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FIGHTING FOR FAIR FARES IN NEW YORK CITY THROUGH CIVIL SOCIETY ENFORCEMENT OF TITLE VI

*Sara Amri**

Low-income New Yorkers rely heavily on public transportation to travel around the city. However, riding the New York City subway system is becoming increasingly unaffordable. New York City's Metropolitan Transit Authority (MTA) has set forth plans to implement semiannual fare increases. No alleviation has been provided, however, to New Yorkers living at or below the federal poverty level, despite the discounts provided to other groups regardless of their income. The inability to travel can have a devastating impact on the upward mobility of poor New Yorkers, and, alarmingly, fare increases appear to have a disparate impact on low-income people of color. The Federal Transit Authority's (FTA) Title VI Guidance represents an important tool to help ensure that fare increases are implemented fairly. As a recipient of federal funds, the MTA is obligated to comply with federal regulations and guidance. Monitoring the MTA's compliance with the FTA's Title VI guidance, and holding government officials accountable for their inaction, is necessary to ensure fare increases do not have a disproportionate burden on low-income New Yorkers. Community based organizations and grassroots advocacy groups are critical to achieving this. Citizen audits, which can be formally embedded in the FTA's regulatory process, are a promising means of ensuring MTA's full compliance with its Title VI obligations, as well as the future political prioritization of reduced-price MetroCards for low-income New Yorkers. The False

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Claims Act also represents another tool for transit advocates seeking to hold grantees of federal funds, like the MTA, directly accountable for their failure to fulfill their responsibilities under Title VI.

INTRODUCTION

In Bill de Blasio's first State of the City Address as Mayor of New York City, he stressed the importance of working towards economic and social justice:

[T]he state of our city, as we find it today, is a Tale of Two Cities – with an inequality gap that fundamentally threatens our future. It must not, and will not, be ignored by your city government . . . [g]ood jobs that pay decent wages are all too scarce. Access to the best health care seems, to many, to be a privilege that cannot be earned. To countless New Yorkers, affordable housing is an oxymoron . . . 46 percent of our city's residents live at or near the poverty line . . . [t]hat disparity, that inequality crisis, is the greatest risk to our New York promise.¹

However, a key component of the economic equality debate in New York City remains largely overlooked: transit affordability. As exemplified by Mayor de Blasio, the debate over income inequality and economic disparity in New York City has been, until recently, largely centered around affordable housing initiatives, job access, and affordable health care.² The Mayor

¹ *Text of Bill de Blasio's First State of the City Address*, N.Y. TIMES (Feb. 10, 2014), <http://www.nytimes.com/2014/02/11/nyregion/text-of-bill-de-blasios-first-state-of-the-city-address.html>.

² *Id.*; see also Molly Ball, *The Equalizer: Bill De Blasio v. Income Inequality*, THE ATLANTIC (Dec. 2015), <https://www.theatlantic.com/magazine/archive/2015/12/the-equalizer/413158/> (discussing Mayor de Blasio's prioritization of income inequality issues on his agenda during his first trip to Washington D.C. as New York City's Mayor in 2014). However, in de Blasio's second term, he has pledged support for a subsidized MetroCard program for poor New Yorkers, and has proposed funding the program "with a new

strives for a “city that honors the notion that a single mom taking the subway to her job as a housekeeper deserves to see her efforts rewarded, just as readily as the family who owns the home she cleans.”³ Ironically, however, by neglecting to address transit equity, the City and State, have made it increasingly difficult for working-class New Yorkers to afford their commute, with the rising cost of transit impacting some of New York’s most vulnerable communities.⁴ According to a recent report issued by the Community Service Society (“CSS”),⁵ more than one quarter of poor, working age New Yorkers reported they were often unable to afford subway and bus fares during the past year,⁶ thus limiting their ability to obtain jobs and affordable housing and oftentimes forcing them to make a choice between purchasing transit fare or

‘millionaire’s tax.’” See J. Brian Charles, *As Bill de Blasio Enters Second Term, Progressive Push for More*, GOVERNING (Nov. 15, 2017), <http://www.governing.com/topics/urban/lc-de-blasio-mayor-new-york-city-second-term.html>. While de Blasio’s proposal is likely to face pushback from the State Legislature in Albany, advocates have stressed that, “it’s a fight the mayor needs to have . . . if he truly intends to make good on high campaign promises from 2013.” *Id.*

³ *Text of Bill de Blasio’s First State of the City Address*, *supra* note 1.

⁴ See *The Transit Affordability Crisis, How Reduced MTA Fares Can Help Low-Income New Yorkers Move Ahead*, COMMUNITY SERVICE SOCIETY 9–19 (April 2016), http://b3cdn.net/nycss/938c33f9b77fec95d7_nv6b2091.pdf [hereinafter *Transit Affordability Crisis*]. The CSS report chronicles the real-life struggles of many New Yorkers facing these difficult choices, including, Leslie, a self-described “working class poor person,” struggling to support her fourteen-year-old son on an annual salary of \$17,000. *Id.* at 15. Since a large portion of her salary goes towards the increasing price of the MetroCard, she has been forced to make difficult decisions, including asking others for help paying the subway fare, counting on a bus driver’s kindness to let her get on without a fare, or having her son jump the turnstile. *Id.* The cost of the MetroCard has even inhibited her ability maintain employment. As she explained, “When I don’t have the fare, I don’t go to work.” *Id.*

⁵ The Community Service Society of New York is a non-profit organization which advocates on behalf of low-income New Yorkers through research and policy analysis, government advocacy, and the provision of direct services. See COMMUNITY SERVICE SOCIETY, <http://www.cssny.org/> (last visited Nov. 2, 2017).

⁶ *Transit Affordability Crisis*, *supra* note 4, at 11.

other necessary items.⁷ These difficult choices are a stark reality for many New Yorkers and, as evidenced in de Blasio's address, are often minimized, if not overlooked, in the debate about economic equality.⁸

High transit costs have a particularly devastating impact on low-income people of color in the workforce, sometimes preventing them from accepting a job outside their neighborhood.⁹ Additionally, inequality is built into the existing fare structure—more affluent riders who can afford a monthly unlimited pass get significant discounts for doing so, while low-income riders, who cannot afford the upfront expense of the monthly pass, ultimately end up paying more for single rides.¹⁰ Further, thousands of people are arrested every year for jumping over subway turnstiles to avoid paying fares, and the majority arrested for this violation are low-income people of color.¹¹ Recognizing the adverse impact of these arrests on the City's most vulnerable, legislators, transit advocates, and criminal justice advocates have described this selectively heavy-handed enforcement as “the very definition of the criminalization of poverty.”¹²

⁷ Press Release, Community Service Society, *Riders Alliance Launch “Fair Fares” Campaign for Reduced-Fare MetroCards for Lowest-Income New Yorkers*, Community Service Society (Apr. 10, 2016), http://b.3cdn.net/nycss/c7e56eda32aca17051_d5m6bnv1n.pdf [hereinafter CSS Press Release].

⁸ *State of the City Address*, *supra* note 1.

⁹ CSS Press Release, *supra* note 7.

¹⁰ See *Transit Affordability Crisis*, *supra* note 4, at 4; *New Fare Info*, METRO. TRANSIT AUTH., <http://web.mta.info/nyct/fare/FaresatAGlance.htm> (last visited Nov. 2, 2017) (providing examples of effective fares per ride and breaking down bonuses transit fares).

¹¹ CSS Press Release, *supra* note 7, at 4; see also Lisa Schreibersdorf & Jared Chausow, *The Unfair Attack on Fare Evasion: Rather Than Pulling Out All Stops to Collect Every Last Time From the Indigent, the City Should Make it Easier for Low-income New Yorkers to Ride Subway and Buses*, N.Y. DAILY NEWS (Aug. 29, 2016), <http://www.nydailynews.com/opinion/schreibersdorf-chausow-unfair-attack-fare-evasion-article-1.2767407> (showing further that over 90% of people arrested for fare evasion were people of color and that mainly poor people are prosecuted for fare evasion).

¹² See Rory Lanman & David R. Jones, *Fare Evasion is a Crime of Poverty*, N.Y. DAILY NEWS (June 16, 2017), <http://www.nydailynews.com/opinion/fare-evasion-crime-poverty-article-1.3250824>.

The federal government has provided some relief to protect against the adverse impact of debilitating fare prices. For example, Title VI of the Civil Rights Act of 1964 prohibits programs receiving federal financial assistance from discriminating on the basis of race, color or national origination.¹³ Additionally, over the past decade, the Department of Transportation (“DOT”), through its Federal Transit Administration (“FTA”), has released a series of guidance documents implementing Title VI.¹⁴ As a recipient of federal funds, New York City’s Metropolitan Transit Authority (“MTA”)¹⁵ is obligated to comply with requirements set forth in the guidance.¹⁶ One such requirement is DOT’s Title VI Guidance, which imposes an affirmative obligation on recipients of federal transit funds to analyze the effect of proposed fare increases and decreases on minority and low-income populations.¹⁷ The guidance serves as an important monitoring mechanism to ensure transit providers’ current and future compliance with federal regulations implementing Title VI.

Further fighting for relief, community-based organizations such as the Community Service Society, in partnership with

¹³ Civil Rights Act of 1964, tit. VI, § 601, 42 U.S.C. § 2000d (2012).

¹⁴ Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1313 (2014) [hereinafter Johnson, *Private Enforcement*].

¹⁵ See *Grant Management*, METRO. TRANSIT AUTH., <http://web.mta.info/mta/grant/> (last visited Nov. 2, 2017).

¹⁶ See *id.*; FED. TRANSIT ADMIN., FTA C 4702.1B, CH. IV-19, CIRCULAR ON TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (2012) [hereinafter 2012 CIRCULAR FTA C 4702.1B]. See also STATE OF N.Y. METRO. TRANSP. AUTH. 2014 TITLE VI PROGRAM, TRIENNIAL REPORT COVERING THE PERIOD OF JULY 1, 2010 TO JUNE 30, 2013, at MTA Certificate and Assurances (2014) [hereinafter 2014 MTA TITLE VI PROGRAM] (showing a submitted Title VI report for 2010–2013 pursuant to the Title VI requirements and guidelines for Federal Transit Administration Recipients).

¹⁷ 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at Ch. IV-19; see Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1380 (2012) [hereinafter Johnson, *Equality Directives*].

grassroots transit advocacy groups like the Rider's Alliance,¹⁸ have been advocating with policymakers for a reduced fare MetroCard program for low-income New Yorkers.¹⁹ Legislative advocacy efforts are key in the push towards affordable fares in New York City and many policymakers, including Mayor de Blasio, are now supportive of such a proposal.²⁰ However, as this Note suggests, transit affordability and accessibility for low-income New Yorkers must be a larger component of the economic justice debate in New York City.

Applying Olatunde Johnson's²¹ notion of administrative directives as "equality directives," this Note argues that although presently underutilized, FTA's Title VI guidance is a key tool in securing affordable transit fares for low-income New Yorkers, and

¹⁸ Rider's Alliance is a non-profit organization that helps transit riders in New York advocate for themselves with MTA, the press, and elected officials. *Who We Are*, RIDERS ALL., <http://www.ridersny.org/mission-statement/> (last updated Oct. 18, 2017).

¹⁹ Dan Rivoli, *Transit Advocates Want MetroCard Discount for Low-income New Yorkers*, N.Y. DAILY NEWS (Apr. 10, 2016), <http://www.nydailynews.com/news/politics/nyc-pols-pushed-approve-metrocard-discount-poor-article-1.2595504>.

²⁰ See Ben Fractenberg, *Low-Income New Yorkers Desperately Need Half-Price MetroCards: Officials*, DNAINFO (Oct. 19, 2016), <https://www.dnainfo.com/new-york/20161019/civic-center/reduced-fare-metrocards-city-council-riders-alliance> (discussing how the majority of New York City council members now support a reduced fare metro program for low-income New Yorkers); *contra* David R. Jones & John Raskin, *Fair Fares Funding a Test for New York's Progressive Mayor*, CITY & STATE (Mar. 20, 2017), <http://cityandstateny.com/articles/opinion/fair-fares-funding-a-test-for-new-york%E2%80%99s-progressive-mayor.html> ("The only prominent city politician who opposes the proposal seems to be the mayor."); Jack Offenhartz, *De Blasio Will Propose Tax on Rich to Pay for Subway Repairs, MetroCards for Low-Income Riders*, GOTHAMIST (Aug. 6 2017), http://gothamist.com/2017/08/06/de_blasio_will_propose_tax_on_rich.php; *but see* Charles, *supra* note 2 (indicating that in de Blasio's second term as Mayor of New York City, he is now supportive of the Fair Fares proposal, and has proposed funding it through a "millionaire's tax").

²¹ Olatunde Johnson is a Professor of Law at Columbia Law School, focusing her academia on "modern civil rights legislation, congressional power, and innovations to address discrimination and inequality in the United States." *Faculty Description of Olatunde Johnson*, COLUMBIA LAW SCH., <http://www.law.columbia.edu/faculty/olatunde-johnson> (last visited Nov. 2, 2017).

in combatting persistent racial and economic inequality.²² Additionally, this Note explains why civil society groups are crucial not only in ensuring that agencies such as the MTA are fulfilling their Title VI obligations, but also in enhancing the visibility and prioritization of transit equity issues in New York City. This Note suggests that civil society groups can take three actions to help ensure future fare increases are fair for low-income riders: first, by monitoring the MTA's Title VI compliance, second, by helping identify weaknesses or flaws in the MTA's fare equity analyses, and finally, by working with the agency to develop as well as implement future fare equity analyses.

Part I of this Note will set the framework of the transportation equity movement in the United States and will look specifically at this movement in New York City. It will provide a brief historical analysis of public transit fares in New York City, the present state of transit affordability, and the impacts of increasing MetroCard fares on low-income New Yorkers. Part II examines Title VI of the Civil Rights Act of 1964 and the FTA's guidance on its implementation.²³ Part III will apply Johnson's theory on the equity enhancing potential of FTA's Title VI guidance to the present transit affordability movement in New York City. Part III will also explore practical setbacks to implementing the guidance, as well as the key role of community advocacy groups in its monitoring and enforcement. Part IV will address solutions to mitigate the impact of increasing transit fares on low income New Yorkers, detailing the need for greater transparency within the FTA and MTA. Part IV will also discuss the role that civil society and community advocacy groups play in their capacity as champions of transit equity focusing on the current tools at their

²² Johnson, *Equality Directives*, *supra* note 17, at 1379–81.

²³ The Federal Transit Administration is an agency that operates within the United States Department of Transportation (“DOT”) that “seeks to improve public transportation by assisting state and local governments with planning, implementation, and financing public transportation project.” *Federal Transit Administration*, USA.GOV, <https://www.usa.gov/federal-agencies/federal-transit-administration> (last visited Nov. 2, 2017). *See generally Improving Public Transportation for America's Communities*, FED. TRANSIT ADMIN., <https://www.transit.dot.gov/about-fta> (last visited Nov. 2, 2017) (discussing the FTA's role in advancing mass public transportation across the nation).

disposal and how they may use the False Claims Act as an additional method of ensuring the MTA is compliant with its Title VI obligations.

I. TRANSPORTATION EQUITY

A. *The United States*

Inequality in transportation can be traced far back in American history.²⁴ One of the most prominent examples includes the practice of forcing black passengers to ride in “separate but equal” railroad cars, a practice held constitutional by the Supreme Court in *Plessy v. Ferguson*.²⁵ The arrest of Rosa Parks in Montgomery, Alabama for refusing to give up her seat to a white passenger in violation of the city’s segregation laws also exemplifies the historical embeddedness of racial segregation in transportation.²⁶ Ushering in a formal end to such practices, Title VI of the Civil Rights Act of 1964 and the desegregation cases made racial segregation in transportation illegal.²⁷ Despite the change of law and subsequent legal rulings, inequity in public transportation persists.²⁸ For example, transportation policies have historically had a significant impact on segregation, particularly in metropolitan areas, by “encouraging White flight from central cities and contributing to concentrated, racialized poverty in urban areas.”²⁹ Despite the progression towards equality in transportation, the decision-making of transit providers influenced by both elected officials as well as constituents pushing their own agendas to keep higher-income communities inaccessible to poorer

²⁴ Sean B. Seymore, *Set the Captives Free! Transit Inequity in Urban Centers, and the Laws and Policies Which Aggravate the Disparity*, 16 GEO. MASON U. CIV. RTS. L. J. 57, 57 (2005).

