Promoting Opportunity through Impact Statements: A Tool for Policymakers to Assess Equity

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April 2012

American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

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Debates over the size and scope of federal spending have dominated the political discourse over the last several years. While much discussion centers on the amounts of spending going towards various programs, less attention has been focused on ensuring that taxpayer funds, wherever they are expended, invest in greater opportunity for all communities. The American ideal of opportunity rests on the belief that everyone should have a fair chance to achieve his or her full potential, and is in keeping with core values: equal treatment, economic security and mobility, a voice in decisions that affect us, a chance to start over after misfortune or missteps, and a sense of shared responsibility for each other as members of a common society.

Governmental bodies can expand opportunity each time they support or control any number of projects, from highways and mass transit lines, to schools and hospitals, to land use and economic development, to law enforcement and environmental protection. With prudent management of these projects, they can improve access to quality jobs, housing, education, business opportunities, and good health, among other opportunities, and thus better serve all people in the United States fairly and effectively. All too often, however, such projects perpetuate or even deepen unequal opportunity and further isolate affected communities from resources.

A coordinated process is needed to ensure that public funding complies with anti-discrimination laws and not only confronts barriers to opportunity that affect regions throughout the United States, but also builds the foundation necessary to give all communities a chance to achieve economic security and mobility. We therefore propose that administrative agencies use an Opportunity Impact Statement (OIS) process as part of their evaluation of ongoing and proposed government funded projects and programs. The OIS process is a logical outgrowth of existing statutes, regulations, and executive orders that already require data collection, public participation, and pre- and post- award analysis as part of an administrative agency's civil rights compliance measures.

This issue brief will proceed in four parts. Part I will highlight post-Hurricane Katrina reconstruction efforts as one example demonstrating the need for Opportunity Impact Statements. Part II will describe the proposed OIS process – including the submission and analysis of relevant data, the weighing of public participation, and the analysis of any discriminatory impact – and the process's overall benefits. Part III will apply the OIS in the context of illustrative housing and transportation projects. This section will explore how the OIS can be helpful in those contexts, which are critically important for opportunity and equal access. Part IV of the brief will demonstrate how the U.S. Department of Justice's mandate to ensure

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compliance with civil rights laws empowers it to secure interagency cooperation and successful implementation of the OIS procedure.

I. The Need for Opportunity Impact Statements

The reconstruction of the Gulf Coast in the years after Hurricane Katrina presents a strong example of the pitfalls and the potential of government investment decisions. In the years after the storm, the reconstruction of the Gulf Coast only exacerbated inequalities that had already existed in the region before the storm.[6] Due to failed housing policy, lack of transportation, and discrimination that shut out many people of color from reconstruction jobs,[7] African-American and Latino evacuees were more than twice as likely to be unemployed two months after the storm as their white counterparts.[8] Lucrative federal hurricane recovery contracts that had the potential to reinvigorate local businesses and economies went mostly to large, out-of-state companies; as of May 2006, local businesses in Alabama, Louisiana, and Mississippi had received only 18 percent of those contracting funds.[9] Minority contractors, too, were largely overlooked in the initial contract awards.[10]

Bush Administration policies played a key role in narrowing the opportunities for equal employment and economic growth in the post-Katrina reconstruction effort by limiting labor and equal opportunity protections. On September 8, 2005, President George W. Bush announced the suspension of the Davis-Bacon Act in the Gulf Coast, eliminating a guarantee that federally contracted workers would receive local prevailing wages, and thus making it harder for unionized contractors to receive federal reconstruction funds.[11] The next day, the U.S. Department of Labor suspended requirements that government contractors have an affirmative action plan addressing the employment of women, minorities, and people with disabilities, if the companies were first-time government contractors working on the reconstruction effort.[12]

And as the employment opportunities and protections in the post-Katrina years diminished, a series of public investment decisions made it even harder for low-income

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[6] For pre-Katrina inequalities, see generally U.S. Equal Employment Opportunity Commission, EEOC Litigation Settlements April 2003, *available at* http://archive.eeoc.gov/litigation/settlements/settlement04-03.html (EEOC finding that New Orleans-based construction giant, The Industrial Company, "engaged in discriminatory recruitment and hiring practices on a nationwide basis which prevented African Americans from being hired into construction positions because of their race."); Alcorn v. City of Baton Rouge, 2002-0952 (La. App. 1 Cir. 12/30/04); 898 So.2d 385 (holding that the Baton Rouge Police Department had subjected African American police officers to recurring acts of racial discrimination and racial harassment); and ARLOC SHERMAN & ISAAC SHAPIRO, CTR. ON BUDGET & POLICY PRIORITIES, ESSENTIAL FACTS ABOUT THE VICTIMS OF HURRICANE KATRINA (2005), http://www.cbpp.org/files/9-19-05pov.pdf.

[7] *See* JUDITH BROWN-DIANIS ET AL., AND INJUSTICE FOR ALL: WORKERS' LIVES IN THE RECONSTRUCTION OF NEW ORLEANS (2006), *available at* http://www.advancementproject.org/sites/default/files/publications/workersreport.pdf.

[8] Jared Bernstein, Economic Policy Institute, *Katrina Evacuees Face Extreme Levels of Joblessness*, Nov. 17, 2005, http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_20051109/ (citing Bureau of Labor Statistics special tabulations from the Current Population Survey, Oct. 2005).

[9] U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHLIGHTS: AGENCY CONTRACTING DATA SHOULD BE MORE COMPLETE REGARDING SUBCONTRACTING OPPORTUNITIES FOR SMALL BUSINESSES, GAO-07-205 (2007), *available at* http://www.gao.gov/products/GAO-07-205.

[10] *See* Hope Yen, *Minority Firms Getting Few Katrina Contracts*, ASSOCIATED PRESS, Oct. 4, 2005, *available at* http://www.sddt.com/news/article.cfm?SourceCode=200510041al.

[11] Thomas B. Edsall, *Bush Suspends Pay Act In Area Hit By Storm*, WASH. POST, Sept. 9, 2005, at D03.

[12] Jonathan D. Glater, *Storm and Crisis: Labor; Contractors Get Affirmative Action Exemption*, N.Y. TIMES, Sept. 20, 2005, http://query.nytimes.com/gst/fullpage.html?res=9E06E0DB1630F933A1575AC0A9639C8B63.

communities of color to remain in the region. After the hurricane, the government permanently closed Charity Hospital where nearly three-quarters of the patients were African American and 85% had income levels below $20,000.[13] The education system had been dismantled since the hurricane, and most of the public schools were replaced by charter schools with selective admission policies and enrollment caps, to the exclusion of thousands of predominantly low-income children of color.[14]

On the housing front, instead of reopening the public housing units in New Orleans that could have been preserved with some repairs, the U.S. Department of Housing and Urban Development and the Housing Authority of New Orleans closed most of the city's public housing, securing some developments with fences and razor wire and installing shutters over the windows and doors of others.[15] Finally, when Louisiana created the Road Home Homeowner Assistance Program, intended to rebuild communities by providing grants to homeowners whose homes had been damaged in the storms, evidence suggested that the grants for African-American homeowners were more likely to be based on pre-storm values of their homes as opposed to the cost of damage (often leaving them without enough money to rebuild), while white homeowners were more likely to receive grants based on the actual cost of repairs.[16]

The limitations on labor and equal opportunity protections, as well as the inequitable application of federal resources, significantly diminished the opportunities and heightened the inequalities in the Gulf Coast.[17] Because the natural devastation traced long-standing disparities in neighborhood investments that had disadvantaged African-American and poor communities, 73% of all of those displaced in Orleans parish were African American.[18] And those who remained displaced after the storm were typically younger, poorer, more likely to be African American, and more likely to have children than those who stayed or migrated into the region.[19] As a result, the socio-demographic composition of New Orleans and its surrounding area in the post-Katrina years was significantly altered. In the year after the hurricane hit, the African American population in the metropolitan area as a whole declined from 38% in 2005 to 31% in 2006, while the white population in the area increased from 53% to 65% overall.[20]

