANSPORTATION COMMISSION,

*Defendant-Appellee.*

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On Appeal From the United States District Court  
for the Northern District of California  
The Honorable Elizabeth D. Laporte, Magistrate Judge Presiding  
(Case No. C-05-1597-EDL)

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**BRIEF OF *AMICUS CURIAE* OF THE IMPACT FUND, EQUAL JUSTICE SOCIETY, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, EQUAL RIGHTS ADVOCATES, LABOR COMMUNITY STRATEGY CENTER/BUS RIDERS UNION, LATINOJUSTICE PRLDEF, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, THE MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, THE NAACP LEGAL DEFENSE & EDUCATION FUND, INC., THE NATIONAL CAMPAIGN TO RESTORE CIVIL RIGHTS, THE NATIONAL HEALTH LAW PROGRAM, AND URBAN HABITAT IN SUPPORT OF PLAINTIFF-APPELLANTS AND IN SUPPORT OF REVERSAL**

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## I. INTRODUCTION

The California Legislature adopted California Government Code §11135 (“Section 11135”) in 1977 to prohibit discrimination by recipients of state funding. Administrative regulations issued three years later explained that Section 11135 prohibited practices with either the purpose *or effect* of discriminating. This prohibition on practices with an adverse impact mirrored the federal law developed under Title VI and Title VII of the Civil Rights Act of 1964. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In 1999, the California Legislature further strengthened Section 11135 by adopting an explicit provision that allowed a private right of action to enforce its regulations, which include this prohibition on discrimination that results in an adverse impact. Plaintiffs relied upon this provision, among others, to challenge the MTC funding for mass transit in this case.

The district court was called upon to address, as a matter of first impression, the standard of proof for entities seeking to defend against adverse impact claims under Section 11135. Instead of applying the well-established business necessity standard, the court erred when it adopted a watered down “substantial legitimate justification” defense to adverse impact for cases that it described as involving complex decision-making.

In reaching this conclusion, the court looked to a few isolated Title VI cases that post-date the adoption of the Section 11135 regulations. For the reasons stated by appellants, “substantial legitimate justification” and business necessity are equivalent under federal law. *See* Appellants’ Br. 56-58. But even assuming that the district court was correct that federal cases interpreting Title VI provide in certain circumstances for a lesser “substantial legitimate justification” standard that is, in fact, a watered down version of business necessity, it was erroneous to apply that more lenient standard in this case. The federal authority upon which the district court relied is inapposite because while the California Legislature has strengthened and expanded Section 11135, Title VI law has been narrowed in the intervening years. *See e.g. Alexander v. Sandoval*, 532 U.S. 275 (2001) (no private right of action to enforce Title VI prohibition on discrimination resulting in an adverse impact). The court’s ruling ignored the language of Section 11135, its legislative history, and administrative regulations. Its holding is, moreover, at odds with the express mandate of the statute and case law directing a broad construction of the law to effectuate its terms.

Finally, there is nothing in Section 11135 or its regulations that supports the court’s conclusion that a different defense should apply to

discriminatory practices that reflect complex decision-making processes. In fact, social science research confirms that implicit biases and “group think” are most likely to distort rational decision-making where decision-making processes are complex. Such complicated systems particularly require rigorous scrutiny and justification under the business necessity defense. The district court’s construction of Section 11135’s requirements must, therefore, be reversed.

## **II. GOVERNMENT CODE §11135 HAS ALWAYS REQUIRED A BUSINESS NECESSITY DEFENSE TO REBUT A FINDING OF DISCRIMINATORY ADVERSE IMPACT**

The district court’s adoption of what it considered a more lenient “substantial legitimate justification” defense to a finding of adverse impact ignored the history and regulations of Section 11135 and instead relied upon a few federal cases that were never incorporated into Section 11135.

Review of the history of Section 11135 and its regulations demonstrates that a defendant must present a strong business necessity defense to rebut a finding of adverse impact. Moreover, unlike Title VI, the legislative history and text of Section 11135 require that its terms be given a broad, liberal construction to effectuate its anti-discrimination goal.

### **A. Section 11135 Incorporated a Robust Adverse Impact Standard Including a Business Necessity Defense.**

In 1977, the California Legislature enacted California Government Code § 11135 et. seq., banning discrimination by recipients of state funding. 1977 Cal. Stat. ch. 972, p. 2942, §1. When it adopted Section 11135, the Legislature authorized the Secretary of the Health and Welfare Agency to issue regulations defining the parties protected by Section 11135 and the standards for determining what practices were discriminatory.<sup>1</sup>

The Secretary issued final regulations in 1980 and defined discrimination to include not only intentional discrimination, but also practices that result in disparate impact.<sup>2</sup> CAL. CODE REGS. tit. 22, §§ 98101(i)(1), (j)(1). The regulations prohibit practices that “utilize criteria or methods of administration that have the *purpose or effect* of subjecting a person to discrimination. . .” as well as making site or location selections “that have the *purpose or effect* of excluding persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any

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<sup>1</sup> CAL. GOVERNMENT CODE §11139.5 states: “The Secretary of the Health and Welfare Agency, with the advice and concurrence of the Fair Employment and Housing Commission, shall establish standards for determining which persons are protected by this article and standards for determining what practices are discriminatory.”