²⁵ *Id.* (citing *Plessy v. Ferguson*, 163 U.S. 537, 532 (1896)).

²⁶ Stacey Bredhoff et al., *An Act of Courage, The Arrest Records of Rosa Parks*, NAT’L ARCHIVES, <https://www.archives.gov/education/lessons/rosa-parks> (last visited Nov. 2, 2017).

²⁷ Seymore, *supra* note 24, at 57.

²⁸ *Id.*

²⁹ Johnson, *Equality Directives*, *supra* note 17, at 1379.

populations, continues to impact the geographic segregation and isolation of many low-income, racial, and ethnic groups.³⁰

Equity in transportation is reflected in a transportation system that enables the full participation of all Americans in society regardless of factors including “age, ability, ethnicity, income, or car ownership.”³¹ Transportation not only impacts physical mobility, but also access to opportunity.³² A recent nationwide study conducted by Harvard found that issues like residential segregation and income inequality, which can be directly linked back to transportation inequality, also have a direct correlation to upward mobility.³³ Further, a 2014 study from New York University found a similar link as the Harvard study in New York City—poor access to public transit was linked to higher rates of unemployment and lower income levels.³⁴ While many Americans own cars, millions of inner-city residents rely solely on public transportation.³⁵ Thus, access to reliable public transit has a tremendous influence on one’s overall quality of life.³⁶ Efficiency

³⁰ See Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1961–64 (2015).

³¹ Seymore, *supra* note 24, at 61 (arguing that an evaluation of transportation equity entails an analysis of factors such as the negative impact of transportation policies on the environment, how resources are allocated and invested, and how service is distributed among different populations, particularly low-income groups).

³² Gillian B. White, *Stranded: How America’s Failing Public Transportation Increases Inequality*, ATLANTIC (May 16, 2015), <http://www.theatlantic.com/business/archive/2015/05/stranded-how-americas-failing-public-transportation-increases-inequality/393419/> [hereinafter *Stranded*].

³³ See Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates*, 1, 5, 30–31, 40–43 HARVARD UNIV. (May 2017), https://scholar.harvard.edu/files/hendren/files/movers_paper2.pdf.

³⁴ Sarah M. Kaufman et al., *Mobility, Economic Opportunity and New York City Neighborhoods*, N.Y.U., <https://wagner.nyu.edu/files/faculty/publications/JobAccessNov2015.pdf> (last updated Nov. 2015).

³⁵ Seymore, *supra* note 24, at 61.

³⁶ *Id.*; see Emma G. Fitzsimmons, *Cuomo Declares a State of Emergency for New York City Subway*, N.Y. TIMES (June 29, 2017), <https://www.nytimes.com/2017/06/29/nyregion/cuomo-declares-a-state-of-emergency-for-the-subway.html>

and affordability of public transit impacts accessibility to “just about everything associated with upward mobility and economic progress” including access to employment, schools, and healthcare.³⁷ “[I]n many central cities and metropolitan regions with a [large proportion of transit dependent riders] . . . lack of car ownership and inadequate public transit service . . . exacerbate, social, economic, and racial isolation, especially for low-income people of color—residents who already have limited transportation options.”³⁸ As noted by Rosabeth Moss Kanter, a professor at Harvard University, while public transportation is sought after by many, it is particularly crucial to the mobility of low-income residents.³⁹

The cost to ride public transit is becoming an increasingly significant issue in the discussion surrounding accessibility.⁴⁰ This phenomenon is not limited to New York.⁴¹ Across the United States, other large metropolitan cities have also experienced fare increases which have burdened low-income households.⁴² In attempting to address the consequence of high transit costs, Seattle and San Francisco, for example, have already adopted fare

ml?mcubz=1; see also *The Human Cost of Subway Delays: A Survey of New York City Riders*, BUREAU OF POL’Y AND RES. 7 (July 2017), <http://comptroller.nyc.gov/wp-content/uploads/documents/The-Human-Cost-of-Subway-Delays.pdf> (“Residents of lower income New York City zip codes were 14 percent more likely to be reprimanded at work on account of subway delays than respondents from higher income areas, seven percent more likely to be late for a job interview, four percent more likely to have lost wages, and eight percent more likely to be late for a doctor’s appointment.”).

³⁷ White, *Stranded*, *supra* note 32.

³⁸ Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 *FORDHAM URB. L.J.* 1181, 1189 (2004) [hereinafter *Transportation Equity in the U.S.*].

³⁹ White, *Stranded*, *supra* note 32.

⁴⁰ *The City Needs Fair Fares Now More Than Ever*, CITY & STATE (Mar. 20, 2017), <http://cityandstateny.com/articles/policy/infrastructure/fair-fares-subsidizing-metrocards-2017.html#.WRSaKVPyu8o>.

⁴¹ White, *Stranded*, *supra* note 32 (“In the past five years many metro areas including New York, Portland, and St. Louis have seen fare hikes.”).

⁴² *Id.*

discount programs for low-income residents.⁴³ Further “[r]ecent additions to public transportation options, like bike share, should—in theory—make getting around easier and cheaper.”⁴⁴ In reality, however, these programs have tended to benefit high-income populations more than low-income ones, as the bike stations were initially placed in wealthier neighborhoods.⁴⁵ Because the bike rental programs require credit cards, poor populations, who are less likely to have access to this form of payment,⁴⁶ are often unable to participate. For example, in Washington D.C., a recent survey found that while the city’s population was nearly 50 percent black,⁴⁷ bike share riders were nonetheless made up of primarily young, white males.⁴⁸ Further, of those using the region’s bike share program, over 50 percent had incomes of \$100,000 or higher.⁴⁹ Rather than experiencing the benefit of these bike share programs, low-income households are thus forced to rely on older methods of transportation such as subway and bus systems,⁵⁰ and are left particularly burdened by fare increases. As has been highlighted by several transportation equity scholars, since the

⁴³ See Kirk Johnson, *Targeting Inequality, This Time on Public Transit*, N.Y. TIMES (Feb. 28, 2015), https://www.nytimes.com/2015/03/01/us/targeting-inequality-this-time-on-public-transit.html?_r=1 [hereinafter, Kirk Johnson, *Targeting Inequality*]; Mike Lindblom, *Discount Fares for Low-income Bus Riders Will be Offered*, SEATTLE TIMES (Feb. 11, 2015), <http://www.seattletimes.com/seattle-news/discount-fares-for-low-income-bus-riders-will-be-offered/>; *Lifeline (Low Income) Pass*, SAN FRANCISCO MUNICIPAL TRANSP. AGENCY, <https://www.sfmta.com/getting-around/transit/fares-passes/low-income-lifeline-pass> (last visited Nov. 2, 2017).

⁴⁴ White, *Stranded*, *supra* note 32.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*; *Quick Facts: District of Columbia*, U.S. CENSUS BUREAU (July 1, 2016), <https://www.census.gov/quickfacts/fact/table/DC/RHI225216#viewtop>.

⁴⁸ See LDA CONSULTING, 2014 CAPITAL BIKESHARE MEMBER SURVEY REPORT 5, 6 (April 3, 2015), <https://d21xlh2maitm24.cloudfront.net/wdc/cabi-2014surveyreport.pdf?mtime=20161206135936> [hereinafter CAPITAL BIKESHARE SURVEY]. According to the survey, 84 percent of respondents were Caucasian. *Id.* at 6.

⁴⁹ White, *Stranded*, *supra* note 32.

⁵⁰ *Id.*; see also CAPITAL BIKESHARE SURVEY, *supra* note 48, at 6–7 (showing the majority of Bikeshare users are above \$100,000 annual income bracket and only 3 percent of Bikeshare users make less than \$25,000).

majority of transit systems focus on developing fare policies that draw higher-income riders away from reliance on their cars for transportation, their policy choices and decision-making have tended to take their transit-dependent “captive riders,” largely low-income people of color, for granted.⁵¹

B. New York

1. Increasing Transit Fares

Transit fares in New York City have risen at an increasingly higher pace over the past decade.⁵² For example, between 2007 and 2015, subway and bus fares rose by 45 percent, six times faster than average salaries in the city,⁵³ and MTA fare increases are now scheduled to occur every two years.⁵⁴ Despite the MTA’s statement that it “expects to be able to limit [the 2017 and 2019 fare and toll increases] to no more than 4%,”⁵⁵ prior fare increases

⁵¹ Bullard, *supra* note 38, at 1189. Transportation policies are likely to favor high-income riders financially too. See Seymore, *supra* note 24, at 67. For example, where transit fares are set at a uniform price regardless of distance traveled, lower-income riders, who are reliant on public transportation and tend to make shorter trips, subsidize higher income riders commuting from the suburbs or from further distances. *Id.* To illustrate, a rider “who travels 20 miles may only pay 20 percent of the true cost of trip” as compared to a rider traveling only one mile, who “may pay more than twice the true cost of the trip.” *Id.*

⁵² See Diane Pham, *All the MTA Fare Hikes of the Last 100 Years*, 6SQFT (Mar. 23, 2015), <https://www.6sqft.com/all-the-mta-fare-hikes-over-the-last-100-years-plus-a-video-of-when-it-cost-just-15-cents/>.

⁵³ Jones & Raskin, *supra* note 20.

⁵⁴ Emma G. Fitzsimmons, *M.T.A. Is Raising Fares and Tolls; One Subway or Bus Ride Will Cost \$2.75*, N.Y. TIMES (Jan. 22, 2015), <http://www.nytimes.com/2015/01/23/nyregion/mta-raises-fares-subways-and-buses.html>; Emma Whitford, *MTA Fares Will Likely Go Up Next Year, But How Much?*, GOTHAMIST (Jul. 28, 2016), http://gothamist.com/2016/07/28/mta_fare_hike_2017.php [hereinafter Whitford, *M.T.A. Is Raising Fares and Tolls*]. See *MTA to Keep Fare Hike Schedule, MTA Warns of \$10 a Swipe Future*, SPECTRUM NEWS NY1 (July 27, 2017), <http://www.ny1.com/nyc/all-boroughs/news/2017/07/27/mta-to-keep-on-two-year-fare-hike-track--board-member-says--10-rides-could-result-.html>.

⁵⁵ Press Release, Metropolitan Transit Authority, *MTA Releases Preliminary 2017 Budget and Four-Year Financial Plan*, Metropolitan Transit

have been above this amount, and appear to have been implemented in a way that adversely impacted low-income groups.⁵⁶ For example, in 2013, the single-fare ticket—utilized primarily by lower-income riders—increased by 10 percent; the 2013 price increase for the 30-Day-Unlimited MetroCard—preferred by higher-income riders who have the financial capacity to pay up front for a month’s worth of travel—rose by less than 4 percent.⁵⁷ Thus, by attempting to reward those who can afford to pay more upfront, the MTA has created a tiered system that disproportionately impacts its lower-income ridership.

In January 2017, the MTA board voted against a proposal to increase the base fare from \$2.75 to \$3.00, despite predictions to the contrary.⁵⁸ Had that proposal succeeded, it would have been the MTA’s fifth increase in the base fare since 2009.⁵⁹ Nevertheless, many riders will still struggle to pay the \$2.75 fare.⁶⁰ As noted by Rebecca Bailin, campaign manager of Riders Alliance, “[i]t’s great that [the MTA] heard our voices, but \$2.75 was and is inaccessible to 800,000 New Yorkers who have to risk arrest by jumping the turnstiles or forgo childcare.”⁶¹ Echoing this sentiment, subway

Authority (Jul. 27, 2016), <http://www.mta.info/press-release/mta-headquarters/mta-releases-preliminary-2017-budget-and-four-year-financial-plan>.

⁵⁶ See e.g. Harold Stolper, *Next Stop, Fairness in Fares: Why New York Needs Low-Income Transit Discounts*, NEW SCHOOL CENTER FOR NEW YORK CITY AFFAIRS (May 11, 2016), <http://www.centernyc.org/transit-discounts> (showing that the “last round of fare hikes raised the cost of the single-fare tickets disproportionately used by low-income riders by 10 percent.”).

⁵⁷ *Id.*

⁵⁸ Tanay Warerkar, *Subway and Bus Fare Will Remain \$2.75 Following MTA Vote*, NY CURBED (Jan. 25, 2017), <http://ny.curbed.com/2017/1/25/14387536/nyc-subway-fare-hike-mta-275-stay>; Whitford, *M.T.A. Is Raising Fares and Tolls*, *supra* note 54.

⁵⁹ Ida Siegal et. al., *MTA Board Votes Against Raising Base MetroCard Fare, But Bonuses Will be Reduced*, NBC NEW YORK (Jan. 25, 2017), <http://www.nbcnewyork.com/news/local/NYC-MetroCard-Fare-Hike-Likely-After-MTA-Votes-411729105.html>.

⁶⁰ See Amanda Mikelberg, *MTA Drops Plan to Hike Subway, Bus Base Fares*, METRO (Jan. 25, 2017) <https://www.metro.us/new-york/mta-s-fare-decision-not-fair-enough-advocates-say/zsjqaz---yicfvkgselqfk> [hereinafter Mikelberg, *MTA Drops Plan to Hike Fares*].

⁶¹ *Id.*

rider Stacey Spencer stressed that the MTA's decision to forgo the proposed increase in the single ride fare was a "little tiny thing in the big picture."⁶² Additionally, as noted by Jaqi Cohen, a coordinator at the transit advocacy group, Straphangers Campaign,⁶³ "income should not be a chief barrier in getting where you need to go."⁶⁴ The MTA's planned increases come at a time when salaries for low-wage workers are stagnating.⁶⁵ If the MTA's planned increases occur, and low-wage workers continue to see stagnant salaries, transit will become an increasing part of their budgets. Speaking on the 2017 fare increase, David Jones, CEO of the Community Service Society and MTA Board member pushed even further: "Fares were already unaffordable to struggling New Yorkers and any increase makes it that much harder . . . Keeping the base fare at \$2.75 is not the answer."⁶⁶ Rather, Jones argues, if Mayor de Blasio is seeking to "widen the doors to economic opportunity for 'the other New York,'" half-priced fares for New Yorkers with incomes at or below the poverty line "should be at the top of his list."⁶⁷

Additionally, the 2017 round of fare increases⁶⁸ saw a decrease in the pay-per-ride bonuses riders receive,⁶⁹ and thus, even though

⁶² *Id.*

⁶³ See *History of the NYPIRG's Straphangers Campaign*, NYPIRG's STRAPHANGER'S CAMPAIGN, <http://www.straphangers.org/aboutus.html> (last visited Nov. 2, 2017). The Straphanger's Campaign is a transit advocacy group in New York City. *Id.*

⁶⁴ Mikelberg, *MTA Drops Plan to Hike Fares*, *supra* note 60.

⁶⁵ Stolper, *supra* note 56.

⁶⁶ Emma Whitford, *MTA Keeps Single Ride at \$2.75 but will Raise Monthly to \$121*, *GOTHAMIST* (Jan. 25, 2017), http://gothamist.com/2017/01/25/metrocard_monthly_fare_2017.php [hereinafter Whitford, *MTA Keeps Single Ride at \$2.75*].

⁶⁷ Press Release, Community Service Society, *Fair Fares Advocate to Mayor: The Countdown to Fair Hikes is on for Low-Income New Yorkers*, Community Service Society (Jan. 25, 2017), <http://www.cssny.org/news/entry/fair-fares-advocates-to-mayor-the-countdown-to-fare-hikes-is-on-for-low-inc>.