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[13] Judith Browne-Dianis & Anita Sinha, *Exiling the Poor: The Clash of Redevelopment and Fair Housing in Post-Katrina New Orleans*, 51 HOW. L.J. 481, 484 (2008).
[14] *Id.*
[15] *Id.* at 488.
[16] *See* Greater New Orleans Fair Housing Action Center v. U.S. Dep't of Hous. & Urban Dev., 639 F.3d 1078 (C.A.D.C. 2011); *see also* NAACP LEGAL DEFENSE FUND, FACT SHEET: FAIR HOUSING AND CIVIL RIGHTS GROUPS FILE FEDERAL LAWSUIT IN POST-KATRINA HOUSING DISCRIMINATION CASE 2 (2008), *available at* http://naacpldf.org/files/road_home_factsheet.pdf.
[17] For more information on this case study, see THE OPPORTUNITY AGENDA, JOBS AND BUSINESS: THE STATE OF OPPORTUNITY FOR WORKERS RESTORING THE GULF (2006), http://opportunityagenda.org/files/field_file/Katrina%20Jobs.pdf. *See also* THE OPPORTUNITY AGENDA, HOUSING: WELCOMING KATRINA'S VICTIMS BACK HOME (2006), http://opportunityagenda.org/files/field_file/Katrina%20Housing.pdf.
[18] Browne-Dianis & Sinha, *supra* note 13, at 483.
[19] *See* WILLIAM H. FREY, AUDREY SINGER & DAVID PARK, BROOKINGS INST., RESETTLING NEW ORLEANS: THE FIRST FULL PICTURE FROM THE CENSUS (2007), http://www.brookings.edu/~/media/Files/rc/reports/2007/07katrinafreysinger/20070912_katrinafreysinger.pdf.
[20] *Id.* at 7.

Imagine, instead, that the federal government had allocated its investments in the rebuilding of the Gulf Coast through the lens of greater and more equal opportunity. The U.S. Department of Housing and Urban Development, for example, could have considered the demographics of New Orleans neighborhoods to ensure that rebuilding rules and the disposition of habitable public housing did not unnecessarily prevent African Americans and other groups from returning to the city. In addition to maintaining fair labor and equal employment opportunity rules, it could have assessed contractor workforce recruiting and hiring practices compared with the regional pool of qualified workers. Evaluating these factors, to determine how taxpayer funds should be deployed after a cataclysmic disaster with deep racial and socioeconomic implications, could have produced both a more equitable and a more prosperous region. More broadly, there is an ongoing need for federal agencies and other actors to assess— through a systematic and informed approach— how their decisions advance equal opportunity and comply with anti-discrimination laws.

Our recommended Opportunity Impact Statement process creates a comprehensive and coordinated enforcement protocol with consistent metrics to facilitate compliance with anti-discrimination protections. It provides a comprehensive tool that public bodies, affected communities, and the private sector can use to achieve programmatic goals and to promote programs and projects that offer equal and expanded opportunity for everyone in a community or region. Drawing from best practices found in the application of other types of impact statements, the OIS effectuates crucial equal opportunity protections while increasing the efficacy of review procedures.

In authorizing, funding, and regulating projects, all levels of government have a responsibility to keep the doors of opportunity open to everyone. There is a substantial body of statutes, regulations, and executive orders designed to ensure that recipients of federal funds do not discriminate, in either purpose or effect, on the basis of race, color, ethnicity, disability, gender, or other social characteristics. Although agencies are obliged to enforce these laws, enforcement mechanisms have been significantly neglected over most of the past several decades.[21] The OIS assesses the impact on equal opportunity of proposed or existing federally-funded projects, facilitates public input, and ensures compliance with a range of equal opportunity laws tied to federal spending. These include: Title VI of the Civil Rights Act of 1964;[22] Title VII of the Civil Rights Act;[23] Title IX of the Education Amendments;[24] Section 504 of the Rehabilitation Act;[25] the Age Discrimination in Employment Act;[26] the Americans with

[21] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010), *available at* http://www.gao.gov/new.items/d10905.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, WOMEN'S EARNINGS: FEDERAL AGENCIES SHOULD BETTER MONITOR THEIR PERFORMANCE IN ENFORCING ANTI-DISCRIMINATION LAWS (2008), *available at* http://www.gao.gov/new.items/d08799.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. GOV'T ACCOUNTABILITY OFFICE, WITHIN-SCHOOL DISCRIMINATION: INADEQUATE TITLE VI ENFORCEMENT BY EDUCATION'S OFFICE FOR CIVIL RIGHTS (1991), *available at* http://archive.gao.gov/d38t12/143730.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, ACTIONS TAKEN TO IMPLEMENT TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (1980), *available at* http://archive.gao.gov/f0202/112097.pdf ("Neither the Department of Justice nor many Federal agencies with assistance programs subject to title VI have effectively implemented title VI requirements.").

[22] 42 U.S.C. §§ 2000d-1 to 2000d-7 (1964).

[23] 42 U.S.C. §§ 2000e to 2000e-17 (1964).

[24] 20 U.S.C. §§ 1681-1688 (1972).

[25] 29 U.S.C. § 794 (1973).

[26] 39 U.S.C. § 621 (1967).

Disabilities Act;[27] the Uniform Relocation Act;[28] Executive Order 11246;[29] Executive Order 12898;[30] and Executive Order 12250.[31] Title VI, for example, prohibits discrimination on the basis of race, ethnicity, or national origin in programs receiving federal financial assistance.

Under Title VI and other equal opportunity statutes or their implementing regulations, government-funded programs may not intentionally discriminate based on covered characteristics like race, nor may they discriminate in practice through an unjustified disparity on those bases. For example, under regulations implementing Title VI, a prima facie disparate impact claim arises if a program disproportionately excludes or burdens members of a particular racial or ethnic group, relative to their representation in the larger population. Unless the policy or practice causing the disparate impact is found to be essential to the fund recipient's mission, the program or activity cannot receive federal assistance.[32] And even where such a finding is made, government assistance remains impermissible if a less discriminatory alternative exists to achieve the intended purposes.[33]

The OIS process has the potential to better facilitate, coordinate, and expedite review and compliance under these anti-discrimination provisions, including Title VI. On both the federal and state levels, impact statements are a well-established mechanism intended to ensure that policymakers have full awareness of the impact of proposed rules or actions.[34] Fiscal impact statements from the non-partisan Congressional Budget Office, for example, outline the costs and benefits of legislation, and many states have adopted similar financial analyses for legislative action.[35] Iowa, Connecticut, and Minnesota have established impact statements that review proposed changes in criminal justice policy to determine whether such action will exacerbate or reduce racial disparities in sentencing and incarceration.[36] Another well-known impact statement is the Environmental Impact Statement (EIS) that the National Environmental Policy Act[37] requires federal agencies to prepare, based on available data and investigation, when a project is