<sup>2</sup> Final regulations were not issued until June 1980, after a suit was filed against the Secretary for delay. See *Westside Community for Independent Living v. Obledo*, 33 Cal. 3d 348 (1983).

program or activity.” CAL. CODE REGS. tit. 22, §§ 98101(i)(1), (j)(1) (emphasis added).

When Section 11135 and its implementing regulations were adopted, federal law uniformly required a rigorous business necessity defense to a finding of discriminatory adverse impact. The leading federal cases decided in that era, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-426 (1975) and *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977), made clear that a finding of adverse impact could only be rebutted by an empirical showing of “business necessity.” While the adverse impact theory was first developed in Title VII employment discrimination cases, the Supreme Court did not limit that theory or the requirement of a business necessity defense to Title VII cases. It assumed its applicability to Title VI as well. *See Board of Education v. Harris*, 444 U.S. 130, 151 (1979) (education case); *see also Larry P. v. Riles*, 793 F.2d 969, 982 & n.9 (9th Cir. 1986) (citing *Harris*).

This business necessity standard controlled the legal landscape when Section 11135 was passed. An early Attorney General Opinion, which predated the issuance of Section 11135 regulations, assumed these federal adverse impact standards would apply to Section 11135 claims. *See 62 Ops.*

Cal. Atty. Gen. 180 (April 17, 1979). Any doubt on the matter was dispelled by the official regulations adopted in 1980 to implement Section 11135.

First, the regulations explicitly adopted the adverse impact theory as a test of discrimination. CAL. CODE REGS. tit. 22, §§ 98101(i)(1), (j)(1) (prohibiting “criteria or methods of administration” or selection of sites and locations “that have the purpose or effect of subjecting a person to discrimination”).

Second, the regulations expressly incorporated regulations issued to implement the Fair Employment and Housing Act. CAL. CODE REGS. tit. 22, §98400. These FEHA regulations require proof of business necessity as a defense to adverse impact. The defense must show “an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and the challenged practice effectively fulfills that business purpose it is supposed to serve.” CAL. CODE REGS. tit. 2, §7286(b).

California cases interpreting these FEHA regulations confirm that a defendant in an employment case must proffer evidence demonstrating business necessity when the plaintiff has established adverse impact. *See City and County of San Francisco v. Fair Employment & Housing Commission*, 191 Cal. App. 3d 976, 986 & n.8 (1987). The Fair Employment & Housing Commission has also applied the adverse impact

theory and its business necessity defense to housing cases, even in the absence of regulations, based in part on the similar anti-discrimination policy in the FEHA housing provisions. *See Dept. of Fair Employment and Housing v. Merribrook Apartments*, FEHC Dec. No. 88-19, 1988 WL 242651\*15 (Nov. 9, 1988). The California Court of Appeal affirmed the Commission's adoption of adverse impact standards for housing cases in *Sisemore v. Master Financial, Inc.*, 151 Cal. App. 4th 1386, 1418-1424 & n. 20 (2007).

The applicable regulations and case law thus confirm that a business necessity defense has always been required to rebut a showing of adverse impact under Section 11135. One need not question whether the Section 11135 regulations conformed to the Legislature's original intent because, in 1999, the Legislature explicitly incorporated the regulations, unchanged, into a private right of action that may be brought to enforce "[t]his article and regulations adopted pursuant to this article . . . ." CAL. GOV. CODE §11139.

The district court ignored this history and instead relied upon a few federal cases decided long after the adoption of Section 11135 and its corresponding regulations.<sup>3</sup> It is axiomatic that the legislative intent of a

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<sup>3</sup> Appellants address why the federal cases relied upon by the district court do not justify a weakened rebuttal standard and we do not repeat those arguments here.

statute should be interpreted in light of the case and regulatory law in effect at the time of its passage. *Trope v. Katz*, 11 Cal. 4th 274, 282 (1995) (cases demonstrate that the words “attorneys’ fees” and “counsel fees” had an established legal meaning at the time the Legislature enacted statute); *Westside Community for Independent Living, Inc. v. Obledo*, 33 Cal. 3d 348, 352 n.5 (1983) (“[t]he Legislature relied heavily on federal precedent when enacting Section 1021.5”). *Cf. Woodland Hills Residents Ass’n v. City Council*, 23 Cal.3d 917, 934 (1979) (Legislature relied upon federal cases pre-dating *Alyeska* case). Where federal case law subsequently changes and neither the Legislature nor the California courts manifest any intention to adopt this new precedent, those changes cannot be used to justify a wholly different reading of historical legislative intent in enacting the statute.

**B. The Legislative History of Government Code §11135 Demonstrates an Intent to Ensure a Broad and Liberal Construction of the Statute.**

The district court not only failed to consider this legislative and regulatory history, but also failed to give Section 11135 a broad, liberal construction. The literal terms of the statute, its legislative history and California’s strong anti-discrimination public policy all mandate such a reading.