⁶⁸ Weekly MetroCards increased from \$31.00 to \$32.00 and monthly unlimited MetroCards increased from \$116.50 to \$121.00. Amanda Mikelberg, *Straphangers Group to Protest New MTA Subway and Bus Fares* (Mar. 16, 2017), <https://www.metro.us/new-york/straphangers-group-to-protest-new-mta>

the base fare remained at \$2.75, riders still faced an increase.⁷⁰ Instead of receiving an 11 percent bonus with a purchase of \$5.50 or more, riders now only receive a 5 percent bonus.⁷¹ Under the adopted pay-per-ride bonus scheme, a rider must purchase twenty full fares before getting a ride for free.⁷² While the alternative proposal saw the base fare increase to \$3.00, riders would have received a 16 percent bonus with a \$6.00 purchase.⁷³ This means that, factoring in the bonuses, the overall effective fare for the adopted plan is slightly higher than the effective fare for the alternative \$3.00 proposal.⁷⁴ Thus, while the decision to keep the base fare at \$2.75 as opposed to increasing it to \$3.00 seems like a big win for transit advocates on its face, both proposals saw an increase in the effective fare, with a minimal difference between the two ultimate figures.⁷⁵ To riders who may not be scrutinizing MTA's fare increase proposals, the extent to which the 2017 fare changes actually benefit them may be largely misleading. Given the transit dependency of poor New Yorkers, fare increases can have broad-reaching and serious consequences on their daily lives.⁷⁶

subway-and-bus-fares/zsJqcp---0Z2X9jllbEvM [hereinafter, Mikelberg, *Straphangers Group to Protest*].

⁶⁹ The MTA provides a percentage bonus of fare for riders who put a certain amount of money on their subway cards. See, e.g., *New Fare Info*, METRO. TRANSIT AUTH., *supra* note 10 (providing example of effective fares per ride and breaking down bonuses transit fares).

⁷⁰ Mikelberg, *Straphangers Group to Protest*, *supra* note 68.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Siegal et al., *supra* note 59.

⁷⁴ See *id.* As per proposal chart, Plan A, adopted by the MTA, saw the base fare remain at \$2.75 but bonuses decreased from 11 percent to 5 percent with a \$5.50 purchase. *Id.* As a result, the effective fare with the bonus is cited as \$2.62. *Id.* Plan B, which was ultimately voted against by the MTA, saw the fare increase to \$3.00, but bonuses increase from 11% with a \$5.50 purchase to 16 percent with a \$6.00 purchase. *Id.* Under Plan B, the effective fare with the bonus would be \$2.59. *Id.*

⁷⁵ See *id.* (examining proposal chart).

⁷⁶ Lancman & Jones, *supra* note 12; see also Nick Pinto, *When Poverty is a Crime on the Subway*, THE VILLAGE VOICE (May 17, 2017), <https://www.villagevoice.com/2017/05/17/when-poverty-is-a-crime-on-the->

2. Transit Dependency of Low-Income New Yorkers

New York City's transit system is one of the largest and most relied-upon in the United States.⁷⁷ It serves a greater number of riders than the next twenty largest transit systems combined.⁷⁸ Low-income residents of New York City are particularly dependent upon transit.⁷⁹ For example, a 2014 American Community Survey found that, of individuals and families living below the poverty level in New York City, "only 30 percent living in New York City ha[d] access to a vehicle at home, [as compared] to 72 percent in the rest of the state and 83 percent in the rest of the nation."⁸⁰ Further, a 2015 Community Service Society survey depicts a similarly alarming picture, finding that poor New York City residents are particularly reliant on public transportation, "with 58 percent relying on subways and buses to get around the city, and only 15 percent relying on private automobiles."⁸¹ According to the survey, "[f]or New York's more than 300,000 working poor, transit expenses often exceed over 10 percent of their family budgets, limiting their ability to access jobs and forcing them to forego other necessities."⁸² Thus, given their extreme dependency upon public transit, and lack of alternate transportation options, low-income New Yorkers—particularly minorities—are the group most severely impacted by increased fares.⁸³

subway/ (discussing the subway as a "lifeline" for many New Yorkers in poverty).

⁷⁷ JOHN BYRON, MOBILITY AND EQUITY FOR NEW YORK'S TRANSIT-STARVED NEIGHBORHOODS: THE CASE FOR FULL-FEATURED BUS RAPID TRANSIT, PRATT CTR. FOR CMTY. DEV. 1 (Dec. 2013), http://prattcenter.net/sites/default/files/pratt_rockefeller_brt_nyc_whitepaper_for_web.pdf.

⁷⁸ *Id.*

⁷⁹ *Transit Affordability Crisis*, *supra* note 4, at 8.

⁸⁰ *Id.* at 6.

⁸¹ *Id.*

⁸² *Id.* at 2.

⁸³ *See id.* at 6.

3. The Adverse Impact of Fare Increases on Low-Income New Yorkers

Even prior to the most recent round of fare increases, the rising cost of subway fares in New York City was recognized as having a particularly severe implication for low-income City residents.⁸⁴ This sentiment has carried through to today where over one quarter of low-income New Yorkers of working age reported that during the past year, they were not able to afford the cost of subway and bus fares.⁸⁵ Prior to the 2017 round of increases, the yearly cost of buying a 30-day unlimited MetroCard for a single earner at the federal poverty level was already approximately \$1,400, an amount representing nearly 12 percent of their annual income.⁸⁶ Further, one in four low-income New Yorkers of working age reported that fare costs prohibited them from seeking medical care, as compared to only 2 percent of New Yorkers with higher incomes.⁸⁷

For New Yorkers trying to escape poverty, unaffordable transit costs contribute to their struggle.⁸⁸ According to the CSS survey, the high cost of transit prevented one out of every three working age, lower-income New Yorkers from searching and accepting employment further from their neighborhood, as well as 27 percent of the survey's unemployed respondents.⁸⁹ While the regional economy has been growing, "incomes have been stagnating for the bottom 98 percent of the work force," and thus the MTA's bi-yearly fare hikes⁹⁰ mean that transit costs are eating up an increasingly significant portion of this population's income.⁹¹

⁸⁴ See Courtney Gross, *Paying the Price for Living in New York*, GOTHAM GAZETTE (Oct. 22, 2007), <http://www.gothamgazette.com/development/3698-paying-the-price-for-living-in-new-york> ("While some who hold lucrative jobs on Wall Street hardly flinch at the possibility of an upcoming subway fare increase or Con Ed rate hike, for low income New Yorkers the slightest rise can mean added expenses that they just cannot afford.").

⁸⁵ *Transit Affordability Crisis*, *supra* note 4, at 11.

⁸⁶ *Id.* at 12.

⁸⁷ *Id.* at 13.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 31.

⁹¹ *See id.*

Further, even though MTA offers discounted fares to both seniors as well as those with a qualifying disability, without regard to their income level, no such fare discount exists for the poorest New Yorkers.⁹²

Fare increases appear to have a particularly harsh impact on low-income minority New Yorkers.⁹³ The CSS survey found that one quarter of working age low-income New Yorkers, 35 percent of Latino residents, and 25 percent of black residents were not able to afford the cost of bus and subway fares.⁹⁴ Additionally, while the high price of subway and bus transit fares was found to keep many low-income New Yorkers from seeking medical care or accepting work further from home, the cost was found to significantly impact low-income black and Latino residents.⁹⁵ This compounds the difficulties already faced by these populations in the New York City job market.⁹⁶ Further, in the Bronx and Queens, where there are large concentrations of low-income Latinos, this problem is even more severe.⁹⁷ As evidenced by these statistics, the financial burden of transit fare costs “reinforce the economic and geographic isolation of some of the most economically disadvantaged families.”⁹⁸

So-called “farebeating arrests,” such as for hopping the turnstile, now represent the greatest number of arrests made by the NYPD—“over 29,000 in 2015, 92% involving people of color.”⁹⁹ By failing to offer affordable transit options in a city that relies so heavily on public transportation, transit justice advocates have noted, and this Note reiterates, that New York City and the NYPD are effectively criminalizing low-income New Yorkers of color.¹⁰⁰ As exemplified by this statistic, the collateral consequences of increasing transit fares are far more severe than financial insecurity

⁹² *Id.* at 11.

⁹³ Jones & Raskin, *supra* note 20.

⁹⁴ *Id.*

⁹⁵ *Transit Affordability Crisis*, *supra* note 4, at 14.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ CSS Press Release, *supra* note 7, at 4; see Schreibersdorf & Chausow, *supra* note 11.

¹⁰⁰ CSS Press Release, *supra* note 7.

alone.¹⁰¹ For transit justice advocates, Title VI of the Civil Rights Act of 1964 can help ensure that agencies receiving federal funding do not further perpetuate injustice.¹⁰²

II. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Title VI of the Civil Rights Act of 1964 is an important legal tool for transit justice advocates. Section 601 of Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁰³ Not only does Title VI prohibit intentional discrimination, “but its regulations provide that funding recipients cannot ‘utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin.’”¹⁰⁴ Section 602 gives authority to administrative agencies that provide federal financial assistance to any program or activity to “effectuate the provisions of [Title VI] with respect to such program or activity by issuing rules, regulations, or orders of general applicability.”¹⁰⁵ This section thereby allows agencies to play an active role in further defining discrimination in their rules, regulations, and guidance documents while also creating additional obligations for recipients of federal funds to ensure the nondiscriminatory implementation of their programs and activities.¹⁰⁶

¹⁰¹ Lancman & Jones, *supra* note 12; *see* Pinto, *supra* note 76.

¹⁰² Johnson, *Private Enforcement*, *supra* note 14, at 1313.

¹⁰³ Civil Rights Act of 1964, tit. VI, § 601, 42 U.S.C. § 2000 (d) (2012).

¹⁰⁴ Johnson, *Private Enforcement*, *supra* note 14, at 1295 (citing 28 C.F.R. § 42.104(b)(2) (2013) (emphasis added); 49 C.F.R. § 21.5(b)(2) (2013) (emphasis added)). As will be addressed in Part II, New York City’s Metropolitan Transit Authority received federal funding and thus is bound by Title VI and the FTA’s regulations implementing it.

¹⁰⁵ 42 U.S.C. § 2000d-1 (2006).

¹⁰⁶ Jerret Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Panning*, 101 CALIF. L. REV. 1131, 1135 (2013).

Title VI provides a unique avenue for transit justice advocates to ensure fare increases are made with low-income and minority groups in mind. Because the majority of major transit agencies receive federal funds from the FTA, transit equity scholars have stressed that enforcement of Title VI through administrative mechanisms can alter the transit planning landscape in the United States,¹⁰⁷ and to do so by means that would not otherwise be possible through judicial enforcement alone.¹⁰⁸ The authority provided to agencies under section 602 has allowed them to reinterpret the meaning of discrimination, expand their enforcement power, and put new procedural safeguards into place.¹⁰⁹ Specifically, the regulatory authority of agencies such as the FTA represents an “extremely underutilized tool” in the transit equity movement,¹¹⁰ and can be used more effectively to enhance Title VI compliance of transit agencies like the MTA.

A. Equality Directives

American civil rights regulations, [such as those implementing Title VI,] function “by placing positive duties on state actors to promote equality and inclusion.”¹¹¹ According to Olatunde Johnson, “equality directives” are “directives to the administrative state,”¹¹² which place “affirmative requirements of equity and inclusion on state and local grantees [of federal funds] and use ex ante regulatory power rather than relying primarily on ex post court enforcement.”¹¹³

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1155–56.

¹⁰⁹ *Id.* at 1156.

¹¹⁰ *Id.* at 1135.

¹¹¹ Johnson, *Equality Directives*, *supra* note 17, at 1343.

¹¹² *Id.* at 1363. Johnson has written extensively on Title VI’s regulatory potential. See Johnson, *Private Enforcement*, *supra* note 14, at 1314; Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125 (2014) [hereinafter Johnson, *Agency Roots*]; Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 191 (2011).

¹¹³ Johnson, *Private Enforcement*, *supra* note 14, at 1314 (quoting Johnson, *Equality Directives*, *supra* note 17, at 1362–63).

Government discretion can still exacerbate disparities between racial and ethnic groups.¹¹⁴ Since the “state has the ongoing power to structure a complex set of racial, ethnic, and socioeconomic arrangements,”¹¹⁵ equality directives, such as Title VI and its implementing regulations, are particularly well-suited to help counter persistent racial and economic injustice.¹¹⁶ First, equality directives focus on using regulatory power rather than power wielded through the judiciary: Title VI requires federal, state, and local recipients of federal funds to take steps to ensure their programs and policies promote Title VI’s objectives.¹¹⁷ Title VI provides the federal government with “bureaucratic mechanisms,” distinct from adjudicative enforcement, that can be leveraged to ensure enforcement of anti-discrimination norms at various levels of government.¹¹⁸ This represents what Johnson calls the “carrot-and-stick element of Title VI” which played an important role in the integration of school districts in the south.¹¹⁹ Importantly, Title VI centers largely around state power.¹²⁰ By setting an antidiscrimination standard for state recipients of federal funds, it strives to ensure that states do not promulgate discrimination.¹²¹

Second, Title VI and its “implementing measures”, such as FTA’s Title VI guidance, require grantees of federal funding to take positive, affirmative steps to help ensure their programs advance Title VI’s objectives.¹²² It is not enough that grantees merely avoid discrimination in the implementation of their

¹¹⁴ Johnson, *Equality Directives*, *supra* note 17, at 1373.

¹¹⁵ *Id.* at 1372.

¹¹⁶ *Id.* at 1366 (noting that equality directives “promote nondiscrimination, equity, and inclusion”).

¹¹⁷ *Id.*

¹¹⁸ See 42 U.S.C. § 2000d-1 (2006) (enabling agencies to terminate funding provided to grantees as a means of enforcing their regulations, and also to enforce regulation “by any other means authorized by law.”); Johnson, *Equality Directives*, *supra* note 17, at 1366.

¹¹⁹ Johnson, *Equality Directives*, *supra* note 17, at 1367.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 1368. For example, equality directives can help grantees ensure that their “programs [] and policies serve to advance integration, nondiscrimination, and inclusion.” *Id.*

programs and activities.¹²³ Rather, they must “take a series of *proactive measures* to achieve inclusionary goals.”¹²⁴ If implementation of a particular policy would, for example, have a discriminatory impact on a minority group, then the guidance requires grantees to “propose, evaluate, and implement more inclusive alternatives.”¹²⁵

Further, equality directives require grantees to “embed a set of equity-promoting requirements in the daily operation of federally funded programs.”¹²⁶ They require grantees to consider both civil rights and equity concerns in order to receive federal funding.¹²⁷ This ensures, distinct from traditional antidiscrimination norms, that consideration of civil rights and equity concerns exist as an actual component of the process of receiving federal funding.¹²⁸ Equality directives are crucial to addressing contemporary inequality.¹²⁹ Requiring advocates for civil rights to shift from focusing on enforcement through the court system and to instead focus on the “untapped regulatory potential” of equality directives is particularly vital in the areas of race and ethnicity.¹³⁰ Because racial injustice persists due in part to the “complex interplay of historic and contemporary bias, poverty, and class-related disadvantage[s],” harnessing the power of regulatory agencies as proactive actors in addressing systemic inequality is key to achieving transit equity.¹³¹

*B. Federal Transit Administration’s Title VI Guidance:
Fare Equity Analyses*

Federal agencies have tremendous power under Title VI to require grantees of federal funds to actively promote

¹²³ *Id.*

¹²⁴ *Id.* (emphasis added).

¹²⁵ *Id.* at 1368.

¹²⁶ *Id.* at 1369. For example, equality directives “impos[e] ongoing requirements of self-evaluation, monitoring, and reporting.” *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 1371.