[27] 42 U.S.C. §§ 12101-12213 (1990).
[28] 42 U.S.C. §§ 4600-4655 (1970) (The URA is not traditionally considered an equal opportunity law, but it requires fair and equitable treatment of persons dislocated by federally funded projects, relocation assistance to displaced persons that minimizes financial and emotional impact, and improvement of the housing condition of displaced persons living in substandard housing.).
[29] 30 Fed. Reg. 12,319 (Sept. 24, 1965) (requiring affirmative action in employment decisions by federal and federally-assisted construction contractors and subcontractors).
[30] 59 Fed. Reg. 7629 (Feb. 16, 1994) (requiring that no racial, ethnic, socioeconomic, or other group of people bear disproportionate environmental burdens resulting from industrial, commercial, or government operations or policies).
[31] 45 Fed. Reg. 72,995 (Nov. 4, 1980) (requiring the coordination, implementation, and enforcement by Executive agencies of federal equal opportunity statutes).
[32] *See* Griggs v. Dukes Power Co., 401 U.S. 424 (1970); Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1981).
[33] *See* Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); *see also* Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989).
[34] *See, e.g.*, Nat'l Conf. of State Legislatures, Preparation of Fiscal Analyses, http://www.ncsl.org/legislatures-elections/elections/fiscal-impact-statements.aspx (last visited Mar. 29, 2012); State of Oregon, Staff Measures Summaries Home Page, http://www.leg.state.or.us/comm/sms/SMS01Frameset.html (last visited Mar. 29, 2012); South Carolina Budget & Control Board, Office of State Budget – Fiscal Impact Statements, http://www.budget.sc.gov/OSB-fiscal-impact.phtm (last visited Mar. 29, 2012).
[35] *Id.*
[36] *See* H.F. 2393, 82nd Gen. Assem., Reg. Sess. (Iowa 2008); 2008 Conn. Legis. Serv. P.A. 08-143 (H.B. 5933) (West); Relating to the Findings of the Commission on Reducing Racial Disparities in the Wisconsin Justice System and the Creation of the Racial Disparities Oversight Commission, Wis. Exec. Order No. 251 (2008); *see also* Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, CRIM. JUST., Winter 2009, at 16.
[37] Pub. L. 91-190 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (2006)).

likely to have a significant effect on the environment. The EIS compares the proposed project to other alternative approaches, and invites public scrutiny and public comment, thus facilitating informed and democratic decision making in the pursuit of sustainable development.

The proposed Opportunity Impact Statement pursues similar goals in the context of opportunity. The OIS is designed to promote careful consideration of significant positive and negative opportunity impacts arising from proposed federally-funded projects. It also creates a single formal evaluation procedure that both ensures meaningful public participation in the agency's consideration of the proposed action and avoids duplicative or uncoordinated attempts at complying with equal opportunity mandates after the fact.

While this issue brief focuses on illustrations of the OIS as it could be applied by federal agencies, it is important to note that states, localities, and private actors would also benefit from initiating use of an OIS. At all levels, the OIS serves to provide a comprehensive, efficient framework to better ensure compliance with existing law.

II. Elements of the Opportunity Impact Statement

Using empirical data, as well as community input and investigation, the Opportunity Impact Statement assesses the extent to which a publicly funded project will expand or contract opportunity for all (e.g., would jobs be created or lost; would affordable housing be created or destroyed?) and the extent to which it will equitably serve residents and communities of different races, incomes, and other diverse characteristics (e.g., would displacement or environmental hazards be equitably shared by affected communities?). These factors are considered in the context of communities' differing assets, needs, and characteristics. Experience shows that simply asking these types of questions and requiring a thorough and public response will have a positive effect on the development of publicly subsidized or authorized projects. Also, where necessary, it will help identify and address potential and actual violations of equal opportunity laws in a timely manner. The OIS will help ensure that all funded projects comply with equal opportunity laws, and can also help determine which projects should be given priority for funding because of their positive impact on opportunity.

The OIS would require both a funding applicant and its government funding agency to evaluate whether or not its program will have an unlawful disparate impact on the basis of protected characteristics before implementing the program. To accomplish this analysis, the OIS process would utilize: data collection and review; public comment and participation; prioritization of equitable projects; and transparency and accountability.

A. Data Collection and Review

To adequately protect equal opportunity, government entities must rely on data collection and the analysis of comparative statistical data to detect any patterns or practices of intentional discrimination,[38] as well as any impermissible disparate impacts that a program or activity may have on a particular group.[39]

[38] *See, e.g.*, Wyvill v. United Companies Life Ins. Co., 212 F.3d 296, 302 (5th Cir. 2000) ("Often, an illegal pattern and

Under Title VI, the specific form and methodology by which federal fund recipients must collect data for the determination of any disparate impact is decided largely at the discretion of federal agencies.[40] But data collection is clearly within each agency's authority. Given the evidentiary structure for assessing liability for discrimination under civil rights law, moreover, collection and analysis of relevant data are clearly necessary in order to ensure compliance. Due to the common structure and legislative goals of Title VI, Title IX, and Section 504 of the Rehabilitation Act of 1973,[41] the data collection requirements described in this section are similarly required to comply with these other civil rights laws. To effectively enforce equal opportunity mechanisms, federal agencies should collect demographic data—disaggregated by race or ethnicity,[42] or, in the case of other equal opportunity mandates, gender, disability, familial status, religion, or age—regarding the jurisdiction or metropolitan area in which the relevant program or activities are to take place, as well as the populations that would be burdened and benefited by negative and positive impacts of those programs or activities.

Individual federal agencies have already made some efforts to require this type of data collection by federal funding applicants.[43] Federal agencies, and not federal fund applicants or recipients, bear the ultimate responsibility for determining civil rights compliance.[44] It is therefore necessary that federal agencies regularly collect and review data submitted by the funding applicants or recipients in compliance with equal opportunity mandates. Affirmative

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practice [of discrimination] is revealed with statistical proof.") (citing Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875 (1984)); Equal Employment Opportunity Comm. v. Dial Corp., 469 F.3d 735, 741 (8th Cir. 2006) ("[S]tatistics combined with anecdotal examples of discrimination may establish a pattern or practice of regular, purposeful discrimination."); Cooper v. Southern Co., 390 F.3d 695, 724 (11th Cir. 2004) ("[I]n a 'pattern and practice' disparate treatment case, 'the plaintiff must prove, normally through a combination of statistics and anecdotes, that discrimination is the company's 'standard operating procedure.'").

[39] *See, e.g.*, Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2nd Cir. 1980) ("discriminatory racial impact is frequently evidenced by statistics") (citing Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15, 339 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977)); Muñoz v. Orr, 200 F.3d 291, 300 (5th Cir. 2000) ("Claims of disparate impact under Title VII must, of necessity, rely heavily on statistical proof.") (citing Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 987 (1988)).

[40] *See* Madison-Hughes v. Shalala, 80 F.3d 1121, 1125 (6th Cir. 1996) (stating that, under Title VI, "data collection is left to HHS's discretion").

[41] *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677 (1980) (interpreting these statutes similarly).

[42] *See* 28 C.F.R. § 42.406(b) (2011) (listing "[t]he population eligible to be served by race, color and national origin" as an example of data to be collected under the preceding provision").

[43] *See, e.g.*, U.S. Dep't of Transp. Title VI Regulations, 49 C.F.R. § 21.7 (2011) ("Every application by a State or a State agency for continuing Federal financial assistance to which this part applies . . . shall *as a condition to its approval and the extension of any Federal financial assistance pursuant to the application*: (1) Contain or be accompanied by a statement that the program is (or, *in the case of a new program, will be*) conducted in compliance with all requirements imposed by or pursuant to this part, and (2) provide or be accompanied by provision for such methods of administration for the program *as are found by the Secretary to give reasonable guarantee* that the applicant and all recipients of Federal financial assistance under such program *will comply* with all requirements imposed by or pursuant to this part.") (emphasis added); U.S. Dep't of Transp. Order No. 1000.12, Implementation of the Department of Transportation Title VI Program (1977) ("Each operating element shall, in developing its Title VI program, examine in detail the nature and structure of programs and activities for which it provides Federal financial assistance, *require information of applicants and recipients to determine compliance, and establish requirements* so as to ensure that the purpose of its Title VI program is achieved.") (emphasis added).