In 1999, the Legislature amended Section 11139 to mandate a liberal construction: “This article shall not be interpreted in a manner that would frustrate its purpose.” 1999 Cal. Stat. ch. 591 (A.B. 1670), §3. Moreover, since its original enactment in 1977, Section 11135 has been amended in different ways to expand its reach and reverse cases that applied a narrow interpretation of the statute. In 1999, the Legislature passed the California Civil Rights Amendments and thereby overruled the decision in *Arriaga v. Loma Linda University*, 10 Cal. Rptr. 2d 619 (Cal. Dist. Ct. App. 1992), which had found no private right of action under Section 11135. As noted above in Section A, the amendment incorporated into Section 11139 an explicit private right of action to enforce the provisions and regulations of the article. 1999 Cal. Stat. ch. 591 (A.B. 1670), §3.<sup>4</sup>

Similarly, in 2001, the Legislature amended the statute to confirm that this private right of action for equitable relief was “independent of any other rights and remedies.” 2001 Cal. Stat. ch. 708 (A.B. 677), §2. As part of the 2001 amendments, the Legislature also broadened the scope of Section 11135 to include programs or activities that are “conducted, operated, or

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<sup>4</sup> The California Civil Rights Amendments of 1999 stated: “This bill would make these provisions and regulations thereunder enforceable by a civil action for equitable relief.” 2001 Cal. Stat. ch. 708 (A.B. 677), §2. California Government Code §11139 was amended to read: “This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief.” CAL. GOV’T. CODE §11139 (1999).

administered by the state or by any state agency.” 2001 Cal. Stat. ch. 708 (A.B. 677), §1. Thus, the Legislature expanded the reach of Section 11135 to apply to the state, and eliminated procedural obstacles to its full implementation.

The Legislature has continually broadened the scope of Section 11135 to include discrimination against a wider range of protected classes. In 1992, the Legislature amended the statute to incorporate broader coverage for persons with disabilities, and expanded the definition of disabled persons. *See* 1992 Cal. Stat. ch. 913, §18. In 2002, the Legislature amended Section 11135 to prohibit discrimination based upon race and national origin. 2002 Cal. Stat. ch. 1102 (S.B. 105). Four years later, the Legislature added “sexual orientation” as a protected class. 2006 Cal. Stat. ch. 182 (S.B. 1441), §1. That same year, it also inserted subsection (f), which prohibits discrimination based on the mere perception that a person has any of the characteristics associated with a protected class or that the person is associated with a person who has or is perceived to have any of those characteristics. 2006 Cal. Stat. ch. 182 (S.B. 1441), §1.

Finally, in 2005, the Legislature rejected a restrictive reading of the statute that would have exempted California State University from its ambit. *See Garcia v. California State University*, 131 Cal. App. 4th 1283, ordered

unpublished, 32 Cal. Rptr. 3d at 724 (2005). In response to *Garcia*, the Legislature passed A.B. 1742, inserting an additional sentence into the original Section 11135 language to explicitly include California state universities: “it is the intent of the Legislature in amending Section 11135 of the Government Code to construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in *Garcia v. California State University*.” 2005 Cal. Stat. ch. 706 (A.B. 1742), §40.

This legislative history confirms that the Legislature consistently intended an expansive interpretation of Section 11135. *Cf. Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 570-571 (1998) (noting history of amendments to Unfair Competition Law shows legislative intent to expand, not restrict, its reach). A broad interpretation of Section 11135 is also consistent with California cases which have repeatedly called for a liberal construction of anti-discrimination statutes. *See e.g. Munson v. Del Taco*, 46 Cal. 4th 661, 673 (2009) (Unruh Civil Rights Act), *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 167 (2007) (same); *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 819 (2001) (“The provisions of the FEHA shall be construed liberally for the accomplishment of the purposes thereof”); *Romano v. Rockwell Int’l, Inc.*, 14 Cal. 4th 479, 493 (1996) (“The

FEHA itself requires that we interpret its terms liberally in order to accomplish the stated legislative purpose.”).

### **III. THE BUSINESS NECESSITY DEFENSE APPROPRIATELY APPLIES TO ALL DECISIONS, COMPLEX OR OTHERWISE**

Nothing in Section 11135 or its regulations suggests that a lesser burden should be applied in complex cases. Social science research indicates that a watered down defense to adverse impact is particularly inappropriate in cases involving complex decision making processes. Far from suggesting a lower standard of justification, the complexity of a decision-making process especially calls for an empirically-based business necessity justification where such decisions result in a significant adverse impact.

Decades of social science research in psychology, sociology, and political science show that when decision-makers face complex decisions, predictable biases and errors in judgment may occur which can result in discriminatory outcomes. However, these biases can be mitigated or prevented by careful attention to process. A rigorous standard of justification encourages policy-makers to commit the necessary time and resources to ensuring rational and less biased decision making processes.

Moreover, considerable research shows that, particularly in complex decision making processes, considerations of power and politics determine outcomes – often with a discriminatory result. A broad application of the business necessity standard requires policy-makers to adopt and apply objective criteria for decision making that decrease the potential impact of power imbalances on the decision making process.

**A. The Business Necessity Defense is Especially Appropriate When Decision Makers Face Complex Decisions Because of the Risk that Their Judgment Will be Affected by Predictable Biases and Errors.**

As this case demonstrates, when making complex decisions, decision-makers are rarely able to take all relevant information into account.<sup>5</sup> Studies show that, among other tools for navigating the decision making process, decision-makers cope with overwhelming complexities by applying socially-developed theories or mental scripts to fill in missing information and reconcile discrepancies.<sup>6</sup> These mental shortcuts include stereotypes, typologies of attitudes such as political or religious affiliation, and general rules of thumb that allow decision-makers to make future predictions based on a small, and often non-representative, sample of past experiences.<sup>7</sup>

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<sup>5</sup> James G. March, A Primer on Decision Making: How Decisions Happen 8 (1994).