¹³⁰ *Id.*

¹³¹ *Id.*

nondiscrimination and equity.¹³² Perhaps most notably, over the past decade, the DOT's FTA, which funds mass transit, has promulgated a guidance document which implements Title VI for grantees of federal transit funds.¹³³ The guidance exemplifies the power granted to an agency under Title VI to not only extend its own enforcement capacity, but also to create additional procedures beyond what is specified in the substantive law.¹³⁴

The U.S. Department of Transit requires funding recipients such as the New York City MTA¹³⁵ to

gather and analyze data to evaluate whether minority groups are benefitting fairly from federally funded programs and services; develop quantitative measures to evaluate whether services are being provided in similar ways to different racial and ethnic groups; evaluate significant system-wide service and fare changes to determine whether they have a discriminatory impact; monitor services every three years to ensure that prior decisions have not resulted in disparate impact; and 'take corrective action to remedy [any] disparities.'¹³⁶

Although the DOT guidance is "informal," a grantee may nonetheless face sanctions, including the suspension and termination of current and future federal assistance, for failure to comply.¹³⁷ Accordingly, the requirement that grantees conduct equity analyses in order to assess the effects of its decisions, examine potential alternatives, and enhance participation in its decision-making effectively transforms Title VI from being a statute which merely prohibits discrimination to "a set of affirmative requirements."¹³⁸ The flexibility granted to federal

¹³² *Id.* at 1364.

¹³³ Johnson, *Private Enforcement*, *supra* note 14, at 1313 (citing 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at IV-11).

¹³⁴ Yan, *supra* note 106, at 1156.

¹³⁵ *Grant Management*, *supra* note 15.

¹³⁶ Johnson, *Equality Directives*, *supra* note 17, at 1380 (quoting 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at IV-10).

¹³⁷ Johnson, *Equality Directives*, *supra* note 17, at 1380–81; *see* 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at VIII-2, VIII-3.

¹³⁸ Johnson, *Equality Directives*, *supra* note 17, at 1381.

agencies under Title VI enables them to steer the decision-making of their grantees and the achievement of Title VI's objectives.

For example, the FTA guidance requires transit providers to evaluate the effects of changes in transit fares on low-income populations, as well as Title VI protected populations.¹³⁹ Thus, prior to implementing a fare change, the FTA requires that the provider first determine "whether minority and/or low-income riders are disproportionately more likely to use the mode of service, payment type, or payment media that would be subject to the fare change."¹⁴⁰ Since the focus of this Note is the potential of administrative directives like FTA's Title VI guidance to be used by civil society in advocating for reduced transit fare for low-income New Yorkers, I will focus primarily on the fare equity analysis requirement for assessing the impact of fare changes on low-income populations.¹⁴¹ I will then examine the application of this requirement by the MTA, as well as its shortcomings in fulfilling this requirement.¹⁴²

The FTA has recognized the importance of evaluating the impact of fare changes on transit dependent ridership.¹⁴³ Thus, while "[l]ow-income [is] not a protected class under Title VI," as minority status would be, grantees are nonetheless required to analyze proposed fare changes in order to determine whether low-income riders will be disproportionately burdened by the changes.¹⁴⁴ If, at the end of its analysis, a grantee determines that low-income ridership will indeed be disproportionately burdened by the proposed fare increase or decrease being assessed, the FTA guidance requires the grantee to then "take steps to avoid, minimize or mitigate impacts where practicable . . . [and] should

¹³⁹ 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at IV-19.

¹⁴⁰ *Id.* The guidance also provides an appendix with examples of service and fare equity analyses. *Id.* at App. K-1-K-14.

¹⁴¹ *See id.* at IV-19.

¹⁴² *See* JOEL C. ANDREWS, MTA NEW YORK CITY TRANSIT, 2010-2013 TITLE VI PROGRAM, 388-401 (2014) [hereinafter NYCT 2014 TITLE VI PROGRAM].

¹⁴³ *See* 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at IV-11-12.

¹⁴⁴ *Id.* (alternation in original).

describe alternatives available to low-income populations affected by the fare changes.”¹⁴⁵

As noted by Jerret Yan,¹⁴⁶ by requiring transit providers to “engage the public”¹⁴⁷ in developing its disproportionate burden test policy, the guide creates a space for “localized innovation” in determining the impact of a fare change on low-income populations.¹⁴⁸ While this specific requirement is positive in the sense of civic engagement, allowing grantees to themselves set the threshold which triggers the equity analysis requirement also means that grantees may be able to “effectively exempt themselves from the equity analysis requirement at will.”¹⁴⁹ For example, one concern is that this flexibility may allow grantees to “pass off meaningless statistics in the place of a true analysis,”¹⁵⁰ thereby allowing them to circumvent the fare equity impact assessment, and ultimately undermine its effective implementation. As will be explored in Part III, a review of MTA’s fare equity analysis suggests that this degree of flexibility allocated to grantees in the design of their fare equity analysis methodology may indeed be undermining the actual utility of the analysis as a monitoring mechanism. The FTA’s failure to effectively enforce their Title VI guidance enables grantees to skirt their Title VI obligations.

C. Enforcement Issues

The full potential of FTA’s Title VI guidance will not be realized unless the FTA forces its grantees to comply with its requirements. Despite the potential of the FTA’s Title VI guidance

¹⁴⁵ *Id.* at IV-21 (2012) (alteration in original).

¹⁴⁶ Jerret Yan is a former attorney adviser with the U.S. Environmental Protection Agency, where he focused on regulatory compliance, including Title VI compliance issues. He is currently an attorney at Hanson Bridgett LLC specializing in government law. *See Our Attorneys*, HANSON BRIDGETT, <https://www.hansonbridgett.com/Our-Attorneys/jerett-t-yan.aspx> (last visited Nov. 2, 2017).

¹⁴⁷ 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at IV-21.

¹⁴⁸ Yan, *supra* note 106, at 1162 (quoting 2012 CIRCULAR FTA C 4702.1B, *supra*, note 16, at IV-21).

¹⁴⁹ Yan, *supra* note 106, at 1162.

¹⁵⁰ *Id.* at 1161.

to aid in the fight for transit equity, its success in achieving Title VI's objectives, in large part, turns on the degree to which compliance with its requirements is enforced. The FTA's guidance notes that recipients of federal transportation funding must certify annually to the FTA that they have and will continue to comply with DOT's Title VI regulations.¹⁵¹ Additionally, they are required to submit a "Title VI Program" to their corresponding FTA Regional Civil Rights Office tri-annually, unless directed otherwise by the FTA.¹⁵² This Program must document how they have complied with the guidance requirements, as well as their obligations under the Title VI regulations promulgated by DOT.¹⁵³ Larger "fixed route providers"¹⁵⁴ such as the MTA also must include their equity analyses as well as efforts taken to mitigate any disparate impacts on minorities or disproportionate impacts on low-income populations, if any, that were identified by the analyses.¹⁵⁵ If, after an opportunity to improve, a recipient is found to "engage in practices that have the 'purpose or effect of denying persons the benefits of' the grantee's services, or discriminatorily 'exclude' individuals or groups . . . [then] the [Federal Transit] [A]gency [can] withhold funds pending resolution of the matter, or [] begin a process to terminate funding."¹⁵⁶ However, as Johnson notes, the effectiveness of this regulatory regime is dependent on whether the FTA follows through with a compliance review of its grantees and actually does "threaten federal funds termination for

¹⁵¹ See 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at III-1 ("In accordance with 49 CFR Section 21.7(a), every application for financial assistance from FTA must be accompanied by an assurance that the applicant will carry out the program in compliance with DOT's Title VI regulations. This requirement shall be fulfilled when the applicant/recipient submits its annual certifications and assurances to FTA.").

¹⁵² *Id.*

¹⁵³ See *id.* at III-1-3.

¹⁵⁴ According to the FTA, "transit providers that operate 50 or more fixed route vehicles in peak service and are located in an Urbanized Area (UZA) of 200,00 or more in population" must conduct a fare equity analysis. See *id.* at IV-10.

¹⁵⁵ *Id.* at IV-10-11.

¹⁵⁶ Johnson, *Equality Directives*, *supra* note 17, at 1398 (citing 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at VIII-2-3) (alteration in original); see also *id.* at I-4 (defining "noncompliance").

failure to [comply].”¹⁵⁷ While agencies may be effective platforms for achieving the goals of Title VI, civil society organizations can function as an additional enforcement layer that can help galvanize transit agencies, such as the MTA, to comply with the FTA’s Title VI guidance.

D. Community Advocacy Groups

Advocacy groups can play a pivotal role in holding agencies accountable for decisions that may adversely affect low-income and minority populations in New York City.¹⁵⁸ As Johnson notes, efforts by civil society groups in the implementation, expansion, and enforcement of equality directives represent an important component in the enforcement of Title VI in the transportation context.¹⁵⁹ For example, advocates for transportation equity created and publicized “model impact assessments” for grantees of federal transit funds as well as examples of “effective interventions in transportation equity.”¹⁶⁰ This information could then be used “to pressure less enthusiastic states and localities” to fully comply with their obligations under FTA’s Title VI guidance.¹⁶¹ Further, efforts to implement equality directives can help “bring ‘rights’ groups—who operate in an antidiscrimination frame—together with groups concerned with poverty alleviation, community revitalization, and environmental reform.”¹⁶² The infrastructural capacity of equality directives to serve as a platform for bringing together various civil rights stakeholders can help ensure that grantees are closely monitored and held accountable.¹⁶³

¹⁵⁷ Johnson, *Equality Directives*, *supra* note 17, at 1398 (alteration in original).

¹⁵⁸ *See id.* at 1408; *see also* Ydanis Rodriguez & Stephen Levin, *Fair Fares is a Subsidy for the Poor, Not the MTA*, CITY & STATE (May 15, 2017), <http://cityandstateny.com/articles/opinion/fair-fares-mta-subsidy-for-the-poor.html> (discussing efforts of transit advocacy groups Rider’s Alliance and the Community Service Society).

¹⁵⁹ Johnson, *Equality Directives*, *supra* note 17, at 1408.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 1410.

¹⁶³ *Id.* at 1411.

Community advocacy groups have been crucial in implementing Title VI through equality directives. Beginning in the late 1900s, community organizations and grassroots groups started organizing to address transportation injustice.¹⁶⁴ In recent years, organizations have sought to utilize the FTA's Title VI guidance in their transit justice efforts. For example, in 2009, Public Advocates, a nonprofit law firm based in San Francisco, filed a Title VI complaint on behalf of various groups against the Bay Area Rapid Transit District ("BART"), the agency responsible for operating rail service in the Bay Area.¹⁶⁵ Public Advocates alleged that the extension proposed by BART "failed to adequately service minority, transit-dependent populations in the East Bay . . . [and] that the system extension violated Title VI because BART had failed to do the required impact assessments or consider alternatives."¹⁶⁶ DOT ultimately removed funding from the project.¹⁶⁷ Public Advocates and other community groups have also urged the FTA to strengthen its guidance for grantees' impact assessments, "by standardizing and tightening the metrics for assessing discriminatory impacts."¹⁶⁸ Consequently, the FTA sent out letters which discussed the importance of meeting FTA Title VI requirements to all recipients of federal transit funds.¹⁶⁹ Following this, in 2012, the FTA revised its Title VI guidance even further, strengthening grantees' obligations.¹⁷⁰ As these examples show, community organizations can help identify weaknesses in the FTA's guidance, bring them to the FTA's attention, and

¹⁶⁴ Johnson, *Private Enforcement*, *supra* note 14, at 1318.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Johnson, *Private Enforcement*, *supra* note 14, at 1318–19; see PUB. ADVOCATES, CIVIL RIGHTS AND ENVIRONMENTAL JUSTICE IN PUBLIC TRANSPORTATION: PROPOSED FTA ACTIONS TO BUILD ON ITS STRONG RECORD OF ENFORCEMENT 3–12 (2010), http://www.prrac.org/pdf/White_Paper_on_FTA_Title_VI_Circular_with_cover_letter_12-20-10.pdf (discussing suggested ways of improving FTA's Title VI guidance).

¹⁶⁹ Johnson, *Private Enforcement*, *supra* note 14, at 1319.

¹⁷⁰ *Id.*

pressure the Agency to revise its requirements to more effectively implement Title VI.

In implementing FTA's Title VI guidance document, many large transit agencies have taken affirmative steps to mitigate harm to minorities and low-income populations when making reductions in transit service or increases in fares.¹⁷¹ For example, prior to increasing its transit fares, the Washington Metropolitan Area Transit Authority conducted a fare and service analysis, and relied on its findings in structuring their fare increases "to mitigate harms to transit-dependent minority and low-income riders."¹⁷² Additionally, the New Jersey Transit Authority, under pressure from a local transit advocacy group to release its equity analysis before a planned increase was to take effect, revised its plan to reduce the increase on local bus and light rail from 25 percent to 10 percent, mitigating the disproportionate impact this potential increase would have on minority and low income riders.¹⁷³ As exhibited, the use of equality directives by community advocacy groups has significant potential in achieving transit justice, and can be utilized as an additional tool to safeguard the interest of low-income and minority groups in New York City.

III. FARE INCREASES IN NYC: FTA'S TITLE VI GUIDANCE AS APPLIED TO THE MTA

Thomas F. Prendergast, former chairman of the MTA, has justified the "modest" 2017 fare increases as required to cover rising costs facing the MTA in its operation.¹⁷⁴ Prendergast notes, however, "The M.T.A. continues to keep its promise to make sure that fare and toll increases, while necessary to keep our system

¹⁷¹ Johnson, *Equality Directives*, *supra* note 17, at 1385–86.

¹⁷² *Id.* at 1386.

¹⁷³ Kyle Wiswall, *NJ Transit Releases Equity Analysis in Nick of Time, Admits Some Impacts*, MOBILIZING REGION (Apr. 23, 2010), <http://blog.tstc.org/2010/04/23/nj-transit-releases-equity-analysis-in-nick-of-time-admits-some-impacts>.

¹⁷⁴ Emma G. Fitzsimmons, *Subway Ride Could Cost \$3 Under M.T.A. Plan for Fare and Toll Increases*, N.Y. TIMES (Nov. 16, 2016), <http://www.nytimes.com/2016/11/17/nyregion/mta-proposals-subway-bus-fare-increase.html> [hereinafter Fitzsimmons, *Subway Ride Could Cost \$3*].

running, remain as low as possible and that they are done in as equitable a way as possible.”¹⁷⁵ Robert E. Foran, MTA’s Chief Financial Officer, maintains that fare increases result in additional benefits to commuters, such as additional “countdown clocks” on subway platforms, a “new subway station at Hudson Yards on Manhattan’s Far West Side,” as well as “the Second Avenue subway line on the Upper East Side.”¹⁷⁶ However, with costs of living in New York City already seemingly unbearably high for many residents,¹⁷⁷ these benefits may not justify fare increases that ultimately prevent low-income residents throughout New York City from accessing the subway system. David R. Jones, president of the Community Service Society and MTA Board Member notes that, the cost of a round trip fare is increasingly prohibitive for many New Yorkers, and even more so for those who fall below the poverty line.¹⁷⁸ He stresses that “de Blasio’s transportation priorities, from new ferry boats to a planned streetcar line, though fine ideas, [do] not address income inequality.”¹⁷⁹ Thus, while the MTA may justify its semiannual fare increases on the need to sustain operational costs for new infrastructure projects, it is simultaneously eroding the accessibility of the sole transit option for many New Yorkers in poverty.¹⁸⁰ As stressed by City

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* Additionally, it might be observed that the cost to complete some infrastructure projects are likely fixed and may have only isolated benefits for specific sets of riders, whereas fare increases are permanent and ongoing burdens on all ridership, which continue to provide MTA revenue even after proposed improvements are implemented.

¹⁷⁷ Emma G. Fitzsimmons, *Advocates for New York’s Working Poor Push for Discounted Transit Fares*, N.Y. TIMES (Nov. 11 2016), <http://www.nytimes.com/2016/11/12/nyregion/advocates-for-new-yorks-working-poor-push-for-discounted-transit-fares.html?action=click&contentCollection=N.Y.%20%2F%20Region&module=RelatedCoverage®ion=EndOfArticle&pgtype=article> [hereinafter Fitzsimmons, *Push for Discounted Transit Fares*].

¹⁷⁸ Fitzsimmons, *Subway Ride Could Cost \$3*, *supra* note 174.

¹⁷⁹ Fitzsimmons, *Push for Discounted Transit Fares*, *supra* note 177.