[44] Memorandum from Bill Lann Lee, Acting Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to the Executive Agency Civil Rights Directors 4-5 (Jan. 28, 1999), *available at* http://www.justice.gov/crt/about/cor/Pubs/blkgrnt.php (citing 28 C.F.R. § 42.408(c) ("Where a federal agency requires or permits recipients to process Title VI complaints, the agency . . . shall retain a review responsibility over the investigation and disposition of each complaint.")).

efforts by all federal agencies to ensure that this type of demographic data is collected are necessary to ensure that discriminatory disparate impacts are not created or exacerbated through the use of government monies.[45]

To determine whether an unlawful disparate impact exists based on the collected data and in violation of Title VI or its counterparts, federal agencies should engage in comparative scrutiny of any statistical disparities between the relevant jurisdiction as a whole (e.g., a city or metropolitan area, a school district, a qualified labor force) and the populations who will be benefited and burdened by the federally funded program or activity (e.g., people benefited by a bus route or light rail, attendance zones of a new school building, people displaced by demolition or exposed to environmental hazards).[46] Federal agencies should collect and analyze such data as a condition for approving the allocation or disbursement of federal financial assistance.

Numerous examples of the proper analysis exist from case law prior to *Alexander v. Sandoval* (in which the Supreme Court ruled that no private cause of action exists to enforce Title VI regulations).[47] For example, in the late 1970s, when the New York City Board of Education was suspected of racially discriminatory teacher assignment practices, the U.S. Department of Health, Education, and Welfare (HEW) compared the average percentage of minority teachers in academic high schools within the entire system with the percentage of minority teachers at high schools with high concentrations of minority students.[48] After analyzing the data, HEW determined that the racial assignment of faculty within the system showed, with statistical significance, an absence of minority teachers at certain academic (i.e., nonvocational) high schools,[49] and subsequently denied federal funding to the Board of Education. Because the analyzed data established a prima facie case of disparate racial impact in violation of Title VI, and the Board of Education "failed to present a sufficient justification for

[45] Executive Order 12898, regarding Environmental Justice, reaffirms the authority and, in some cases, obligation of funding agencies to collect and analyze racial and ethnic data in advance, in order to determine the potential discriminatory effect of a regulated facility, program or activity. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994) ("[E]ach Federal agency, whenever practicable and appropriate, *shall* collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites *expected to have* substantial environmental, human health, or economic effect on the surrounding populations, *when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action.* Such information shall be made available to the public unless prohibited by law.") (emphasis added).

[46] Within the litigation schema, where a complainant shows a causal connection between a facially neutral policy and a disproportionate and adverse impact on a protected Title VI group, see N.Y.C. Envtl. Justice Alliance (NYCEJA) v. Giuliani, 214 F.3d 65, 70 (2d Cir. 2000). The recipient of federal funds must show that the policy causing a discriminatory effect is "necessary to meeting a goal that [i]s legitimate, important, and integral to the [recipient's] institutional mission." Sandoval v. Hagan, 7 F.Supp. 2d 1234, 1278 (M.D. Ala. 1998), *aff'd*, 197 F.3d 484 (11th Cir. 1999), *overruled on other grounds*, Alexander v. Sandoval, 530 U.S. 1305 (2000). Thus, to both anticipate and prevent potential litigation, it is necessary that federal and federally funded programs collect legitimate and comprehensive documentation to prove that any facially neutral programs or activities with discriminatory effects are necessary to the institutional missions of the recipient. In the context of litigation, once the federal fund recipient can prove that the policy causing the discriminatory effect is necessary to its institutional mission, the burden would shift to the provider of federal funds to show whether a comparably effective alternative practice exists which would result in less disproportionality. Elston v. Talladega County Bd. of Educ., 997 F. 2d 1394, 1407 (11th Cir. 1993). However, is it to the advantage of prospective federal fund recipients to make this inquiry *before* the inception of their proposed activities, and for ongoing federal fund recipients to explore these alternatives and shift their programming accordingly as soon as is practicable.

[47] Alexander v. Sandoval, 532 U.S. 275 (2001).

[48] *See* Board of Educ. v. Califano, 584 F.2d 576, 583-85 (1978).

[49] *Id.* at 584-85.

the racial disparities in teacher and staff assignments,"[50] the Second Circuit Court of Appeals in *Board of Education v. Califano* determined that HEW did not err in its denial of federal funding.[51]

Comparing data to determine whether an inappropriate disparate impact exists is similarly appropriate in the employment context. In *Bridgeport Guardians, Inc. v. Bridgeport*, for example, when promotions to the position of police sergeant were strictly based on the rank-order results of an examination, the plaintiffs compared the applicants selected for promotion under the strict use of the examination with the pool of applicants eligible for the promotion.[52] Determining that the comparison revealed that eligible African American and Hispanic candidates were disadvantaged by strict rank-order use of the examination at a statistically significant rate,[53] the Second Circuit affirmed the district court's finding that the plaintiffs had established a prima facie case of disparate impact in violation of Title VII of the Civil Rights Act of 1964.[54] Although the defendants showed that the "examination was content valid and justified by the City's business needs," the court found that the plaintiffs had sufficiently rebutted that evidence by showing that the City could have chosen an alternative method of evaluating the examination results "to alleviate the disparate racial effect of the examination without disserving its legitimate interests."[55]

Instituting an OIS process would strengthen existing data collection requirements and would allow federal agencies to analyze a project or program's relative ability to expand or diminish access to opportunity within a region *before* the allocation or disbursement of federal funds, thus proactively effectuating civil rights mandates.

B. Public Participation and Access to Information

While data collection and analysis are crucial to anticipating and preventing unlawful discrimination and promoting opportunity for all communities, they are not enough. Because discrimination, and in particular, discriminatory impacts of facially neutral policies or practices, is not often readily apparent, federal agencies must enable the public to access information on proposed policies and activities and to meaningfully participate in the regulatory review process.[56] It is important that federal agencies take specific steps, where relevant, for

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[50] *Id.* at 589.
[51] *See id.*
[52] Bridgeport Guardians, Inc. v. Bridgeport, 933 F.2d 1140, 1146-48 (1991).
[53] *Id.* at 1147 ("The Mann-Whitney analysis revealed that the 1989 examination resulted in a pattern that, comparing the scores of White candidates against African American candidates, would occur by chance only once in 10,000 times, and that, comparing the scores of White candidates against Hispanic candidates, would occur by chance only twice in 10,000 times. Given that an occurrence rate of anything less than once in 20 times is not reasonably attributable to chance, the court appropriately found that the pattern of the test scores here, whose occurrence rate was one in 10,000 and two in 10,000, had statistical significance.").
[54] *Id.* at 1148.
[55] *Id.*
[56] *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629, Sec. 5-5 (Feb. 11, 1994) (providing for public participation and access to information in environmental regulation). Because the negative societal effects of unintentionally discriminatory environmental programs and activities may be similarly present in recipient programs and activities outside the arena of environmental regulation, this important provision of Executive Order 12898 should be extended to the proactive process of considering equal opportunity compliance in all federal and federally assisted programs and activities.

participation by members of the public with limited English proficiency;[57] persons with disabilities;[58] American Indians, Alaskan Natives, and Tribes;[59] and other groups relevant to equal opportunity enforcement who might otherwise face barriers.

To the extent practicable, public comment should be facilitated for all proposed projects or programs in the form of community meetings, written public comment submissions, and academic and social science research and analysis. Requiring an active analysis of public comment in the OIS can help funding recipients anticipate consequences that their own data might have missed. Advocates working in the environmental justice sector, as one example, have been developing strategies for meaningful public engagement.[60]

Some of these strategies have been used in the transportation context. For example, the Federal Transit Administration's (FTA) Circular (used to communicate instructions and information to the FTA), titled, "Title VI and Title VI-Dependent Guidelines for Federal Transit Administration Recipients,"[61] states:

> Recipients should make these determinations [of specific public involvement measures] based on the composition of the population affected by the recipient's action, the type of public involvement process planned by the recipient, and the resources available to the agency. Efforts to involve minority and low-income people in public involvement activities can include both comprehensive measures, such as placing public notices at all [locations] . . . and measures targeted to overcome linguistic, institutional, cultural, economic, historical, or other barriers that may prevent minority and low-income people and populations from effectively participating in a recipient's decision-making process.