<sup>6</sup> Id. at 11.

<sup>7</sup> Id.

One documented bias arises when decision-makers assess the probability of an event by the ease with which it comes to mind.<sup>8</sup> For example, decision-makers tend to overstate the probability of events or truth of ideas that consistently appear in the news, are often repeated, or are simpler to understand.<sup>9</sup> The concerns and experiences of minorities, as well as less popular ideas, will not ring as true to decision-makers for whom these experiences or ideas are unfamiliar.

Moreover, popular support for measures to improve air quality and congestion lead policy makers to perceive expensive suburban rail projects as economically and environmentally efficient regardless of the evidence.<sup>10</sup> This skewing of perception appears to have occurred in this case. Minority riders expressed strong concerns to the MTC that new rail projects would draw funding away from essential bus lines serving low income and minority communities. (ER0915). These communities did not challenge such projects outright, but instead requested that the MTC analyze potential disparities to determine whether there is a more economically efficient method for maintaining and expanding transportation services throughout

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<sup>8</sup> Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 SCIENCE 1124 (1974).

<sup>9</sup> Scott Plous, The Psychology of Judgment and Decision Making 121, 130 (1993).

<sup>10</sup> Don Pickrell, A Desire Named Streetcar: Fantasy and Fact in Rail Transit Planning, 58 JOURNAL OF THE AMER. PLANNING ASSOC. 158, 176 (1992)

the region. (ER0421; ER0446; ER0461-62; ER1126-28; ER1131; ER0951-52). Yet community concerns were ignored until after this suit was filed. (ER0452-60; ER0962-63 at 487:25-488:2; ER1061-86; ER1087-101).

Considerable research on implicit bias also shows that individuals unconsciously associate groups with particular attributes, and these implicit biases can produce discriminatory behavior that diverges from a person's stated or explicit beliefs.<sup>11</sup> When policy makers make decisions under time constraints, use unclear standards and criteria for judging between alternatives, and have inadequate access to information, unbounded discretion permits personal implicit biases to distort decision-making processes.<sup>12</sup> Conversely, rational processes that utilize consistent objective measures and provide decision-makers with information reduce discretion and minimize the impact of personal biases.<sup>13</sup>

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<sup>11</sup> Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 CAL. L. REV. 945, 951 (2006). See also Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489 (2005); Gary Blasi, Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology, 49 UCLA L. REV. 1241 (2002); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987); Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 SCIENCE 1124 (1974).

<sup>12</sup> Ana I. Balsa, Naomi Seiler, Thomas G. McGuire & M. Gregg Bloche, Clinical Uncertainty and Healthcare Disparities, 29 AM. J.L. & MED. 203, 207, 209 (2003); Gregg Bloche, Race and Discretion in American Medicine, 1 YALE J. OF HEALTH POL'Y L. & ETHICS 95, 100 (Spring 2001).

<sup>13</sup> Greenwald & Krieger, supra at 1246.

MTC's decision-making process lacked clear objective criteria or data, thereby possibly permitting personal biases to distort judgment. Most notably, in making its funding decisions, the MTC lacked information to show whether the project selection criteria had any correlation to their goal of reducing congestion. (ER1363 at 1264:11-21; ER0984-85 at 605:1-19). Essentially, it applied a decision-making protocol that neither scored nor ranked candidate projects based on their potential to meet MTC's explicit program goals. (ER0725-26.1, ¶¶1, 3; ER0674; ER1334-36 at 1105:24-1107:8). This flawed process left too much discretion to individual decision makers and opened the process to subjective biases.

Studies on group decision-making behavior demonstrate how group dynamics in complex decision environments lead to additional biases and errors in judgment. In group decision-making processes, the desire and pressure to be loyal to the group and conform to the majority can lead to a deterioration of mental efficiency, reality testing, and moral judgment in its members.<sup>14</sup> This phenomenon is described as "group think," and can significantly distort the decision-making process. For instance, case studies have found that groups functioning with "group think" limit their discussions to only a few alternative courses of action, fail to reexamine

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<sup>14</sup> Irving L. Janis, Groupthink: Psychological Studies of Policy Decisions and Fiascoes 9-11 (1982).

decisions even after they learn of risks and drawbacks they had not originally considered, spend little or no time discussing whether discarded alternatives have any merit or feasibility, and make little or no attempt to obtain information from experts.<sup>15</sup> While members pay positive attention to facts and opinions that support their preferred policy, they tend to ignore facts and opinions that do not.<sup>16</sup> Ironically, when the district court elevated the search for consensus to an “important legitimate justification,” ER 0273-274, it increased the risk that “group think” will undermine the anti-discrimination goal of Section 11135.