¹⁸⁰ *See id.*; Pinto, *supra* note 76. A recent New York Times expose suggests that the MTA’s budget crisis and “the failures of the New York City subway system” are largely the result of bad political decision-making by city and state officials. *See* Brian M Rosenthal et al., *How Politics and Bad Decisions Starved New York’s Subway*, N.Y. TIMES (Nov. 18, 2017),

Councilman Carlos Menchaca, a Fair Fares supporter, “[p]ublic transportation is not public if the public cannot afford it.”¹⁸¹ With the subway representing “a lifeline for so many,” this represents a hugely problematic barrier in advancing economic justice for low-income New Yorkers.¹⁸²

A. The Fairness of Fare Increases: Examining MTA’s Fare Equity Analysis

The fare equity analysis requirement of FTA’s Title VI guidance exists so the FTA may monitor and determine whether proposed fare increases by a transit agency receiving federal funds will have a disparate impact on minorities or disproportionate burden on low-income groups.¹⁸³ As discussed below, the way in which the MTA conducts its fare equity analysis raises concerns regarding its ability to comply with their Title VI obligations.¹⁸⁴

Title VI Programs submitted by the MTA to the FTA, which contain its fare equity analysis, are not published by either the MTA or the FTA.¹⁸⁵ A FOIA request for the MTA’s 2014 Title VI analysis¹⁸⁶ reveals that the while the MTA did complete a fare

<https://www.nytimes.com/2017/11/18/nyregion/new-york-subway-system-failure-delays.html>. Specifically, MTA’s current budget crisis did not “happen[] on its own . . . [but] was the result of a series of decisions by both Republican and Democratic politicians . . . [e]ach of them cut the subway’s budget or co-opted it for their own priorities.” *Id.*

¹⁸¹ Pinto, *supra* note 76.

¹⁸² *Id.*

¹⁸³ See 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at IV-19–21.

¹⁸⁴ Telephone Interview with Harold Stolper, Senior Economist, Community Service Society (Mar. 21, 2017) (on file with author).

¹⁸⁵ E-mail correspondence with Dawn Sweet, Program Manager for Complaints & Communication, Office of Civil Rights, Federal Transit Association (Sept. 27, 2016) (on file with author). Citizens must therefore file a formal Freedom of Information Act (“FOIA”) to access these reports. *Id.* This requirement is an unnecessary barrier to civil society review of this information, and the MTA and FTA should consider making this information publically available.

¹⁸⁶ At the time the initial research for this Note was completed, the most recent Triennial Title VI Program submitted by the MTA to the FTA covered the time period of July 1, 2010 through June 30, 2013, and was submitted on

equity analysis, the methodology utilized in conducting their fare equity analysis may have detracted from the compliance report's utility by potentially diluting the impact of fare increases on minority groups and low-income New Yorkers.¹⁸⁷ For example, in 2013, the MTA voted to raise the single ride fare, utilized largely by lower-income riders, by nearly 10 percent, whereas the 30-Day Unlimited MetroCard used by higher income populations was raised by only about 4 percent.¹⁸⁸ However, in its fare equity analysis for the adopted proposal,¹⁸⁹ the MTA nonetheless concluded that there was neither a disparate impact on minority groups nor a disproportionate burden on low-income populations.¹⁹⁰ As noted by Harold Stolper, Senior Economist at the Community Service Society, this conclusion seems to contradict conventional wisdom about differences in fare media¹⁹¹ usage across income groups—namely, that low-income riders in New York City, who are disproportionately black and Latino, rely more heavily on pay-per-ride tickets than unlimited monthly passes.¹⁹² This means that when fares for pay-per-ride tickets rise

June 19, 2014. Thus, this Note focuses only on this Title VI Program, and not subsequently submitted Title VI Programs.

¹⁸⁷ NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 392 (showing summary of proposed fare options).

¹⁸⁸ Stolper, *supra* note 56.

¹⁸⁹ See NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 393; see also *MTA Adopts Fare Increases for 2013*, MTA, <http://www.mta.info/news/2012/12/19/mta-adopts-fare-increases-2013> (last visited Nov. 2, 2017) (showing the MTA ultimately adopted the modified proposal).

¹⁹⁰ See NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 399.

¹⁹¹ Fare media is a term used to describe the different forms of subway transit fare (i.e. single ride ticket, 7-day unlimited pass, unlimited monthly pass). See *id.* at 394 (showing different types of “fare media” or different forms of transit fare within Table 2).

¹⁹² Telephone Interview with Harold Stolper, *supra* note 184. See Seymore, *supra* note 24, at 67 (“Transportation policies favor high-income riders, both financially and in the service provided. When the distance traveled per trip is considered, low-income riders—who usually make short trips—subsidize high-income riders from the suburbs, especially if transit fares are uniform. Thus a suburban passenger who travels 20 miles may only pay 20 percent of the true cost of the trip, whereas an inner-city passenger who travels one mile may pay more than twice the true cost of the trip.”). See also *Transit Affordability Crisis*, *supra* note 4, at 3 (discussing fare structure favoring higher-income riders).

faster than for unlimited monthly passes, low-income riders must spend more proportionately to take the same amount of trips than higher-income riders, and they may also forego some trips altogether due to higher fares.¹⁹³ This appears to represent a disparate impact.¹⁹⁴

The MTA even acknowledges an inequity in its fare structure favoring higher-income riders over lower-income riders in its report.¹⁹⁵ This general outcome in fare structure has also been previously recognized.¹⁹⁶ Yet the MTA instead counterintuitively concludes through its fare equity analysis that no disparate impact nor disproportionate burden on either minority or low-income groups exist.¹⁹⁷ The figures it reports show average fares rising by a lesser amount for the minority and low-income stations as compared with the higher-income, and non-minority stations.¹⁹⁸

One possible cause of this outcome is the manner in which the MTA averages fares in its report. First, the MTA appears to average fares across all fare media types.¹⁹⁹ For example, the agency appears to aggregate trips from different fare media into a single measure of average fare per trip.²⁰⁰ Thus, for low-income riders, if some of the pay-per-ride trips, for example, are no longer being taken at all, the average fare actually falls, because a greater share of trips comes from unlimited passes with lower fares costs

¹⁹³ Telephone Interview with Harold Stolper, *supra* note 184.

¹⁹⁴ *See id.*

¹⁹⁵ *See* NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 392 (“On aggregate, pass customers consume more rides per day than PPR [Pay-Per-Ride] customers as a result of the zero incremental cost of each ride. A side effect of this fare structure is that a rider with lower ability to pay (favoring low-value instruments) will pay more per trip than pass users.”).

¹⁹⁶ *Id.*; *see* Seymore, *supra* note 24, at 67.

¹⁹⁷ *See* NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 395–408 (discussing conclusion of statistical analysis for Modified Proposal 1A that no disparate impact nor disproportionate burden was identified on minority or low-income riders).

¹⁹⁸ *See id.* (presenting projected average fare change charts); Telephone Interview with Harold Stolper, *supra* note 184.

¹⁹⁹ *See* NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 395–408 (presenting projected average fare change charts for Proposals).

²⁰⁰ *See id.*

per trip.²⁰¹ The MTA also appears to aggregate all non-white racial groups.²⁰² Thus, relatively affluent Asian residents, for example, might be lumped together with lower-income black and Hispanic residents.²⁰³

The MTA assesses its predicted change in average fares, yet fails to reconcile how and why; given its acknowledgement that lower-income riders bear higher average fares per trip, its data on average fares demonstrates the opposite.²⁰⁴ Thus, seemingly ignoring this contradiction, the MTA moves forward with conducting its analysis, utilizing data that displays patterns seemingly contrary to common sense.²⁰⁵ Also, as noted by Stolper, a review of the report could not identify a discussion of the elasticity of the numbers used by the MTA as key inputs into its analysis.²⁰⁶ Such analysis would be particularly important in both the context of a disparate impact and disproportionate burden analysis in order to understand how a fare increase would impact the fare media purchasing patterns of minority and/or low-income groups.²⁰⁷

Another seemingly problematic issue is the manner in which the MTA defines ‘low-income’ and ‘high-income’ as well as ‘minority’ and ‘non-minority’ subway stations.²⁰⁸ According to the MTA’s description of its methodology, its minority and low-income areas are defined as “Census tracts where minority and low-income resident percentages exceed NYCT’s [New York City Transit] service area averages.”²⁰⁹ The service area averages appear to be drawn from data kept by NYCT’s Office of

²⁰¹ Telephone Interview with Harold Stolper, *supra* note 184.

²⁰² See NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 395–401 (presenting projected average fare change charts aggregated as minority and non-minority).

²⁰³ Telephone Interview with Harold Stolper, *supra* note 184.

²⁰⁴ *Id.*; see NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 395–401.

²⁰⁵ See NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 395–401 (presenting charts which show the fare increases).

²⁰⁶ Telephone Interview with Harold Stolper, *supra* note 184.

²⁰⁷ *Id.*

²⁰⁸ See NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 390.

²⁰⁹ *Id.*

Management Budget (OMB).²¹⁰ The average fares are then used to define subway stations as minority or low-income stations.²¹¹ The MTA's report describes using its Metrocard Automated Fare Collection System ("AFC")²¹² in order to capture the fare media preferences by subway station, and then to calculate the fare averages according to demographic and location information.²¹³

However, the manner in which the MTA categorizes tracts as minority or low-income could undermine the impact of fare increase on minority and low-income groups. For example, if the MTA determines a tract consists of 60 percent non-minority and 40 percent minority riders, it will get defined as a non-minority tract for purposes of the fare equity analysis.²¹⁴ Thus, in the MTA's calculations, the fare media preferences and ridership patterns of the 40 percent minority riders would appear to be attributed to the data for non-minority riders, given the tracts designation as such.²¹⁵ Without an explanation otherwise, and by defining minority groups so coarsely, the analysis presented by the MTA would seem unable to detect potentially significant impacts on specific minority groups (e.g., black New Yorkers, or even low-income black New Yorkers spread across gentrifying census tracts in Brooklyn).²¹⁶

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 390–91. The MetroCard Automated Fare Collection ("AFC") system is a fare collection technology created by the company Cubic, and is utilized by the MTA. See Press Release, *Cubic Receives Contract Extension Worth \$40.3 Million from New York MTA to Support MetroCard System Until 2022*, Cubic (Nov. 11 2016), <https://www.cubic.com/News/Press-Releases/ID/1771/Cubic-Receives-Contract-Extension-Worth-403-Million-from-New-York-MTA-to-Support-MetroCard-System-Until-2022>. See also Press Release, *Cubic Receives \$10 Million Contract to Provide New Fare Collection Technology for New York City Buses*, Cubic (Apr. 7, 2010), <https://www.cubic.com/News/Press-Releases/ID/36/Cubic-Receives-10-Million-Contract-to-Provide-New-Fare-Collection-Technology-for-New-York-City-Buses> (discussing Cubic's MetroCard fare collection system which is utilized by New York).

²¹³ See NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 390–91.

²¹⁴ Telephone Interview with Harold Stolper, *supra* note 184.

²¹⁵ *Id.*

²¹⁶ *Id.*

While the MTA has conducted the fare equity analysis, as required by the FTA prior to implementing a fare increase, the application and discussion of its methodology may be flawed. As briefly discussed, for the adopted fare increase proposal,²¹⁷ the MTA reported that the projected average fare change would be less for low-income riders as compared to high-income riders,²¹⁸ despite the MTA's claim earlier in its report that the opposite would result from the existent fare structure.²¹⁹ Additionally, by aggregating all of its fare swipe data into a single average fare, the MTA may be causing biased results by masking potentially critical impacts by specific fare types on low-income and minority populations and failing to discuss forgone trips.²²⁰ Further, by combining all minority groups into a single aggregate measure of predominantly minority or non-minority groups, the MTA may also be obscuring any potential impacts on specific minority groups of interest.²²¹ These methodological choices may prevent the utility of their fare equity analysis as a monitoring tool, and also impact the reliability of the MTA's disparate impact and disproportionate burden test results. While more investigation is needed, an initial review of MTA's Title VI program suggests that,

²¹⁷ See NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 392 (summarizing proposed fare options). The MTA Board ultimately adopted the modified proposal 1A. *MTA Adopts Fare Increases for 2013*, *supra* note 189; Garth Johnston, *MTA Approves Fare Hike, \$2.50 MetroCards Start in March*, *GOTHAMIST* (Dec. 19, 2012), http://gothamist.com/2012/12/19/watch_the_mta_hike_your_fare_live.php.

²¹⁸ See NYCT 2014 TITLE VI PROGRAM, *supra* note 142, at 405 (“[L]ow-income population is not adversely affected by the proposed fare change as compared with high-income population, since the net increase in fare is less in low-income group than in the high-income groups. Hence the proposal has no disparate impact on low income riders.”).

²¹⁹ See *id.* at 392 (acknowledging that NYCT's fare structure results in riders who are not able to afford the monthly unlimited pass, and who instead purchase “low-value instruments”, actually paying more per trip).

²²⁰ Telephone Interview with Harold Stolper, *supra* note 184. Interestingly, in examining New York City's subway crisis, “The [New York] Times found, the M.T.A. has used sloppy data collection and accounting games that hide from the public the true causes of the subway's problems.” See Rosenthal et. al., *supra* note 180. This finding is particularly troubling in light of the issues raised in this Note regarding M.T.A.'s fare equity analysis.

²²¹ *Id.*

despite submitting its certifications and assurances to the FTA on its full compliance with its Title VI obligations, the MTA's compliance, at least without considerable additional explanation, may in fact be incomplete.²²² As will be discussed in Part IV, this may give rise to liability under the False Claims Act.²²³

B. Easing The Burden: Reduced Transit Fares for Low-Income New Yorkers

MTA's semiannual fare increases have been met with alarm by community advocacy groups in New York City.²²⁴ Perhaps more than either the MTA or Mayor de Blasio, these organizations appear to understand the gravity of the harm the MTA's frequent fare increases can have on upward mobility for the neediest New Yorkers.²²⁵ In order to alleviate the burden MTA's semiannual fare increase has on low-income riders, the Community Service Society, along with organizations such as the Riders Alliance, have proposed a program that would offer half-price subway and bus fares to New Yorkers with "household incomes below the federal poverty level."²²⁶ Jones argues that the initial Fair Fares proposal,²²⁷ estimated at approximately \$212 million, "a mere 0.25 percent of the city's 84.7 billion preliminary budget,"²²⁸ would not

²²² See *infra* Part IV.

²²³ *Id.* The private enforcement of Title VI's disparate impact regulations is limited by the Supreme Court decision *Alexander v. Sandoval*, which held there is no private right of action to enforce Title VI's disparate impact regulations. See *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001); Johnson, *Agency Roots*, *supra* note 112, at 125.

²²⁴ *The City Needs Fair Fares Now More Than Ever*, *supra* note 40.

²²⁵ *Id.*

²²⁶ Emma G. Fitzsimmons, *Push for Discounted Transit Fares*, *supra* note 177.

²²⁷ The Fair Fares proposal, put forth by transit advocates in New York City, seeks to fund a half-priced MetroCard program for low-income New Yorkers whose incomes fall at or below the federal poverty level. Emma Whitford, *Seeking Compromise, Advocates Ask De Blasio To Phase In Half-Price MetroCards for Poor NYers*, GOTHAMIST (Apr. 25, 2017), http://gothamist.com/2017/04/25/half_price_metrocards.php [hereinafter Whitford, *Seeking Compromise*].

²²⁸ Jones & Raskin, *supra* note 20.

“break the bank.”²²⁹ While Mayor de Blasio has stated that the program “is a good meaningful proposal,”²³⁰ he has nonetheless maintained that the MTA is the state’s responsibility,²³¹ and thus has been “reluctant” to fund it absent some financial assistance from Governor Andrew Cuomo and the state.²³² A spokeswoman for the mayor also stated that the city has already made significant payments to the MTA’s operations and capital budget.²³³ Further, the MTA argued that it already helped low-income New Yorkers riding the subway by “subsidizing fares for students and people 65 or older.”²³⁴ The deadlock between the city, state, and MTA itself as to who should fund the half-priced MetroCard program represents the largest barrier to its implementation.