Effective practices include:

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[57] *See* Exec. Order No. 13,166, 65 Fed. Reg. 50121 (Aug. 16, 2000) (reaffirming the obligation to eliminate limited English proficiency as an artificial barrier to full and meaningful participation in all federally assisted programs and activities).

[58] *See, e.g.*, U.S. Dep't of Transp. Section 504 Regulations, 49 C.F.R. § 28.110(b) (2011) ("The Department shall provide an opportunity to interested persons, including individuals with handicaps, agency employees with handicaps, and organizations representing individuals with handicaps, to participate in the self-evaluation process [of its current policies and practices] by submitting comments (both oral and written).").

[59] *See, e.g.*, U.S. Dep't of Transp. Order No. 5301.1, Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes (1999) ("Consult with Indian tribes before taking any actions that may significantly or uniquely affect them. This process may be supplemented by seeking information from other relevant sources and may be required by specific laws, regulations, and executive orders.").

[60] *See, e.g.*, Cheryl Simrell King et al., *The Question of Participation: Toward Authentic Public Participation in Public Administration*, 58 PUB. ADMIN. REV. 317, 317 (1998), *available at* http://www.centerforurbanstudies.com/documents/service/King_The_Question_of_Participation.pdf (arguing that the principal public participation methods used by government agencies—public hearings, public meetings, and notice and comment rulemaking procedures alone—frequently do not create conditions necessary for effective, or "authentic" public participation).

[61] FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., CIRCULAR: TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (2007), *available at* http://www.fta.dot.gov/documents/Title_VI_Circular_4702.1A.pdf.

(1) Coordinating with individuals, institutions, or organizations and implementing community-based public involvement strategies to reach out to members in the affected minority and/or low-income communities.
(2) Providing opportunities for public participation through means other than written communication, such as personal interviews or use of audio or video recording devices to capture oral comments.
(3) Using locations, facilities, and meeting times that are convenient and accessible to low-income and minority communities.
(4) Using different meeting sizes or formats, or varying the type and number of news media used to announce public participation opportunities, so that communications are tailored to the particular community or population.
(5) Implementing DOT's policy guidance concerning recipients' responsibilities to LEP [limited English proficiency] persons to overcome barriers to public participation.[62]

When developing a process for considering public input in federal funding decisions, all agencies should consider incorporating the FTA's language into their public participation plans.

C. Response to Findings

The results of Opportunity Impact Statements can both ensure compliance with equal opportunity laws and help federal agencies decide which projects are most worthy of support. If, based on the data collected and reviewed and the public comments submitted, a federally funded program is shown to have a disproportionate adverse effect on a particular community covered by Title VI or other equal opportunity statutes, the funding applicant or recipient should be required to "prove a substantial legitimate justification for its practice."[63] Absent that showing, or if a less discriminatory alternative is found, federal funding should not go forward.[64]

[62] *Id.* at IV-4, IV-5.
[63] *See* Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).
[64] The primary means of enforcing compliance with Title VI is through voluntary agreements with the recipients--fund suspension or termination is a means of last resort. Accordingly, if an agency believes an applicant is not in compliance with Title VI, the agency has three potential remedies: (1) resolution of the noncompliance (or potential noncompliance) "by voluntary means" by entering into an agreement with the applicant, which becomes a condition of the assistance agreement; or (2) where voluntary compliance efforts are unsuccessful, a refusal to grant or continue the assistance ; or (3) where voluntary compliance efforts are unsuccessful, referral of the violation to the Department of Justice for judicial action. Agencies may also defer the decision whether to grant the assistance pending completion of a Title VI (Title IX, or Section 504) investigation, negotiations, or other action to obtain remedial relief. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, TITLE VI LEGAL MANUAL, at Sec. XI (2011), *available at* http://www.justice.gov/crt/about/cor/coord/vimanual.php. Also note that, before denying or terminating federal funds to an applicant/recipient, a four step process should be undertaken: "(1) the agency must notify the recipient that it is not in compliance with [Title VI] and that voluntary compliance cannot be achieved; (2) after an opportunity for a hearing on the record, the 'responsible Department official' must make an express finding of failure to comply; (3) the head of the agency must approve the decision to suspend or terminate funds; and (4) the head of the agency must file a report with the House and Senate legislative committees having jurisdiction over the programs involved and wait 30 days before terminating funds. The report must provide the grounds for the decision to deny or terminate funds to the recipient or applicant." *Id.* at Sec. XI(C) (citing 42 U.S.C. § 2000d-1 (2006); *see also, e.g.*, 45 C.F.R. § 80.8(c) (2011)).

More broadly, however, the results of Opportunity Impact Statements can help to determine public spending priorities even in the absence of a civil rights violation. When choosing among two or more applicants for federal assistance that are otherwise equally attractive, funding agencies should select the applicant whose OIS indicates it will produce greater and more equal opportunity, even if none of the putative programs would actively violate equal opportunity laws.

D. Transparency and Accountability

In 2009, when the Recovery Accountability and Transparency Board created Recovery.gov, the website used to track the government's stimulus allocations, they set a new and heightened standard for government transparency.[65] Previously, the Office of Federal Financial Management had only been able to collect information on the initial recipients of federal funds.[66] However, after 2009, they were able to collect a second level of data—this time, on the secondary entities to which their initial grants had been distributed.[67]

The OIS process would fulfill the public's elevated expectations of transparency through a public, written report, as well as a record of the goals, data, analysis, and public comments that led to the report's conclusions. Interactive online and geographical information system mapping applications can further increase the accessibility of reports. The report will guide governmental and community decision making regarding the proposed project, while providing guidelines for the future development and regulation of projects that are ultimately approved. Moreover, the OIS serves as a uniform record across agencies demonstrating good faith efforts to comply with equal opportunity requirements.

III. Agency-Specific Applications of the OIS Model

The Opportunity Impact Statement has broad potential for use by federal agencies, as well as recipients, and for independent use by states, localities, and private actors who seek to comply with equal opportunity responsibilities while expanding opportunity for all. The following section highlights its potential application to transportation and housing, two areas of crucial importance in furthering access to opportunity.

A. Transportation

The Department of Transportation (DOT) encompasses federal agencies that work on issues of air, road, rail, and sea transportation, as well as oil and gas pipelines.[68] The DOT's spending and policies have a tremendous impact on American life, shaping how individuals and whole communities travel to jobs, health care, commerce, and schools. Although the DOT is obligated to ensure equal access to the benefits of such travel, as well the equal sharing of the

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[65] Gregory Korte, *Recovery.gov a model for transparency,* USA TODAY, Sept. 28, 2010, http://www.usatoday.com/tech/news/2010-09-28-stimulus28_ST_N.htm.
[66] *Id.*
[67] *Id.*
[68] DOT Agencies, http://www.dot.gov/DOTagencies.htm (last visited Dec. 10, 2010). Agencies under the umbrella of the DOT include the Federal Aviation Administration, Federal Highway Administration and the Federal Railroad Administration, among others.

burdens that transportation projects can create, those responsibilities have faltered due to the lack of consistent, comprehensive oversight.[69] Independent reviews throughout the years have identified weaknesses in the DOT's past enforcement of funding criteria that an OIS could help address. For example, the United States Government Accountability Office found that "there was substantial variation in the extent to which states prioritized [highway projects funded by the American Recovery and Reinvestment Act] in economically distressed areas and how they identified these areas. Due to the need to select projects and obligate funds quickly, many states first prioritized projects based on other factors and only later identified whether these projects fulfilled the requirement to give priority to projects in economically distressed areas."[70]