MTC’s decision-making process exhibited characteristics of “group think.” First, MTC fully funded all 14 proposed rail projects it received even when some proposals lacked complete information or failed to meet many of MTC’s criteria. (ER0993, ¶¶12-13; ER0338-401 at ER0340; ER1408; ER1378, ¶¶12-13). Second, MTC updated and re-adopted this plan again and again even when minority riders raised serious concerns about the potential disparate impact on low-income and communities of color. (ER0915). Third, MTC ignored concerns raised by both its Environmental Justice Advisory Group (“EJAG”) and its Minority Citizens’ Advisory Committee (“MCAC”). Both advisory committees requested that MTC

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<sup>15</sup> Id.

<sup>16</sup> Id.

revise its flawed equity analysis to adequately study the impact of its decisions on minority communities. (ER0895-936; ER0470; ER0968 at 512:2-15). Finally, MTC's Deputy Director of Policy admitted that it had no information on whether MTC's funding criteria bore some relationship to explicit goals (ER0985 at 605:1-19; ER1363 at 1264:11-21), and failed to seek additional information from experts.

Studies show that organizations that follow more rational procedures for decision-making formulate efficient decisions that are more narrowly tailored to address the problem at hand. In one study, researchers found that decision processes that involved more extensive information gathering and use of quantitative analytic techniques resulted in more effective decisions.<sup>17</sup> To reduce group think, decision processes need to include a wider range of policy alternatives, opinions and challenges by outside experts, a careful examination of doubts and opposing opinions, and statistical analysis on risk and consequences.<sup>18</sup>

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<sup>17</sup> James W. Dean & Mark P. Sharfman, Does Decision Process Matter? A Study of Strategic Decision-Making Effectiveness, 39 ACADEMY OF MANAGEMENT JOURNAL 389 (1996).

<sup>18</sup> Janis, supra 9-11; Howard Kunreuther & Jacqueline Meszaros, Organizational Choice Under Ambiguity: Decision Making in the Chemical Industry Following Bhopal, in Organizational Decision Making 61, 77 (Zur Shapira ed., 1997).

Ideally, policy-makers faced with complex policy decisions should carefully weigh alternatives by applying objective criteria and accurate measures of how alternatives will meet their goals. Social science research shows that, absent explicit requirements, such steps are often not taken. Validation research, which links means to ends, is indispensable to responsible decision-making.<sup>19</sup> Where a policy has an adverse impact upon a protected class, an empirically-based justification for the policy must be required. This justification must demonstrate that the policy is in fact necessary and central to reducing or eliminating unnecessary discriminatory impact. Only a rigorous standard that requires defendants to show both an overriding legitimate business purpose, and that the challenged practice effectively fulfills the business purpose, will create a level of accountability that reduces the biases and errors in judgment inherent in complex decision making.

The “substantial legitimate justification” standard as it was applied by the district court in this case does not require a defendant to engage in an empirically driven analytical process to confirm that a proposed policy that has a clear adverse impact is truly necessary and tailored to meet the desired goals of the project.

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<sup>19</sup> Herbert A. Simon, Administrative Behavior: A Study of Decision Making Processes in Administrative Organizations 189 (1961).

## **B. The Business Necessity Defense Limits Discriminatory Effects Resulting From Power and Politics in Complex Cases**

Complex decision processes are particularly susceptible to distortions due to power and politics because inconsistent goals and uncertainties about consequences make rational decision-making difficult.<sup>20</sup> Complex decisions require judgment and compromise on who should be benefited and who should be burdened.<sup>21</sup> Unfortunately, power influences whose interests prevail and politics shape how compromises are reached. Research in multiple organizational settings documents that decision-makers make decisions based on considerations of power rather than what is best for the organization.<sup>22</sup> Often, entities that are able to bring in more resources to an organization are favored over those that cannot, even when this practice exacerbates existing inequalities.<sup>23</sup> These power distortions in the decision-making process lead to inefficiency and inequity.<sup>24</sup>

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<sup>20</sup> Gerald R. Salancik & Jeffrey Pfeffer, The Bases and Use of Power in Organizational Decision Making: The Case of a University, 19 ADMINISTRATIVE SCIENCE QUARTERLY 454 (1974).

<sup>21</sup> Id. at 454.

<sup>22</sup> Aaron Wildavsky, Political Implications of Budgetary Reform, 21 PUBLIC ADMINISTRATION REVIEW 184 (1961); Ross Stagner, Corporate Decision Making: An Empirical Study, 53 JOURNAL OF APPLIED PSYCHOLOGY 1-13 (1969); J. Victor Baldrige, Power and Conflict in the University of New York (1971).

<sup>23</sup> Salancik & Pfeffer, supra at 470.

<sup>24</sup> Id.

Research has demonstrated that power distortions plague current public transit policy. While a majority of public transit riders are low-income and minority inner-city residents who rely on local bus routes for access to jobs, schools, medical care, and other necessities, most federal, state, and local policies favor suburban and downtown commuter services.<sup>25</sup> Funding inequities continue despite the fact that inner-city riders are generally less costly to serve than suburban commuters.<sup>26</sup> Moreover, expensive new suburban rail projects that promise to reduce traffic congestion and improve air quality have tended to attract far fewer new riders than anticipated.<sup>27</sup>

Inefficiencies and inequities such as these are products of power distortions in transit policy-making. On one side of the power balance is a predominantly white, suburban electorate that benefits from new commuter rail systems. This electorate is allied with local business and civic interests that lobby for new rail projects as a means to stimulate local economic

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<sup>25</sup> Mark Garrett & Brian Taylor, Reconsidering Social Equity in Public Transit, 13 BERKELEY PLANNING JOURNAL 7-9 (1999).