Community advocacy groups have been active in advocating for the reduced fare program, releasing research reports on the impact of the fare increases on low-income and minority groups, and advocating with the MTA and politicians to adopt such a program.²³⁵ “The initiative has garnered the support of [] a majority of City Council members, the public advocate, the city comptroller, [and New York City’s biggest unions]”²³⁶ However, despite these efforts, Mayor de Blasio nonetheless omitted the

²²⁹ *Id.*

²³⁰ Samar Khyrshid, *Saying City ‘Can’t Afford’ ‘Fair Fares’ De Blasio Points to State*, GOTHAM GAZETTE (Jan. 26, 2017), <http://www.gothamgazette.com/city/6731-de-blasio-says-city-can-t-afford-fair-fares-points-to-state>.

²³¹ Vincent Barone, *Low-income MetroCard Proposal Excluded from Mayor’s Budget*, AMNEWYORK (April 26, 2017), <http://www.amny.com/transit/low-income-metrocard-proposal-excluded-from-mayor-s-budget-1.13522015>.

²³² Fitzsimmons, *Push for Discounted Transit Fares*, *supra* note 177.

²³³ *Id.* See Gloria Pazmino, *De Blasio Says Cuomo Should Rethink MTA Bridge Lights*, POLITICO (July 19, 2017), <http://www.politico.com/states/new-york/albany/story/2017/07/19/de-blasio-suggests-cuomo-should-rethink-mta-resources-113504>. Mayor de Blasio recently critiqued a project, promoted by Governor Cuomo, to “outfit the region’s bridges with multi-colored LED lights.” *Id.* De Blasio argued that the project, “should not be a priority, as the city faces crippling problems in its subway system . . . [and] [t]he state, the governor, the MTA have to come up with a plan that reallocated their resources to the problems at hand.” *Id.*

²³⁴ Fitzsimmons, *Push for Discounted Transit Fares*, *supra* note 177.

²³⁵ *The City Needs Fair Fares Now More Than Ever*, *supra* note 40.

²³⁶ Barone, *supra* note 231.

proposal from his preliminary budget, maintaining that the program was still too expensive for the city to afford, and once again pointed to the state and Governor Cuomo as responsible for such a program.²³⁷ In response, advocates even revised the proposal, so that the half-priced MetroCard program would be gradually phased in, first for the neediest residents with annual incomes at or below 50 percent of the federal poverty level, and then for residents with incomes up to 75 percent of the federal poverty level.²³⁸ The City Council even included the pilot program in its budget proposal to the Mayor, requesting \$50 million to cover the first phase of the program, instead of the initial \$200 million estimated by advocates as the full cost to fund the program for all low-income New Yorkers.²³⁹ However, the Mayor still refused to include the program in his budget,²⁴⁰ despite his purported desire to address income inequality in New York City.²⁴¹

Recently, however, Mayor de Blasio, who was up for reelection in November, has proposed a “millionaire’s tax” which would fund the program.²⁴² The proposal comes in the midst of a

²³⁷ See Press Release, Community Service Society, *As City Budget Negotiations Enter Final Weeks, Elected Officials and Fair Fares Advocates Rally For Funding*, Community Service Society (Apr. 25, 2017), <http://www.cssny.org/news/entry/as-city-budget-negotiations-enter-final-weeks-elected-officials-and-fair-fa>; see David Meyers, *Sunday: Rally for Fair Fares*, STREETS BLOG NYC (Mar. 17, 2017), <http://nyc.streetsblog.org/2017/03/17/sunday-rally-for-fair-fares-with-the-riders-alliance/>; Danielle Tcholakian, *Half-Price MetroCards for Low-Income New Yorkers Get \$50M Council Boost*, DNAINFO (Apr. 5, 2017), <https://www.dnainfo.com/new-york/20170405/civic-center/subsidized-subway-metrocards-mta-half-price-city-council>.

²³⁸ See Barone, *supra* note 231; Tcholakian, *supra* note 237; Whitford, *Seeking Compromise*, *supra* note 227.

²³⁹ Tcholakian, *supra* note 237.

²⁴⁰ Barone, *supra* note 231.

²⁴¹ *Text of Bill de Blasio’s First State of the City Address*, *supra* note 1.

²⁴² Emma G. Fitzsimmons, *Bill de Blasio Will Push for Tax on Wealthy to Fix Subway*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/nyregion/bill-de-blasio-will-push-for-tax-on-wealthy-to-fix-subway.html> [hereinafter Fitzsimmons, *Push for Tax on Wealthy to Fix Subway*]; Offenhartz, *supra* note 20 (citing Senator Michael Gianaris’s “millionaire’s tax” plan as a source of inspiration for the Mayor’s tax proposal). The proposal calls for a “0.5% increase in income tax on individuals who make over \$500,000, and married couples who make more than \$1 million.” Offenhartz, *supra* note 20.

crisis facing the MTA and New York City subways, as well as intense criticism from both city residents,²⁴³ as well as the subway and bus unions.²⁴⁴ While the majority of the estimated 800 million annually that would be generated by the the tax would go towards upgrades and repairs for the subway and bus system, around 250 million would be allocated to fund the Fair Fares program.²⁴⁵ The proposal requires approval from both Governor Cuomo and the majority-Republican State Senate, which “shot down similar attempts by de Blasio, including a ‘millionaire’s tax,’ that would have raised money for affordable housing programs.”²⁴⁶ The proposal appears to be “an especially tough sell”²⁴⁷ with some State Senate Republicans already expressing their disapproval of the idea.²⁴⁸ However, the Mayor’s new support for the program is a

Some reports have suggested that de Blasio’s proposal may not be a “serious suggestion”, but instead a “reelection-year ploy.” See *De Blasio Announces Plan to Tax Wealthiest New Yorkers to Help Fund Subway, Buses*, CBS NEW YORK (Aug. 7, 2017), <http://newyork.cbslocal.com/2017/08/07/de-blasio-subway-repairs-tax-hike/>.

²⁴³ See J. David Goodman, *Angry About Subway Delays? De Blasio says Blame Cuomo, and Vice Versa*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/nyregion/de-blasio-cuomo-subway-delays.html>.

²⁴⁴ See *Bill de Blasio Will Push for Tax on Wealthy to Fix Subway*, *supra* note 242 (noting that Mayor de Blasio has been “targeted by a harsh television ad campaign by the subway workers union.”).

²⁴⁵ Offenhartz, *supra* note 20.

²⁴⁶ Vincent Barone & Laura Figueroa, *De Blasio Proposal Would Tax the Wealthy to Fix NYC Subway, Bus Systems*, AMNEWYORK (Aug. 7, 2017), <http://www.amny.com/transit/de-blasio-proposal-would-tax-the-wealthy-to-fix-nyc-subway-bus-systems-1.13941059>; see Offenhartz, *supra* note 20.

²⁴⁷ Offenhartz, *supra* note 20.

²⁴⁸ Erin Durkin, *De Blasio To Propose Taxing Rich to Help Pay for Subway Repairs*, N.Y. DAILY NEWS (Aug. 6, 2017), <http://www.nydailynews.com/news/politics/de-blasio-propose-taxing-rich-pay-subway-repairs-article-1.3388722>. Senate Majority Leader John Flanagan has criticized Mayor de Blasio’s tax proposal, however, noting that “the city already has a \$4.2 billion surplus and therefor has the ability to [fund his proposal] with existing resources . . . [de Blasio] doesn’t need to reach into the wallets of city residents to make that happen.” *De Blasio Announces Plan to Tax Wealthiest New Yorkers to Help Fund Subway, Buses*, *supra* note 242. Additionally, Joseph Lhota, Chairman of the MTA also rejected the plan noting that “even in the unlikely event that the Republican-controlled state legislature approved it, the funding would come too

step in the right direction, and as noted by Councilmember Ydanis Rodriguez, “is a testament to grassroots organizing on the part of activists like The Riders Alliance and the Community Service Society.”²⁴⁹ As exemplified by the Mayor’s “change of heart,” grassroots advocacy is crucial to achieving transit justice in New York City, and future monitoring efforts by civil society can help ensure the fairness of future fare increases.²⁵⁰

The FTA’s Title VI guidance has remained largely underutilized in transit advocacy efforts in New York City and represents an additional avenue for advocates and organizers in both promoting the half-priced MetroCard program as well as monitoring the MTA’s future fare increases. Its grounding in federal law positions the guidance as a mechanism through which advocates can garner the necessary political will to adopt a reduced-fare program—whether the funding ultimately comes from the city, state, or elsewhere.²⁵¹ As proof that a reduced fare program is possible in New York City, similar programs for the poor have been adopted in other large metropolitan cities. In 2015,

late.” Henry Goldman, *De Blasio Proposes Tax on Wealthy to Fix New York City’s Crumbling Subways*, BLOOMBERG POLITICS (Aug. 7, 2017), <https://www.bloomberg.com/news/articles/2017-08-07/de-blasio-proposes-tax-on-wealthy-to-fix-nyc-s-crumbling-subways>.

²⁴⁹ Offenhartz, *supra* note 20.

²⁵⁰ *Id.*

²⁵¹ Barone, *supra* note 231; Johnson, *Equality Directives*, *supra* note 17, at 1380. Alternatives for funding the reduced fare proposal also include increasing the gas tax. See Aria Bendix, *The Working Poor Can’t Afford New York City Transit*, CITY LAB (April 13, 2016), <http://www.citylab.com/commute/2016/04/how-can-the-working-poor-afford-new-york-city-transit-half-price-metrocards/477762/>; Conor Skelding, *Councilman Hopes to ‘Embarrass’ Administration out of Arresting Fare-beaters*, POLITICO (July 19, 2017), <http://www.politico.com/states/new-york/city-hall/story/2017/07/19/councilman-hopes-bill-will-embarrass-administration-out-of-arresting-fare-beaters-113492>. Councilmember Rory Lancman has introduced a bill to New York City Council that would require the New York City Police Department “to report quarterly on how many arrests and summons officers made for fare evasion.” *Id.* The data would be aggregated by “race, sex, age, precinct of the officer, and subway station.” *Id.* The Council member expects the data will “show a wide disparity in the demographics of who is getting arrested,” and thus “will ‘embarrass’ the de Blasio administration into no long[er] arresting turnstile jumpers.” *Id.*

the city of Seattle implemented the ORCA LIFT program,²⁵² which provided reduced fares for low-income riders, giving discounts to people whose household income is no more than 200 percent of the federal poverty level.²⁵³ One year later, approximately “42 percent of passengers [had] taken the bus and light rail more frequently since [receiving] their ORCA LIFT card, [indicating] an increase in productivity.”²⁵⁴ San Francisco also offers half-price monthly passes to low-income riders.²⁵⁵ Additionally, Boston is looking into this idea, and cities such as Charlotte²⁵⁶ and Denver²⁵⁷ already provide reduced passes through nonprofit groups.²⁵⁸

²⁵² ORCA Lift is a program for low-income riders in Seattle administered through King County Department of Transportation which provides discounted transit rides of up to 50 percent or more for qualified riders. *Orca Lift*, KINGCOUNTY.GOV, <http://kingcounty.gov/depts/transportation/metro/fares-orca/orca-cards/lift.aspx> (last visited Nov. 2, 2017); Bendix, *supra* note 251 (“Already, cities including Seattle, San Francisco, and London offer fare discounts to low-income or unemployed residents.”).

²⁵³ See Kirk Johnson, *Targeting Inequality*, *supra* note 43; Lindblom, *supra* note 43.

²⁵⁴ *A Year After Launch, ORCA LIFT Shows How Transit Can Help Confront Income Inequality*, KING COUNTY (Mar. 7 2016), <http://kingcounty.gov/elected/executive/constantine/news/release/2016/March/07-orca-lift-anniversary.aspx> (alteration in original).

²⁵⁵ See *Lifeline (Low Income) Pass*, *supra* note 43. San Francisco Municipal Transit Association (SFMTA) provides qualifying low-income residents with half-price passes for their MUNI transit system. As of June 26, 2017, the cost of the pass is only \$38.00. *Id.*

²⁵⁶ The Charlotte Area Transit System supplies transit passes, discounted up to 25 percent, to non-profit organization with 80 percent or more of their clients at or below the federal poverty level. See CHARLOTTE AREA TRANSIT SYSTEM FARE EQUITY ANALYSIS FOR THE FY2017 PROPOSED INCREASES, CITY OF CHARLOTTE 26 (June 2016), <http://charlottenc.gov/cats/about/civil-rights/Documents/CATS-FY17-Fare-Increase-Equity-Analysis.pdf>.

²⁵⁷ Denver’s Regional Transportation District offers half-price transit passes to qualifying 501(3)(c) non-profit organizations that provide assistance to low-income individuals. See *Fare Payment Options*, REGIONAL TRANSPORTATION DISTRICT, <http://www.rtd-denver.com/Fares.shtml> (last visited Nov. 2, 2017). However, the RTD recently put a cap on the amount of passes that organizations can request. See Mike Iliopoulos, *RTD Places Cap on Tickets for Non-profits, Sparking Concern Among Low-income Riders*, DENVER

New York City's failure to approve a reduced fare MetroCard program appears to be less about insurmountable budgetary constraints and more about a lack of political will in prioritizing such a program for low-income residents.²⁵⁹ By reframing New York City's Fair Fares debate in the context of MTA's compliance with the FTA's Title VI guidance, the reduced fare proposal is a way to mitigate the disproportionate burden future fare increases may have on low-income populations. Additionally, doing so can help ensure the proposal moves away from being viewed as a political choice, as exemplified by Mayor de Blasio and Governor Cuomo's debate on the program, but rather as an obligation under federal law.

IV. SOLUTIONS

Equality directives like the FTA's Title VI guidance can mitigate the harms low-income riders suffer when transit fares increase.²⁶⁰ As previous examples show, not only do they have the potential to function as an accountability mechanism, but they can help bring transit affordability issues to light, as well as ensure the future prioritization of these issues in political decision-making.²⁶¹ However, implementation and enforcement concerns remain, and thus community advocacy groups are key in "unleash[ing] the capacity of equality directives."²⁶² One potential way to harness the promise of equality directives is through what K. Sabeel

CHANNEL (Apr. 17, 2017), <http://www.thedenverchannel.com/news/local-news/rtd-places-cap-on-tickets-for-nonprofits-sparking-concern-among-low-income-riders>.

²⁵⁸ Fitzsimmons, *Push for Discounted Transit Fares*, *supra* note 177.

²⁵⁹ David R. Jones, *Not Too Late for 'Fair Fares' in City Budget*, COMMUNITY SERVICE SOCIETY (May 4, 2017), http://www.cssny.org/news/entry/FairFaresinCityBudget_UrbanAgenda.

²⁶⁰ Johnson, *Private Enforcement*, *supra* note 14, at 1314–19.

²⁶¹ *See id.* at 1318 (discussing FTA Title VI guidance as used by advocates in California).

²⁶² Johnson, *Equality Directives*, *supra* note 17, at 1413 (alteration in original).

Rahman,²⁶³ Professor of Law at Brooklyn Law School and democracy theorist, has defined as “citizen audits”, which can help enhance the transparency, monitoring, and compliance by transit agencies with Title VI.²⁶⁴

A. Citizen Audits

Citizen audits represent “the organized, strategic use of participatory monitoring techniques to hold government actors accountable.”²⁶⁵ According to Rahman, they serve as a mechanism in which grassroots groups and historically underserved communities can exert increased influence “not on the legislative process, but rather on bureaucratic processes of governance and policy implementation.”²⁶⁶ Citizens can then use this data and information as a tool to hold city government officials accountable for promises made to underserved communities and indigent groups.²⁶⁷ An additional benefit of citizen audits is that they are

²⁶³ K. Sabeel Rahman is an Assistant Professor of Law at Brooklyn Law School, a Schmidt Family Fellow at New America, and a Four Freedoms Fellow at the Roosevelt Institute. His academic research focuses on questions of democratic and participatory governance, public law, and economic policymaking. *See About*, K. SABEEL RAHMAN, <http://www.ksabeelrahman.com/about/> (last visited Nov. 2, 2017).