To remedy these concerns, the DOT has full authority to implement all aspects of an Opportunity Impact Statement process on a pilot, targeted, or universal and permanent basis. Title VI authorizes agencies to ensure compliance by withholding funds or "by any other means authorized by law."[71] The administrative authority to implement this procedure is further amplified by relevant executive orders.[72] Requiring and analyzing data regarding the potential discriminatory impact of programs being considered for federal funding falls well within this mandate and is consistent with the Department's responsibility "to effectuate its provisions by issuing rules, regulations, or orders of general applicability,"[73] and freedom "to utilize all the resources at its disposal and to seek creative ways to gather necessary information to make preliminary compliance decisions."[74]

An OIS process would enable the DOT to collect the information necessary to prioritize equal opportunity compliance in its funding decisions, create equal opportunity oversight and quality assurance, engage community and advocacy groups in planning and policy development, and provide clear prospective guidance to the states in their efforts to comply with equal opportunity laws.

1. Data Collection within the DOT

[69] For example, in September 2009, Public Advocates filed a successful civil rights administrative complaint with the Federal Transit Administration (FTA) challenging a $492 million Bay Area airport connector project, for failure to conduct the equity assessment required by FTA's Title VI rules. More information available at: http://www.publicadvocates.org/bartoakland-airport-connector-oac.

[70] U.S. GOV'T ACCOUNTABILITY OFFICE, RECOVERY ACT: STATES' USE OF HIGHWAY INFRASTRUCTURE FUNDS AND COMPLIANCE WITH THE ACT'S REQUIREMENTS, TESTIMONY BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, HOUSE OF REPRESENTATIVES 6, 4 (2009), *available at* http://www.gao.gov/new.items/d09926t.pdf; *see also* U.S. COMM'N ON CIVIL RIGHTS, TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? 71-72 (2002), *available at* http://www.law.umaryland.edu/marshall/usccr/documents/tenyrchekupvol2.pdf.

[71] 42 U.S.C. § 2000d-1 (2006).

[72] *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 4, 1980); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

[73] *See* Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973); *see also* 42 U.S.C. § 2000d-1 (1964).

[74] *See* Memorandum from Bill Lann Lee, Acting Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to the Executive Agency Civil Rights Directors 4-5 (Jan. 28, 1999), *available at* http://www.justice.gov/crt/about/cor/Pubs/blkgrnt.php (stating that a final determination as to whether there has been a violation of Title VI remains the responsibility of the Federal agency, and not the recipient of Federal funds, and that the Federal agency is "free to utilize all the resources at its disposal and to seek creative ways to gather necessary information to make preliminary compliance decisions").

The DOT Title VI regulations already authorize the level of data collection that would be required under the OIS process, though these have lacked proper enforcement in the past. For example, DOT regulations require that both fund recipients and sub-recipients "have available for the Secretary racial and ethnic data showing the extent to which members of minority groups are beneficiaries of programs receiving federal financial assistance."[75] An OIS pre- or post-approval data collection requirement would simply provide a more uniform and predictable approach to fulfilling this requirement. Although this analysis directly references the DOT requirements under Title VI of the Civil Rights Act of 1964, courts have recognized the common structure and legislative goals of Title VI, Title IX of the Education Amendments of 1972,[76] and Section 504 of the Rehabilitation Act of 1973, and have interpreted them similarly.[77] The data collection and analysis requirements laid out in the DOT Title VI regulation and order are similarly required to comply with these other civil rights laws as well.[78]

The DOT's authority to collect data regarding possible discriminatory disparate impact is further evident in its order effectuating Executive Order 12898, which addresses environmental justice concerns. The DOT order states, in part:

> [T]o assure that disproportionately high and adverse effects on minority or low income populations are identified and addressed, DOT shall collect, maintain, and analyze information on the race, color, national origin, and income level of persons adversely affected by DOT programs, policies, and activities, and use such information in complying with this Order.[79]

2. Public Input and Participation for DOT Projects

Public input is an essential factor in the Opportunity Impact Statement because it can illuminate possible consequences that the DOT's data collection alone might miss. By engaging diverse public participation at the approval stage, moreover, the Department can lay the groundwork for wide utilization of programs that are later approved. Several DOT orders direct its agencies to involve the community when undertaking new projects. The authority for the DOT solicitation and consideration of public input regarding disparate impacts of federally funded projects can be found, among other places, in the DOT Title VI Order, which specifically requires the DOT Director of Civil Rights to "[d]isseminate information to and provide *continuous and meaningful consultation with the public concerning the Department's Title VI program*, including, in appropriate situations, the provision of material in languages other than English."[80] Public input and participation are similarly required by the DOT to effectuate Section

[75] 49 C.F.R. § 21.9(b) (2011).
[76] Title IX applies, with a few specific exceptions, to all aspects of education programs or activities (including education or training programs) operated by recipients of federal financial assistance. U.S. Dep't of Justice, Civil Rights Division, Overview of Title IX of the Education Amendments of 1972 (2009), http://www.justice.gov/crt/about/cor/coord/ixovervw.php.
[77] *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677 (1980).
[78] *See* 49 C.F.R. 27.7(a)-(c) (2011).
[79] U.S. Dep't of Transp. Order 5610.2, Department of Transportation Order to Address Environmental Justice in Minority Populations and Low-Income Populations 18378 (1997), *available at* http://www.fra.dot.gov/Pages/128.shtml.
[80] U.S. Dep't of Transp. Order No. 1000.12, Implementation of the Department of Transportation Title VI Program (1977) (emphasis added), *available at* http://www.acogok.org/Newsroom/Downloads08/title6report.pdf.

504 of the Rehabilitation Act,[81] and another DOT order (5301.1) includes a similar public participation requirement for all programs, policies, and procedures that affect "American Indians, Alaska Natives, and Tribes."[82]

These DOT orders emphasize the need for a public input and participation process in any coordinated effort to effectively and expeditiously implement the DOT's civil rights compliance efforts and inform its decision-making. Serious dedication to these principles could help the DOT better understand the potential impact of its projects and allow it to avoid negatively or unfairly impacting the communities.

3. Project Analysis

Once data has been collected, the DOT body reviewing the OIS must determine whether there is a potentially unlawful disparate impact. The agency should compare the demographic composition of the most relevant jurisdiction in which the project would be located with the demographic composition of the populations that would be benefited and burdened by the project. The existing DOT Title VI regulations provide examples that concretize the agency's role in analyzing comparative impact information. Regulations for DOT agencies (such as the Federal Highway Administration and others)[83] require the collection and analysis of comparative data. For instance, in order to ensure that transportation routes equitably serve all communities and are "convenient to the disadvantaged areas of nearby communities to enhance employment opportunities for the disadvantaged and minority population," the agency must compare neighborhood demographic data for the jurisdiction in question with the demographic characteristics of proposed routes.