<sup>26</sup> Id. at 22. *See generally* THOMAS W. SÁNCHEZ, RICH STOLZ & JACINTA S. MA, MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICIES ON MINORITIES (2003), [http://www.civilrightsproject.ucla.edu/research/transportation/trans\\_paper03.php](http://www.civilrightsproject.ucla.edu/research/transportation/trans_paper03.php).

<sup>27</sup> Don Pickrell, A Desire Named Streetcar: Fantasy and Fact in Rail Transit Planning, 58 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 158-76 (1992)

development.<sup>28</sup> On the other side of the power balance are low-income and minority inner city residents who rely on public transit for basic mobility, but are largely unorganized as a constituency.<sup>29</sup> Moreover, federal transit policies that favor capital projects encourage local authorities to fund new rail developments at the expense of operations costs in order to leverage larger amounts of federal funding.<sup>30</sup> Finally, decisions to open new rail transit lines draw positive media attention and build public support for elected officials and transit agencies, while the maintenance of bus-lines do not.<sup>31</sup>

Applying the business necessity standard in all disparate impact discrimination cases under Section 11135 where adverse impact is shown will help to protect policy and decision making processes from power distortions that lead to a disparate impact on minority communities. Requiring decision-makers to show that their challenged practice is an appropriate course of action to further an overriding business necessity for which no less discriminatory alternatives exist will force decision-makers to consider the interests of less powerful groups and act as a check against powerful majorities.

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<sup>28</sup> Garrett & Taylor, supra at 21.

<sup>29</sup> Id. at 21-22.

<sup>30</sup> Id. at 16.

<sup>31</sup> Id. at 21.

#### IV. CONCLUSION

The district court's adoption of its lower "substantial legitimate justification" standard for "complex" decisions erodes the strong anti-discrimination protections intended by the Legislature in Section 11135 and could lead to a patchwork of differing standards based on perceptions of complexity. Instead of ensuring non-discriminatory decision-making, a weakened defense to an adverse impact finding will perpetuate the tendencies toward group think and implicit bias that are potentially present in any complex decision-making process. Requiring a rigorous business necessity justification will lead to better decisions and less discriminatory impact. The Legislature intended Section 11135 and its regulations to impose a strong adverse impact standard, including the business necessity defense. Because the district court disregarded this clear legislative and regulatory intent, its decision should be reversed.

DATED: November 23, 2009

Respectfully Submitted,

/s/ Brad Seligman  
Brad Seligman<sup>32</sup>  
The Impact Fund

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<sup>32</sup> *Amici* would like to acknowledge the assistance of Equal Justice Society law clerks Danfeng Soto-Vigil Koon and Audrey Daniel, and Impact Fund Equal Justice Works law fellow Nina Farnia in the preparation of this brief.

**Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C)  
and Circuit Rule 32-1 for Case Number 09-15878**

I certify that:

XX Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text,

\_\_\_\_\_ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

DATED: November 23, 2009

Respectfully Submitted,

/s/ Brad Seligman

Brad Seligman

Attorney for *Amici Curiae*

No. 09-15878

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SYLVIA DARENSBURG, ET AL.,

*Plaintiff-Appellants,*

vs.

METROPOLITAN TRANSPORTATION COMMISSION,

*Defendant-Appellee.*

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On Appeal From the United States District Court  
for the Northern District of California  
The Honorable Elizabeth D. Laporte, Magistrate Judge Presiding  
(Case No. C-05-1597-EDL)

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**MOTION OF THE IMPACT FUND, EQUAL JUSTICE SOCIETY, THE  
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA,  
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN  
PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA,  
EQUAL RIGHTS ADVOCATES, LABOR COMMUNITY STRATEGY  
CENTER/BUS RIDERS UNION, LATINO JUSTICE PRLDEF, THE  
LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN  
FRANCISCO BAY AREA, LEGAL AID SOCIETY – EMPLOYMENT LAW  
CENTER, THE MEXICAN AMERICAN LEGAL DEFENSE &  
EDUCATIONAL FUND, THE NAACP LEGAL DEFENSE & EDUCATION  
FUND, INC., THE NATIONAL CAMPAIGN TO RESTORE CIVIL  
RIGHTS, THE NATIONAL HEALTH LAW PROGRAM, AND URBAN  
HABITAT FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN  
SUPPORT OF PLAINTIFF-APPELLANTS AND IN SUPPORT OF  
REVERSAL**

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*Amici curiae* Impact Fund, Equal Justice Society, the American Civil Liberties Union of Northern California, Asian American Legal Defense and Education Fund, Asian Pacific American Legal Center of Southern California, Equal Rights Advocates, Labor Community Strategy Center/Bus Riders Union, LatinoJustice PRLDEF, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Legal Aid Society—Employment Law Center, the Mexican American Legal Defense & Educational Fund, the NAACP Legal Defense & Education Fund, Inc., the National Campaign to Restore Civil Rights, the National Health Law Program and Urban Habitat request leave to file the proposed *amicus curiae* brief in support of appellant Sylvia Darensburg's appeal. *Amici* bring this motion pursuant to Federal Rule of Appellate Procedure, Rule 29(a). The parties do not object to the filing of this *amicus* brief, although Appellee Metropolitan Transportation Commission has filed an objection to the pending request for a 2 week extension of time to file this brief. .