²⁶⁴ K. Sabeel Rahman, *From Civic Tech to Civic Capacity: The Case of Citizen Audits*, 7 PS: POL. SCI. & POL. 751, 751 (2017).

²⁶⁵ *Id.* (emphasis omitted).

²⁶⁶ *Id.* For example, Slumdwellers International (“SDI”), and its affiliate organizations, work with slums located around the world, “to conduct ‘pavement censuses’ documenting patterns of land use, tenancy, and where (if any) public goods such as sewage, water, and other services are provided.” *Id.* at 752. *See About the Organization*, THE SKOLL FOUNDATION, <http://skoll.org/organization/slum-dwellers-international/> (last visited Nov. 2, 2017) (SDI is a “network of community-based organizations of the urban poor in 33 countries in Africa, Asia, and Latin America” that works towards assisting network members to “build a voice and collective capacity in urban poor communities.”).

²⁶⁷ Rahman, *supra* note 264, at 751; *see generally* XAVIER DE SOUZA BRIGGS, *DEMOCRACY AS PROBLEM SOLVING: CIVIC CAPACITY IN COMMUNITIES ACROSS THE GLOBE* 4–5 (MIT Press, 2008) (discussing theories similar to “Citizen Audits” employed by grass-roots organizations in Mumbai). Another recent example is the rapid proliferation of “copwatching” groups, which organize “neighborhood ‘patrols’ of residents to monitor police activity and

“autonomous from government officials,” and thus, grassroots groups have “greater power than in ordinary transparency regimes” where data is “ultimately controlled and potentially limited by government actors.”²⁶⁸ The independence of citizen audits as monitoring bodies distinct from regulatory agencies, such as the FTA, can help bolster the Title VI compliance of grantees of federal funds, and also direct the policy priorities of local officials.

1. Promoting Transparency

Citizen audits extend beyond traditional approaches of democracy and participation of civil society.²⁶⁹ They are distinct from the “Open Government” movement,²⁷⁰ which primarily focuses on the “democracy-enhancing and governance-promoting” aspects of transparency of information.²⁷¹ President Obama’s Executive Order 13642 provides that government entities may opt

ultimately to prevent abuses of police power.” Rahman, *supra* note 264, at 751 (citing Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 411 (2016)). Copwatching activities are intended to confront and “counteract systemic forms of racial bias that manifest in everything from arbitrary stop-and-frisk patterns against African-American and Hispanic residents, to excessive use of force.” *Id.* at 751. The process of ongoing monitoring efforts helps grassroots groups connect, collaborate, and organize with one another, as well as to more directly advocate with government officials. *Id.* See also Catherine Rentz & Doug Donovan, *After Freddie Gray’s Death, Copwatchers Film Police to Prevent Misconduct*, BALTIMORE SUN (June 27, 2015), <http://www.baltimoresun.com/news/maryland/bs-md-copwatch-20150627-story.html> (discussing formation of WeCopwatch in Baltimore, which seeks to prevent police brutality and misconduct by the filming of police officers, and also conducts “Know Your Rights” trainings with Baltimore residents).

²⁶⁸ Rahman, *supra* note 264, at 752.

²⁶⁹ *Id.* at 752.

²⁷⁰ See Tim O’Reilly, *Government as a Platform*, in OPEN GOVERNMENT: COLLABORATION, TRANSPARENCY, AND PARTICIPATION IN PRACTICE (Daniel Lathrop & Laurel Ruma eds., O’Reilly Press, 2010). As noted by Rahman, the movement for “Open Government” promotes “greater transparency and citizen participation” as a means of enhancing democracy and promoting governance. Rahman, *supra* note 264, at 752. “One aspect of open government is the opportunity created when governments make their data more publicly available for citizens to monitor public officials and policy outcomes.” *Id.* at 753.

²⁷¹ Rahman, *supra* note 264, at 752.

to operate as “open by default” with regard to their data, ensuring agency records are available to the public.²⁷² Notably, the FTA does not make grantee’s Title VI programs publically available.²⁷³ Thus, in order to promote transparency, the FTA should adopt an “open by default” standard for its information.²⁷⁴ This would allow advocacy groups and concerned citizens to closely track and monitor the MTA’s compliance with FTA’s Title VI requirements as well as FTA’s actual enforcement of the guidance.²⁷⁵

Citizen audits extend even further than Open Government principles, enabling communities to take the lead in monitoring efforts and in gathering information and data.²⁷⁶ This puts constituents in the driver’s seat, allowing them to determine issues that are of direct importance and the best method for monitoring them.²⁷⁷ In a purely transparency-focused framework lack of information is understood as the main problem with the political process.²⁷⁸ However, for activists conducting citizen audits the underlying issue is “a *systematic political indifference* towards the needs, concerns, and voice of the marginalized communities.”²⁷⁹

Citizen audits are a particularly useful advocacy tool for NYC transit justice advocates given what appears to be the continued “sparr[ing]” between city, state government officials, and the

²⁷² Proclamation No. 13642, 78 Fed. Reg. 28,111 (May 14, 2013) [hereinafter Executive Order on Open Government]; Rahman, *supra* note 264, at 753.

²⁷³ Email correspondence with Dawn Sweet, *supra* note 185 (on file with author) (noting that the DOT does not publish Title VI programs, but that they can be requested and received through FOIA). Thus, in order for civil society stakeholders to determine whether a grantee, such as the MTA, even submitted a Title VI program as required, let alone complied with the specific provisions of the fare equity analyses, one would need to request this information through the Freedom of Information Act.

²⁷⁴ See Executive Order on Open Government, *supra* note 272.

²⁷⁵ 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at IV-19 (specifying requirements of federal transit fund grantees in implementing Title VI).

²⁷⁶ Rahman, *supra* note 264, at 753.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* (emphasis added).

MTA, on how such a reduced fare-program would be funded.²⁸⁰ Citizen audits remedy political indifference by enabling citizens to better access on-the-ground facts, as well as information regarding the activities of policymakers.²⁸¹ They help direct this information at policymakers in order to ensure their voices are heard in political decision-making.²⁸² It is this “productive contestation” that fosters a response from politicians and bureaucrats, in large part, through the “accumulation of power” by previously marginalized groups.²⁸³ Given the deadlock between the city and state regarding the funding of a reduced-fare MetroCard program for low-income New Yorkers, citizen audits can help advocates and effected communities ensure the future prioritization of this issue.

2. Working Within the Regulatory Process

To achieve the goal of political accountability, citizen audits should be a component of institutions’ broader strategies.²⁸⁴ Regulatory agencies help with the “development and implementation of specific policies,”²⁸⁵ as exemplified by DOT’s regulations implementing Title VI, and the FTA’s Title VI guidance.²⁸⁶ As Rahman notes, they “serve as a unique ‘nexus of democracy and governance.’”²⁸⁷ Specifically, they provide a

²⁸⁰ Emma Whitford, *Reduced Fare MetroCards for Poor NYers: A Popular Idea, But Who Pays for It?*, GOTHAMIST (Nov. 29 2016), http://gothamist.com/2016/11/29/metrocard_reduced_fare.php; Nick Powell, *No Excuses, Mr. Mayor—Support Fair Fares*, CITY & STATE (Jul. 31, 2017), <http://cityandstateny.com/articles/opinion/mayor-de-blasio-support-fair-fares.html> (criticizing Mayor de Blasio as “content to be an unwitting pawn in Cuomo’s ridiculous game of ‘Whose Subway is it Anyway?’”).

²⁸¹ Rahman, *supra* note 264, at 754.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 755.

²⁸⁵ *Id.*

²⁸⁶ See 2012 Circular FTA C 4702.1B, *supra* note 16, at Ch. IV-19.

²⁸⁷ Rahman, *supra* note 264, at 755 (quoting CHRIS ANSELL, PRAGMATIST DEMOCRACY: EVOLUTIONARY LEARNING AS PUBLIC PHILOSOPHY 3–4 (Oxford University Press, 2011)); see Mark Warren, *Governance-Driven Democratization*, CRITICAL POLICY STUDIES 3, 3–13 (2009).

platform for citizens to directly engage in the development and implementation of their policies.²⁸⁸ In doing so, they facilitate a level of direct participation in the formulation of policies that has been more difficult to achieve through traditional forms of democratic governance, such as elections and legislatures.²⁸⁹ By formally embedding citizen audits in their regulatory processes, regulatory agencies can help ensure that surveillance and monitoring by civil society become a crucial component of regulatory governance.²⁹⁰

The Community Reinvestment Act of 1977 (“CRA”),²⁹¹ which created a process for engaging community groups in its enforcement, exemplifies the potential of regulatory processes to facilitate citizen audits,²⁹² and can serve as a model for the FTA. While the main focus of the CRA was to “address racial disparities in credit access and lending,” a significant innovation is how it involved community groups in ensuring its enforcement.²⁹³ The CRA provided citizens with publicly-available data on lending by banks, as well as an option to evaluate “whether a bank met local credit needs.”²⁹⁴ By allowing community groups to directly

²⁸⁸ Rahman, *supra* note 264, at 755 (citing ANSELL, *supra* note 287, at 3–4); see Warren, *supra* note 287, at 3–13.

²⁸⁹ See sources cited, *supra* note 288.

²⁹⁰ Rahman, *supra* note 264, at 755.

²⁹¹ The Community Reinvestment Act of 1977 states that “regulated financial institutions have continuing and affirmative obligations to help meet the credit needs of the local continuing and affirmative obligations to help meet the credit needs of the local communities in which they are chartered.” Community Reinvestment Act, 12 U.S.C. § 2901 (1977). It was enacted “in response to concern about redlining of minority and low-income areas, and market failures in low-income communities.” Michael Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 NYU L. REV. 513 (2005). The CRA “establishes a regulatory regime for monitoring the level of lending, investments, and services in low- and moderate-income neighborhoods traditionally underserved by lending institutions.” *A Brief Description of the CRA*, NATIONAL COMMUNITY REINVESTMENT COALITION (Jan. 16, 2008), <https://ncrc.org/a-brief-description-of-cra/>.

²⁹² See Rahman, *supra* note 264, at 755; Community Reinvestment Act, 12 U.S.C. §§ 2901–08.

²⁹³ Rahman, *supra* note 264, at 755.

²⁹⁴ See *id.*; Community Reinvestment Act, 12 U.S.C. §§ 2901–08 (1977).

request agency examination of specific banks the groups believed were not fulfilling their obligation under the Act, the Act enabled citizen leverage and control over this issue.²⁹⁵ In order for a bank to get regulatory approval for a merger, it needed to have a good CRA “score”²⁹⁶ which, in turn, had the effect of incentivizing the banks to work directly with community groups.²⁹⁷ Thus, the “CRA institutionalized some degree of countervailing power” since it led banks to proactively and directly work with community groups in negotiating different practices in order to promote the lending goals of the Act.²⁹⁸

By adopting an open-data practice and facilitating citizen audits, regulatory agencies have the power to transform democratic participation and enhance the effective implementation of their policy goals.²⁹⁹ As noted by Rahman, an agency could write in an “inspection trigger” to its regulations, as exemplified through the CRA provision, or even a “mandatory hearing request”—both of which would actually mandate the engagement of regulators with citizen auditors.³⁰⁰ This would improve the monitoring ability of agencies such as the MTA to ensure their compliance with regulatory obligations, and further ensure that the voices and concerns of the communities and citizens directly impacted by agency policy decisions would be heard.

3. Bolstering Enforcement of Title VI

Citizen audits serve as a particularly apt solution to enforcement issues facing the FTA in implementation of its Title VI guidance. As noted previously, in order to aid in citizen audits,

²⁹⁵ Rahman, *supra* note 264, at 755.

²⁹⁶ *Id.*; see Barr, *supra* note 291, at 524–25. (“Final changes to the regulations implementing CRA issued in 1995 focused CRA evaluations on objective performance measures rather than the more subjective and process-oriented factors that regulators previously had used . . . [L]arge banks are evaluated on a three-part test of their lending, investments, and services, while small banks undergo a streamlined review of lending.”).

²⁹⁷ Rahman, *supra* note 264, at 755.

²⁹⁸ *Id.*

²⁹⁹ See *id.* at 753–54.

³⁰⁰ *Id.* at 756.

the FTA must first ensure it adopts the “open by default” standard for government agencies,³⁰¹ so that all information and data obtained from grantees is publically available.³⁰² Information obtained through citizen audits, along with publically released agency information, can be utilized together to ensure MTA’s Title VI compliance and FTA’s Title VI enforcement. Citizen audits can enable transit groups and concerned citizens alike to mobilize and scrutinize policy decisions regarding fare increases and their impact on low-income and minority groups. Citizen audits can, for example, enable advocacy organizations in New York City to monitor the MTA’s compliance with the fare and service equity analysis required by FTA’s Title VI guidance and also identify ways to improve the analysis. Grassroots groups and activists who represent underserved communities that are hard hit by the MTA’s now semiannual fare increase are likely better suited to monitor and hold accountable FTA grantees than the FTA itself because of the direct stake the community has in the outcome of agency policy decisions.³⁰³

Citizen auditors have the power to hold agency heads and city government officials accountable as well.³⁰⁴ They serve as a mechanism to broaden awareness of potential Title VI violations by the MTA.³⁰⁵ Further, they can help enable low-income and underserved communities to demand attention from government

³⁰¹ See Executive Order on Open Government, *supra* note 272, at 28111 (“Government information shall be managed. . .to promote interoperability and openness, and, wherever possible and legally permissible, to ensure that data are released to the public in ways that make the data easy to find, accessible, and usable.”).

³⁰² See *id.* at 28111.

³⁰³ See Rahman, *supra* note 264, at 753 (noting that citizen audits are effective because they gather information that is “focused on the issues of concern to the constituencies, linked to a particular advocacy vehicle to make information influential and relevant to policymakers.”).

³⁰⁴ *Id.* at 752 (noting that “leveraging community participation in monitoring the degree to which regulators and business alike follow and enforce existing standards has become a more widespread tool for empowering communities and holding policymakers accountable in a variety of contexts”).

³⁰⁵ See Rahman, *supra* note 264, at 751 (discussing the potential of citizen audits to “hold government officials accountable . . . [and] generate pressure and influence on policy makers”).

officials regarding policy decisions negatively impacting community members.³⁰⁶ For example, where a fare increase may be found to disproportionately burden low-income New Yorkers, and the MTA alleges mitigation is not “practicable” given funding constraints, civil society can work together to generate political pressure on city officials to ensure funds are allocated to address this issue.³⁰⁷ Here, citizen audits might enable New Yorkers to demand the prioritization of city funding so that MTA can in fact implement a half-price MetroCard program.

The FTA should consider writing a “mandatory hearing request” option, and an “inspection trigger” similar to that utilized by the CRA within its regulations.³⁰⁸ Thus, if advocates believe deficiencies exist in MTA’s fare analysis, or that FTA is skirting its compliance review obligations, citizen audits can, as theorized by Rahman, engage with both regulators as well as grantees to ensure effective compliance going forward.³⁰⁹ As was exemplified with the CRA, this may influence the MTA, in its anticipation of enhanced scrutiny through citizen audits, to ensure its compliance with FTA Title VI requirements, and proactively mitigate any potential adverse impacts. This will also ensure that future fare changes are made with Title VI in mind.

³⁰⁶ See DE SOUZA BRIGGS, *supra* 267, at 4; Simonson, *supra* note 267, at 392.

³⁰⁷ 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at IV-21. (“At the conclusion of the analysis, if the transit provider finds that low-income populations will bear a disproportionate burden of the proposed fare change, the transit provider should take steps to avoid, minimize, or mitigate impacts where practicable. The transit provider should describe alternatives available to low-income populations affected by the fare changes.”).

³⁰⁸ Rahman, *supra* note 264, at 755–56 (discussing potential usefulness of “mandatory hearing request” or another sort of “inspection trigger”).