This comparative analysis to determine disparate impact is also amply reflected in the case law.[84] Such cases make clear that to properly determine whether a disparate impact exists, the DOT reviewing body must analyze the comparative benefits and burdens of a project or policy across the racial, ethnic, and other characteristics covered by the equal opportunity laws. If a proposed federally funded program is shown to have a disproportionately adverse effect, the agency should determine that a prima facie case of discrimination arises, thus raising the presumption that funding will be denied. The funding applicant or recipient should then be given

[81] 49 C.F.R. § 28.110(b) (2011).
[82] U.S. Dep't of Transp. Order No. 5301.1, Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes (1999), *available at* http://isddc.dot.gov/OLPFiles/OST/ 009273.pdf.
[83] 49 C.F.R. § 21, App. C(a)(1)(viii)-(ix), App. C(a)(2)(vi)-(vii), App. C(a)(3)(iii) (2011).
[84] *See* Bryan v. Koch, 627 F.2d 612, 616 (2d Cir. 1983) (regarding a city's decision to close a hospital, finding a prima facie case of discrimination by "comparing the 98% minority proportion of the [federally funded hospital's] patients with the 66% minority proportion of the patients served by the City's municipal hospital system"); Meek v. Martinez, 724 F. Supp. 888, 898 (S.D. Fla. 1989) (prima facie case established upon showing that inclusion of irrelevant factors in formula for distributing funds pursuant to Older Americans Act reduced funding to "high minority" districts by 45%, 37%, 18%, and 15%); Larry P. v. Riles, 793 F.2d 969, 982-83 (9th Cir. 1984) (regarding an IQ test used to place children in "educable mentally retarded" programs, court found a "clear demonstration of discriminatory impact" where "black children as a whole scored ten points lower than white children on the tests, and that the percentage of black children in E.M.R. classes was much higher than for whites"); *see also* Shannon v. U.S. Dep't. of Hous. & Urban Dev., 436 F.2d 809, 821 (3rd Cir. 1970) (prima facie case proven through segregative impact of housing policy); Coal. of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 127 (S.D. Ohio 1984) (prima facie case of disparate impact discrimination in the context of a proposed highway project).

the opportunity to "prove a substantial legitimate justification,"[85] rooted in demonstrated facts, for its presumptively discriminatory practice. But even if the federal fund applicant or recipient is able to show a "substantial legitimate justification" for its challenged practice, funding may still not go forward if "an equally effective alternative practice which results in less racial disproportionality" exists.[86] This is a factual inquiry in which public input is crucial.

As an example, the original plans for the Central Corridor Light Rail Transit project in Minnesota ran through predominantly African American and Asian American neighborhoods between St. Paul and Minneapolis and provided the fewest number of stations relative to the number of transit riders in those neighborhoods, compared to other neighborhoods.[87] It was only after each community filed a civil rights complaint with the Federal Transit Authority that the region's metropolitan planning organization agreed to install additional stops in the minority communities.[88] And even with the stations approved, the communities are currently being offered little to ensure that market-driven transit oriented development does not displace existing small businesses and low-income residents.[89]

Employing an OIS process in the planning of transportation investments could effectively avoid these situations. In the case of the Central Corridor Light Rail Transit project, as a *condition* of receiving or continuing government funding for the plan, the local metropolitan planning organization would be held to their existing civil rights requirements to collect data showing the relative benefits and burdens the project would have on access to opportunity for local communities; consult and address any social science research on the project's impact on the local area; and actively solicit, engage, and document public concerns and testimonies regarding the project's effects. The agency would then analyze the data presented to determine if any impermissible disparate impacts arise and, if the funding applicant could provide no substantial legitimate justification for its plan or if there was a less discriminatory alternative to the plan, the public funding would not go forward. By engaging in this process at the front end, community groups would no longer have to engage in the prolonged and cumbersome process of filing civil rights complaints after a project has been approved in order to have their voices heard. And, throughout the project's development, as a condition of continued funding, transportation agencies would have the necessary information and analysis available to consistently uphold the promise of equal opportunity for all of the communities they affect.

B. Housing and Urban Development

Title VI and the Rehabilitation Act similarly cover the U.S. Department of Housing and Urban Development. In addition, Section 3608(e)(5) of the Fair Housing Act (Title VIII) requires HUD to "administer [housing and urban development] programs . . . in a manner affirmatively furthering the policies of [the Fair Housing Act]."[90] The policies of the Fair

[85] Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).
[86] U.S. Dep't of Transp. Order No. 1000.12 (1977).
[87] Gen Fujioka, Planners Network: The Organization of Progressive Planning, *Transit-Oriented Development and Communities of Color: A Field Report*, Winter 2011, http://www.plannersnetwork.org/publications/2011_winter/fujioka.html.
[88] *Id.*
[89] *Id.*
[90] 42 U.S.C. § 3608(e)(5) (2006).

Housing Act are, among others, "to provide, within constitutional limitations, for fair housing throughout the United States";[91] to "remove the walls of discrimination which enclose minority groups";[92] and to foster "truly integrated and balanced living patterns."[93] In other words, they include both non-discrimination and integration. An Opportunity Impact Statement mechanism would greatly assist HUD's success in upholding that mandate and should be incorporated into any revisions of the HUD regulations that clarify the "affirmatively furthering fair housing" (AFFH) requirement.

The obligation to affirmatively further fair housing applies to grantees of all of HUD's housing and community development programs, and, as part of a certification that they will abide by their affirmative fair housing obligations, these grantees are required to conduct an analysis of impediments (AI) to fair housing within their area, take appropriate actions to overcome those impediments, and maintain records reflecting the analysis and the actions taken.[94] The AI involves an "assessment of conditions, both public and private, affecting fair housing choice for all protected classes."[95] This encompasses "actions, omissions or decisions" which "restrict housing choices or the availability of housing choices,"[96] or which have the effect of doing so, based on "race, color, religion, sex, disability, familial status, or national origin,"[97] including "[p]olicies, practices, or procedures that appear neutral on their face."[98] HUD's suggested AI format includes a housing profile that describes "the degree of segregation and restricted housing by race, ethnicity, disability status, and families with children; [and] how segregation and restricted housing supply occurred."[99]

Experience in the field encountering discriminatory housing practices has made clear that these existing mechanisms have been necessary, yet insufficient, in practice.[100] As noted in a thorough report by the Leadership Conference on Civil Rights, now the Leadership Conference on Civil and Human Rights, the ineffectiveness of the AI process is largely due to the absence of specific regulations regarding the necessary elements of an AI, or the criteria for approval.[101] This assessment of the AI process was echoed in a September 2010 report by the Government Accountability Office.[102] These findings mirror the experience of fair housing groups, civil rights attorneys, and individuals around the country struggling to secure fair housing.

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[91] 42 U.S.C. § 3601 (2006).
[92] 114 Cong. Rec. 9563 (1968) (statement of Rep. Celler).
[93] 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale).
[94] OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE, VOL. 1, 102 (1996), *available at* http://www.nls.gov/offices/fheo/images/fhpg.pdf; Michael Allen, Counsel, Relman & Dane, PLLC, Testimony to the National Commission on Fair Housing and Equal Opportunity Public Hearing 2 (Sept. 22, 2008), *available at* http://www.prrac.org/projects/fair_housing_commission/boston/allen.pdf.
[95] OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 94, at 2-7.
[96] *Id.* at 2-8.
[97] *Id.*
[98] *Id.* at 2-17.
[99] *Id.* at 2-28.
[100] Dr. Jill Khadduri, Former Director of the Division of Policy Development at HUD, Testimony in Support of Thompson v. Hous. and Urban Dev., Civ. Act. No. MJG-95-309 (D. Md. 2006) 39 (Aug. 19, 2005), *available at* http://www.prrac.org/projects/fair_housing_commission/atlanta/khadduri.pdf.
[101] LEADERSHIP CONFERENCE ON CIVIL RIGHTS, FAIR HOUSING OBLIGATIONS OF FEDERAL GRANTEES 1 (2008), http://www.civilrights.org/publications/reports/fairhousing/obligations.html.
[102] U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010), *available at* http://www.gao.gov/new.items/d10905.pdf.