I. STATEMENTS OF INTEREST

A. The Impact Fund

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest organizations and firms across the country. It provides training programs, advice and counseling, and amicus representation regarding class action and related issues. It is a California State Bar Legal Services

Trust Fund Support Center, providing services to legal services projects across the state. The Impact Fund is lead counsel in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004), *en banc* pending, and other major class action lawsuits. It provided technical advice and support for amendments to California Government Code § 11135. It also provided a grant for litigation costs to Public Advocates, appellant counsel in this case. In addition, it funded in part the work of the Labor Community Strategy Center/Bus Riders Union in its case against the Los Angeles Metropolitan Transit Authority. *See e.g. Labor Community Strategy Center v. Los Angeles County Metro. Trans. Auth.*, 263 F. 3d 1041 (9th Cir. 2001).

B. Equal Justice Society

Equal Justice Society is a national organization of scholars, advocates and citizens that seeks to promote equality and enduring social change, with a primary mission of combating the continuing scourge of racial discrimination and inequality in America. The Equal Justice Society has a strong interest in protecting the integrity of the core constitutional principle of equal protection of the laws for all California citizens.

C. American Civil Liberties Union of Northern California

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members. The ACLU-NC is a regional affiliate of the national ACLU. The ACLU affiliate was founded seventy-

five years ago to preserve and protect the fundamental principles of the Bill of Rights. The ACLU is strongly committed to protecting the rights of minorities to equal protection as guaranteed by the Fourteenth Amendment and anti-discrimination statutes such as California Government Code Section 11135, and has participated in many cases asserting such rights.

D. Asian American Legal Defense and Education Fund

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all.

E. Asian Pacific American Legal Center of Southern California

The Asian Pacific American Legal Center (APALC) is the largest, most diverse legal service and civil rights organization focusing on Asian Pacific Americans in the United States. Since its founding in 1983, APALC's legal and community services have had far reaching impact at the local level, where much of its work is focused, as well as at the state and national level, particularly in the areas of employment discrimination, voting rights, and language rights.

F. Equal Rights Advocates

Equal Rights Advocates (ERA) is a San Francisco-based human and civil rights organization dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation and advocacy. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has undertaken difficult impact litigation that has resulted in establishing new law and provided significant benefits to large groups of women.

G. Labor Community Strategy Center/Bus Riders Union

The Labor Community Strategy Center/Bus Riders Union is the court-recognized class representative of Los Angeles bus riders. It has over 3,000 members and 150 volunteer leaders with over 15 years of experience in the field of civil rights, environmental justice and mass transit. It has been involved for over 13 years in the enforcement of a federal court order consent decree between the Bus Riders Union and the Los Angeles MTA. Most recently, it began an initiative to challenge the MTA's Long Range Transportation Plan (approved on October 22, 2009) that has enabled a robust expansion of rail and highway to primarily white, suburban communities at the expense of urban communities of color, which would be forced to bear the burden of 14 fare increases, service cuts, and virtually no bus expansion for 30 years.

H. LatinoJustice PRLDEF

LatinoJustice PRLDEF (“LatinoJustice”) (formerly, Puerto Rican Legal Defense & Education Fund) is a national non-partisan not-for-profit organization that champions an equitable society and supports the human and civil rights of Latinos in the United States. Established in 1972, LatinoJustice is one of the nation’s oldest civil rights legal defense funds to defend the constitutional and civil rights of the community through engaging in impact litigation, education and advocacy and promoting equal protection under the law at the national, state and local levels.

I. The Lawyers’ Committee for Civil Rights of the San Francisco Bay Area

The Lawyers’ Committee for Civil Rights of the San Francisco Bay Area is a civil rights and legal services organization dedicated to advancing the rights of people of color, low-income people, immigrants and refugees, women, children and other underrepresented groups and individuals. Founded in 1968 by the leading members of the San Francisco bar, the Committee is the local affiliate of the national Lawyers’ Committee for Civil Rights Under Law, which was founded in 1963 at the behest of President Kennedy. The Lawyers’ Committee has, since its inception, been actively involved in combating discrimination. It has litigated numerous discrimination cases, including actions involving Government Code § 11135.

J. Legal Aid Society – Employment Law Center

The Legal Aid Society - Employment Law Center (“LAS-ELC”) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, LAS-ELC has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy, sexual orientation, and national origin.

K. Mexican American Legal Defense & Educational Fund (MALDEF)

Founded in 1968, MALDEF is the leading national civil rights organization representing the 48 million Latinos living in the United States through litigation, advocacy, and educational outreach. MALDEF’s mission is to foster sound public policies, laws and programs to safeguard the civil rights of Latinos living in the United States and to empower the Latino community to participate fully in our society. MALDEF has litigated many cases under state and federal law to ensure equal treatment of Latinos. MALDEF sets as a primary goal ensuring that Latinos have equal protection of the law.