In 2007, for example, Westchester County settled a suit that alleged that, despite strong evidence of racial segregation within the county, Westchester continually certified under the AI process that it was affirmatively furthering fair housing.[103] Although Westchester County submitted periodic AIs and continued to receive HUD funding, its AIs failed to mention race discrimination or racial segregation, they included "no analysis of whether these might operate to diminish fair housing choice," and they "refused to identify or analyze community resistance to integration on the basis of race and national origin as an impediment."[104] Using an analysis which a federal court later invalidated,[105] Westchester County argued that income was a "better proxy for determining need than race when distributing housing funds," and that race was "not among the most challenging impediments" to fair housing in Westchester.[106]

An Opportunity Impact Statement process would ensure compliance with the requirement to affirmatively further fair housing by incorporating: specific metrics that must be taken into account to ensure equal housing opportunity for all Americans, as well as assessing integrative and segregative effects of proposed housing projects or programs; an improved data collection process, which would allow for further inclusion and consideration of both public comment and independent analysis; and a stronger process for oversight, review, and administrative enforcement.

The OIS requirement should attach at an early stage, so that information regarding fair housing impact may inform the design, prioritization, and selection of projects, instead of serving merely as a final hurdle to be overcome. Where the information submitted is inadequate on its face to ensure that fair housing will be affirmatively furthered, funding should be denied or withheld by the agency pending a revised OIS that meets the basic criteria described above. The regulations should disfavor, moreover, projects that may affirmatively further fair housing in one narrow respect while having a disparate or segregative effect in another respect. For example, a proposal for mixed income housing that would be integrated in its predicted occupancy, but would overwhelmingly displace low income, minority homeowners, should be disfavored for funding.

Appropriate public investment—based on an agency's consideration of existing data, active public engagement, and considerations of the relative burdens and benefits placed on all communities that a project affects—can expand opportunity within a region in deep and lasting ways. As an example, in Texas, when $3 billion of government funding was being allocated to provide for disaster recovery in the wake of the 2008 hurricanes Ike and Dolly, the initial allocation plan was to spread the funding across the state with little to no oversight of the local planning agencies to ensure that the funds increased equal opportunity as required by civil rights mandates.[107] But, after two prominent fair housing groups, Texas Appleseed and the Texas Low Income Housing Information Service, filed a complaint with HUD showing that the plan did not direct aid to the most-damaged regions and the people with the fewest resources and violated federal civil rights and fair housing laws, the HUD secretary, Shaun Donovan, rejected the initial

[103] *See* Anti-Discrimination Ctr. of Metro N.Y. v. Westchester County, 495 F. Supp. 2d 375, 377-78 (S.D.N.Y. 2007).
[104] Allen, *supra* note 94, at 3. *See also Anti-Discrimination Ctr. of Metro N.Y.*, 495 F. Supp. 2d 375.
[105] *Anti-Discrimination Center of Metro N.Y.*, 495 F. Supp. 2d at 387.
[106] Allen, *supra* note 94, at 3.
[107] *See* Op-Ed, *HUD Steps Up in Texas*, N.Y. TIMES, June 13, 2010, at A22, *available at* http://www.nytimes.com/2010/06/14/opinion/14mon3.html.

planning proposal and Texas negotiated an agreement with the advocates that will ensure that a majority of the money will be spent rebuilding devastated communities and helping the most vulnerable residents rebuild their lives.[108] As a result of this agreement, in the Houston-Galveston area alone, this reallocation of funding could produce 3,000 jobs over the next few years.[109]

An OIS process would ensure that these types of successes in public investment can be duplicated in all regions of the United States, without relying on the few active community groups to file complaints with government agencies after funding plans have already been approved. By engaging in an OIS process before funding is allocated, government agencies will have the structure available to appropriately analyze the benefits and burdens that a publicly funded project might have within a region and, as was the case in Texas, reallocate funds in ways that increase opportunity and adhere with existing civil rights mandates.

IV. Department of Justice Oversight of Agency Compliance

Because past efforts to comply with the equal opportunity mandate have been inconsistent across and between agencies, implementation of the Opportunity Impact Statement mechanism would be greatly enhanced by the creation of an interagency working group in the arena of equal opportunity compliance. Interagency working groups have been a feature of past Executive Orders[110] and create a mechanism for ensuring that policies and practices across agencies are consistent and manageable. The Department of Justice is best positioned to oversee such an entity.

Under Executive Order 12250 (E.O. 12250), the Department of Justice (DOJ) is charged with ensuring the consistent and effective implementation of Title VI and other civil rights laws applicable to the recipients of federal financial assistance.[111] Because the Supreme Court has held that victims of disparate impact discrimination have no private right of action to enforce regulations implementing Title VI,[112] under the guidance of the DOJ, federal agencies must be particularly vigilant in their role as enforcers of these disparate impact regulations.

While some of the responsibilities set forth in E.O. 12250 have been fulfilled by past administrations, many have not. For example, the Federal Coordination and Compliance Section within the Civil Rights Division of the Justice Department—technically the hub of implementation for E.O. 12250—has never been empowered to coordinate adequately with other agencies, nor accomplish the full range of functions set out in the Executive Order.[113]

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[108] *Id*.
[109] *See Ike rebuilding could bring jobs*, ASSOCIATED PRESS, Oct. 15, 2010, *available at* http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=483&Itemid=.
[110] *See, e.g.*, Exec. Order 12,866, 58 Fed. Reg. 190 (Oct. 4, 1993) (creating a Regulatory Working Group which would "serve as a forum to assist agencies in identifying and analyzing important regulatory issues"); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (creating an Interagency Working Group on Environmental Justice which would oversee the development and implementation of all agency efforts to collect, analyze, and disseminate information on the adverse environmental and health impacts of Federal programs and activities on protected populations).
[111] Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 4, 1980).
[112] Alexander v. Sandoval, 532 U.S. 275 (2001).
[113] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GENDER ISSUES: WOMEN'S PARTICIPATION IN THE SCIENCES HAS INCREASED, BUT AGENCIES NEED TO MORE TO ENSURE COMPLIANCE WITH TITLE IX 13 (2004), *available at*

Furthermore, while most agencies have issued regulations implementing Title VI within their spending activities, some still have not. Because both the Attorney General and the Administrator of the Office of Information and Regulatory Affairs (OIRA) share a central and continuing interest in ensuring that equal opportunity laws are complied with in all federal and federally assisted programs, it is of paramount importance that the Equal Opportunity Interagency Working Group is created, and that all members of the Opportunity Working Group are required to report issues relating to the equal opportunity compliance of their particular departments or agencies.

V. Conclusion

Policymakers are charged with ensuring that federal assistance meets the needs of all Americans. The Opportunity Impact Statement is intended to bring the voice of affected communities, structured efficiency, and balanced analysis to the table in the context of opportunity. The OIS would provide a comprehensive and fair evaluation of significant opportunity impacts, as well as reasonable alternatives, providing decision-makers and the public with full information and allowing for the minimization of adverse impacts.[114] On the federal, state, or local level, implementation of the OIS can help balance the need for efficiency in review of necessary government-funded projects with evidence-based evaluation and transparency.

The Opportunity Impact Statement carries the potential to expand opportunity greatly in communities around the country while encouraging public accountability and civic engagement. Moreover, it is a flexible tool that can be applied to any number of projects, big or small. We believe that providing the Opportunity Impact Statement is an important step in realizing our society's promise as a land of opportunity.

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http://www.gao.gov/new.items/d04639.pdf ("Although Executive Order 12250 requires Justice to coordinate the implementation and enforcement by executive agencies of various nondiscrimination provisions of civil rights laws, including Title IX, it has no legal authority to make agencies conduct required compliance activities. Justice officials reported that aside from reminding the agencies of the need to comply with Title IX regulations and providing the agencies with guidance and technical assistance, there is little they can do to ensure compliance with Title IX.").

[114] These goals have been tested in for a such as the Environmental Impact Statement, as created by NEPA, Pub. L. 91-190 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (2006)).