L. NAACP Legal Defense & Educational Fund, Inc.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit corporation established to assist African Americans and other people of color in securing their civil and constitutional rights. For six decades, LDF attorneys have

represented parties in litigation before the Supreme Court and other federal courts in the prosecution of lawsuits that challenge racial discrimination.

M. National Campaign to Restore Civil Rights

The National Campaign to Restore Civil Rights (NCRCR) is a non-partisan movement working to ensure that our courts protect and preserve equal justice, fairness, and opportunity. NCRCR is comprised of lawyers, academics, students, and community activists who joined together in response to a series of Supreme Court decisions that raised concerns about civil rights protections. NCRCR draws upon the experience of a cross-cutting range of organizational partners.

The Supreme Court's decision in *Alexander v. Sandoval*, which limited the ability of individuals and communities to address actions with an unjustified disparate impact on the basis of race and national origin under federal law, was one of the key changes in civil rights law that led to NCRCR's development, and from its inception, NCRCR has worked to ensure the vitality of anti-discrimination law such as California Government Code §11135.

N. The National Health Law Program

The National Health Law Program (NHeLP) is a non-profit, public interest law firm working to improve access to quality health care for low-income people and others who experience health care disparities. NHeLP provides legal and policy analysis, advocacy, information, and education. Since its founding more

than 40 years ago, NHeLP has developed expertise working with federal and state laws designed to end discrimination based on race, sex, national origin, religion, sexual orientation, or marital status. With its headquarters in Los Angeles, NHeLP works in depth on addressing the challenges facing low-income Californians as they seek to obtain health care. NHeLP has long been committed to effective enforcement of laws promising all of the State's residents equal access to care.

O. Urban Habitat

Urban Habitat builds power in low-income communities and communities of color by combining education, advocacy, research and coalition building to advance environmental, economic and social justice in the Bay Area. Urban Habitat believes that an affordable, reliable, and connected public transit system is one of the fundamental building blocks of a healthy region. Urban Habitat's Transportation Program works to transform the transportation movement by infusing leadership from the communities that have historically lacked political and economic power in the region. In 2001, 2005 and 2009 Urban Habitat critiqued MTC's Equity Analysis when it reported that low income communities and communities of color (labeled Communities of Concern by MTC) received more benefits from MTC's Regional Transportation Plan (RTP) investments than non-Communities of Concern.

## II. RELEVANCE AND DESIRABILITY OF *AMICUS* BRIEF

This proposed brief is submitted on behalf of 15 civil rights organizations located throughout the country. *Amici* regularly represent plaintiffs who bring disparate impact claims and, as such, have a strong interest in the maintenance of a vigorous business necessity standard as the burden for defendants in adverse impact cases. Where multiple actors, beneficiaries, and interests are at play in a decision making process, the risks of discriminatory impact are substantially increased. This robust defense standard encourages businesses and governments to apply empirically based self-evaluation policies when making complex decisions in order to prevent discriminatory effects. Conversely, a lesser requirement, such as the “substantial legitimate justification” standard as it was applied by the district court, could facilitate the inadvertent implementation of discriminatory practices. Thus, only the application of a business necessity standard will decrease the likelihood of discriminatory impact.

The watered down “substantial legitimate justification” standard as applied by the district court is not only inconsistent with California legislative history and intent, but will open the door for implicit biases and “group think” to distort otherwise rational decision making processes. Here, *amici* have focused on analyzing the legislative history of California Government Code §11135, a statute which the California Legislature has consistently expanded over the last twenty

years while maintaining a robust adverse impact standard that includes a business necessity defense. This history, along with a review of social science research regarding the discriminatory results of unchecked decision-making processes, shows that the establishment of a “substantial legitimate justification” standard is inconsistent with the expressed intent of the California Legislature. Moreover, the social science research reveals that, contrary to the findings of the district court, a strong business necessity defense is even more vital in cases involving complex decision-making.

*Amici* respectfully move that this Court grant leave to file the brief submitted by *amici curiae*.

DATED: November 23, 2009

Respectfully Submitted,

/s/ Brad Seligman

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Brad Seligman  
The Impact Fund

**CERTIFICATE OF SERVICE**

CASE: *Darensburg v. Metropolitan Transportation Commission*

CASE NO: U.S. Court of Appeals for the Ninth Circuit, Case No. 09-15878

I, Tony Dang, declare that:

I am employed at the Impact Fund, 125 University Avenue, Suite 102, Berkeley, California, 94710. I am over the age of 18 years and not a party to this action. I hereby certify that, on November 23, 2009, using the CM/ECF system, I electronically filed a true and correct copy of the following document(s):

**MOTION FOR LEAVE FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* OF THE IMPACT FUND, EQUAL JUSTICE SOCIETY, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, EQUAL RIGHTS ADVOCATES, LABOR COMMUNITY STRATEGY CENTER/BUS RIDERS UNION, LATINOJUSTICE PRLDEF, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, THE MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, THE NAACP LEGAL DEFENSE & EDUCATION FUND, INC., THE NATIONAL CAMPAIGN TO RESTORE CIVIL RIGHTS, THE NATIONAL HEALTH LAW PROGRAM, AND URBAN HABITAT IN SUPPORT OF PLAINTIFF-APPELLANTS AND IN SUPPORT OF REVERSAL**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document via First-Class Mail to the following non-CM/ECF participants:

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