³⁰⁹ See *id.* (discussing the Community Reinvestment Act of 1977 which empowered community groups by “institutionaliz[ing] some degree of countervailing power” by leading banks “to pro-actively engage[] [community groups] in direct negotiations [with banks] over alternative lending practices and projects”) (alteration in original).

B. False Claims Act

1. Establishing Liability Under the False Claims Act

Advocates may be able to establish a claim against the MTA under the federal False Claims Act, which imposes liability for making false claims to the Federal government for money or property.³¹⁰ In order to establish liability under the qui tam provision of the FCA, which “allow[s] a private party to bring a civil action in the name of the government,”³¹¹ the Second Circuit has held that a plaintiff must show that defendants “(1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury.”³¹² The False Claims Act may serve as another means for transit justice advocates and civil society groups to ensure that grantees of federal funds, like the MTA, are in fact complying with their obligations under Title VI.

As required by the FTA’s Title VI guidance, and pursuant to 49 C.F.R. Section 21.7(a),³¹³ “every application for financial assistance from FTA must be accompanied by an assurance that the applicant will carry out the program in compliance with DOT’s Title VI regulations.”³¹⁴ Recipients of federal funds fulfill this

³¹⁰ False Claims Act, 31 U.S.C. §§ 3729 (2010).

³¹¹ *Accord* 31 U.S.C. § 3730 (b) (2010); Stephen F. Hayes, *Enforcing Civil Rights Obligations Through the False Claims Act*, 1 COLUM. J. RACE & L. 29, 31 (2011) (“The person who pursues the action—the relator—receives a portion of any amount recovered on the government’s behalf.”).

³¹² U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., N.Y., 668 F. Supp. 2d 548, 560 (S.D.N.Y. 2009) (quoting U.S. ex rel. Mikes v. Straus, 274 F.3d 687, 695 (2d Cir. 2001)). *See generally* 31 U.S.C. § 3729 (a).

³¹³ 49 C.F.R. § 21.7 (a)(1)(2016) (“Every application for Federal financial assistance . . . shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by, an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. Every award of Federal financial assistance shall require the submission of such an assurance.”).

³¹⁴ 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at III-1.

requirement by submitting annual certifications and assurances to the FTA.³¹⁵ While more investigation is needed as to the sufficiency of MTA's fare equity analysis, an initial review of MTA's Title VI program, as briefly discussed above, raises serious concerns regarding its methodology and analysis.³¹⁶ Notably, shortcomings in MTA's fare equity analysis could inhibit its ability to identify and address possible Title VI violations.³¹⁷ If investigating advocates determine that the MTA is not in compliance with its Title VI obligations, despite submitting certificates of assurance to the FTA, they could bring suit against the MTA for violation of the Federal False Claims Act (FCA).³¹⁸ Specifically, they could argue that the MTA was aware or should have been aware that their fare equity analysis was insufficient, and thus they had falsely submitted their certificates and assurances regarding their compliance with Title VI in order to continue receiving federal funds.

2. *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York*

A similar argument under the FCA was argued successfully by advocates in the housing context in *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., NY*.³¹⁹ In that case, a fair housing group, Anti-Discrimination Center

³¹⁵ *Id.*

³¹⁶ These concerns pertain to both the disparate impact analysis for minority groups as well as the disproportionate burden analysis for low-income populations. *See supra* Section III.A.

³¹⁷ *See e.g., Anti-Discrimination Ctr. of Metro N.Y.*, 668 F. Supp. 2d at 550 (concluding that Westchester County's failure to consider race when making certifications to HUD for federal funding inhibited its ability to further the purpose of the FHA in preventing discriminatory housing).

³¹⁸ *See* False Claims Act, 31 U.S.C. §§ 3729–3730 (2010). Again, making MTA's fare equity analyses publically available would promote investigations by civil society into MTA's compliance with FTA's Title VI Guidance.

³¹⁹ *Anti-Discrimination Ctr. of Metro N.Y., Inc.*, 668 F. Supp. 2d at 550, 570–71.

(“ADC”)³²⁰ brought suit against Westchester County (“County”).³²¹ ADC alleged that the County’s annual certifications to the Federal government, which stated that it had complied with HUD³²² regulations and guidance on affirmatively furthering fair housing (“AFFH”),³²³ were “false” within the meaning of the False Claims Act.³²⁴ Plaintiff-ADC stressed that, “to obtain the HUD funds at issue . . . the County had to analyze and record its analysis of the impediments to fair housing choice, and then to take appropriate action[] to overcome those impediments and also record those actions.”³²⁵

³²⁰ The Anti-Discrimination Center (ADC) is a non-profit organization that “works to prevent and remedy all forms of discrimination in housing, employment, education, and public accommodations through advocacy, litigation, education, outreach, monitoring, and research.” *About Us*, ANTI-DISCRIMINATION CTR., <http://www.antibiaslaw.com/about-us> (last visited Nov. 2, 2017).

³²¹ *Anti-Discrimination Ctr. of Metro N.Y., Inc.*, 668 F. Supp. 2d at 550.

³²² The Department of Housing and Urban Development is the federal agency that “administers programs that provide housing and community development assistance,” and works to “ensure fair and equal housing opportunity for all.” *U.S. Department of Housing and Urban Development, Agency Details*, USA.GOV, <https://www.usa.gov/federal-agencies/u-s-department-of-housing-and-urban-development> (last visited on Nov. 2, 2017).

³²³ The Affirmatively Furthering Fair Housing (AFFH) rule requires “certain HUD grantees . . . to conduct an Assessment of Fair Housing (AFH) planning process” which will “help communities analyze challenges to fair housing choice and establish their own goals and priorities to address the fair housing barriers in their community.” U.S. Department of Housing and Urban Development, *Affirmatively Furthering Fair Housing*, HUDUSER.GOV, https://www.huduser.gov/portal/affht_pt.html (last visited Nov. 2, 2017). It was promulgated under President Barack Obama’s Department of Housing and Urban Development in 2015. See Jake Blumgart, *Fair Housing Still Has a Chance Under Trump*, SLATE (Mar. 14, 2017), http://www.slate.com/articles/business/metropolis/2017/03/the_affirmatively_furthering_fair_housing_rule_is_still_working_under_trump.html (noting that AFFH “require[s] jurisdictions that receive federal housing funding to not only document barriers to integration and opportunity, but to detail—and prioritize—policies to eradicate them”).

³²⁴ *Anti-Discrimination Ctr. of Metro N.Y.*, 668 F. Supp. 2d at 550.

³²⁵ *Id.* at 551 (alteration in original). In its decision, the Southern District of New York noted that Westchester County failed to conduct a proper analysis. *Id.* at 563. The parties eventually entered into a consent decree that was subject to

Westchester County argued its analysis was not entirely “devoid” of race because it referenced “local opposition” to new affordable housing which, it suggested, implicitly included opposition on the basis of race.³²⁶ The court however held that “such a veiled reference . . . does not reflect any analysis of how race-based opposition impeded fair housing” to make a record of that analysis, as was required by the HUD guidance.³²⁷ Going even further, the court noted that “[w]ithout a *targeted analysis* of race as a potential impediment to fair housing, the County was unprepared to grapple with the second component of its AFFH duty to take appropriate action to overcome the effects of any racial discrimination or segregation it might identify as an impediment.”³²⁸ Here, the court appears to make clear to grantees of federal funds, that more than paper compliance is required to satisfy its Title VI obligations: a grantee needs to engage in a meaningful analysis before submitting its certificate of assurances to the Federal government.³²⁹

Westchester County also sought to challenge enforcement of the HUD Guidance requirements.³³⁰ The Court noted however that

monitoring by the court. Sam Roberts, *Westchester Adds Housing to Desegregation Pact*, N.Y. TIMES (Aug. 10, 2009), <http://www.nytimes.com/2009/08/11/nyregion/11settle.html?action=click&contentCollection=N.Y.%20%2F%20Region&module=RelatedCoverage®ion=EndOfArticle&pgtype=article&mtref=undefined&gwh=DDF4B5A0919792BC49F8D27662CCFC07&gwt=pay>. See Stipulation and Order of Settlement and Dismissal, 688 F. Supp. 2d 548 (S.D.N.Y. 2009), <https://archives.hud.gov/news/2009/pr09-149-settlement-westchester.pdf>.

³²⁶ *Anti-Discrimination Ctr. of Metro N.Y., Inc.*, 668 F. Supp. 2d at 562.

³²⁷ *Id.*

³²⁸ *Id.* (emphasis added) (alteration in original).

³²⁹ *Id.* at 562–63 (“Even assuming the County’s contention to be true, however, such a veiled reference, buried within a finding that local opposition was an obstacle to ‘affordable’ housing, does not reflect any analysis of how race-based opposition impeded fair housing, as distinct from other forms of local opposition. Nor does this reference reflect an analysis of how race-based local opposition might be an impediment to fair, and not just affordable, housing. Without a targeted analysis of race as a potential impediment to fair housing, the County was unprepared to grapple with the second component of its AFFH duty to take appropriate action to overcome the effects of any racial discrimination or segregation it might identify as an impediment.”). *Id.* at 562.

³³⁰ *Id.* at 563.

“since the HUD Guide is firmly rooted in the statutory and regulatory framework and consistent with the case law, it is persuasive of the issue of whether the County was required to analyze race-based impediments in conducting its [analyses of impediments to AFFH].”³³¹ A similar argument can be made of the FTA Title VI Guidance and its fare equity analysis requirement, since the Guidance is also grounded in the statutory and regulatory framework promulgated under Title VI.³³² As exemplified by this case, advocates and grassroots organization, can not only help raise awareness regarding injustices that may be occurring, but can also use litigation as a tool to hold agency decision-makers accountable.

3. Establishing the MTA’s Liability Under the FCA

As discussed above, an initial investigation suggests that the MTA’s vague fare equity analysis might not be the sort of meaningful analyses required by the Second Circuit that would enable the MTA to overcome FCA’s falsity element.³³³ However, more information is still needed. If this element is established, advocates must then determine whether the MTA submitted its claims for federal funding, despite knowing that its fare equity analysis was insufficient.³³⁴ As discussed above, this element of

³³¹ *Id.*

³³² *Id.* at 560 (quoting *United States ex. rel. Mikes v. Straus*, 274 F.3d 687, 695 (2d Cir. 2001)); see *False Claims Act*, 31 U.S.C. § 3729(a) (2009); 2012 CIRCULAR FTA C 4702.1B, *supra* note 16.

³³³ *Anti-Discrimination Ctr. of Metro N.Y., Inc.*, 668 F. Supp. 2d at 562–63. In that case, the court found that “no reasonable jury could conclude either that the County appropriately analyzed race in conducting its [analysis of the impediments to fair housing] or that it maintained the required report of that analysis.” *Id.* at 563. The court noted that the County included had only a “veiled referenced” to race-based impediments to fair housing, as opposed to the targeted analysis that the was required, and thus “no genuine issue of material fact” exists as to whether they fulfilled this obligation prior to submitting their certifications to HUD. *Id.* at 562.

³³⁴ See *False Claims Act*, 31 U.S.C. §§ 3729(b)(1) (2010) (discussing the definition of “knowingly” with respect to the submission of a claim). Notably however, establishment of elements one, two, and five of the FCA, as set forth

the FCA claim would require a showing of either actual knowledge, deliberate ignorance, or reckless disregard of their insufficiency and falsity.³³⁵

In *Westchester*, the court noted that a reasonable factfinder could find that “the County acted knowingly or in reckless disregard as to the falsity of its certifications” since it had received training materials, the HUD Planning Guide, and internal memos, which notified it that failing to analyze race appropriately was a violation of its AFFH obligations.³³⁶ Similarly, fare equity advocates may be able to establish this element by showing that the MTA received information from the FTA, including the FTA Title VI guidance, which informed them that failure to analyze the disparate impact and disproportionate burden of fare increases on minority and low-income populations appropriately would be a violation of their obligations under DOT’s Title VI regulations.³³⁷ The *Westchester* court ultimately granted ADC’s motion for summary judgment on every element of their FCA claim, except the knowledge element, noting that “the County’s voluntary submission at least permits the inference that the County did not act in knowing and reckless disregard as to the falsity of its certifications.”³³⁸ Because the County ultimately settled, the court did not make a determination regarding the knowledge element of ADC’s FCA claim, and so this element appears to remain the largest hurdle for transit advocates considering bringing claims against the MTA.³³⁹

by the Second Circuit, appear to be generally straightforward as applied to the MTA. See *Anti-Discrimination Ctr. of Metro N.Y.*, 668 F. Supp. 2d at 560 (“In order to impose liability under the FCA, the plaintiff must show that defendants ‘(1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury.’”) (quoting *Mikes v. Straus*, 274 F. 3d at 695)). The MTA made a claim to the federal government seeking payment from the treasury. See MTA 2014 TITLE VI PROGRAM, *supra* note 16.

³³⁵ *Anti-Discrimination Ctr. of Metro N.Y., Inc.*, 668 F. Supp. 2d at 567 (quoting *Mikes*, 274 F.3d at 696).

³³⁶ *Id.* at 567–68.

³³⁷ 2012 CIRCULAR FTA C 4702.1B, *supra* note 16, at III-1.

³³⁸ *Anti-Discrimination Ctr. of Metro N.Y., Inc.*, 668 F. Supp. 2d at 568.

³³⁹ See *id.* at 570–71 (holding that the ADC’s summary judgment was granted with respect to the FCA elements that “the defendant made a claim, to

If a court found that the MTA's fare equity analysis was insufficient, similar to the finding in *Westchester*, then transit justice advocates can utilize the False Claims Act as a means of holding grantees of federal funds directly accountable for their failure to fulfill their Title VI obligations, and potentially work with them to ensure that future fare equity analyses are sufficient.³⁴⁰ As in Westchester County's AFFH analyses, the MTA's fare equity analysis seems to lack a more "targeted analysis" as to its conclusion no disparate impact exists, and appears "veiled" in the sense that it claims it is compliant yet provides vague, and in parts contradictory, explanations as to why.³⁴¹ Further, the way in which the MTA has both conducted and presented its fare equity analysis would also undermine its ability to both identify and address a disparate impact or disproportionate burden where one existed. Given this, the MTA would not be able to certify in its assurances, as it did in its 2014 Title VI Program, that it has undertaken an appropriate Title VI assessment.³⁴² Thus, the MTA's submission of its certificates of assurance in its tri-annual Title VI Program—a precondition to its receipt of continued Federal transit funds—might violate the False Claims Act.³⁴³

A finding that the MTA violated that False Claims Act by failing to conduct a sufficient fare equity analysis would represent a big win for the transit justice movement in New York City. First, it would send a message to the MTA that its compliance with its Title VI obligations is being carefully monitored, and repercussions exist for its failure to comply. The information and data gathered and obtained through citizen audits can help advocates determine when and how an agency, like the MTA, is noncompliant with its Title VI obligations. The threat of a future

the United States government, that was false or fraudulent, seeking payment from the Federal Treasury" but that their motion "is denied as to the knowledge element of an FCA claim").

³⁴⁰ See *id.* *Anti-Discrimination Ctr. of Metro N.Y., Inc.*, 668 F. Supp. 2d at 562–63 (holding that no reasonable juror could find they conducted an analysis of race based impediments to fair housing).

³⁴¹ See *id.* at 562.

³⁴² See MTA 2014 TITLE VI PROGRAM, *supra* note 16.

³⁴³ See False Claims Act, 31 U.S.C. §§ 3729 (2009).

lawsuit would likely deter the MTA from skirting their obligations in the future. Hopefully, it would also influence the MTA to proactively involve and engage community groups and transit justice advocates to assist in the development and implementation of future fare equity analyses, so as to avoid the threat of future litigation.

CONCLUSION

In order to fight “injustice and inequality” in New York City, more must be done to ensure transit fares are affordable for New Yorkers living in poverty.³⁴⁴ MTA’s semiannual fare increases may be an afterthought for many. It may be annoyance for others. But for over 800,000 New Yorkers living on incomes below the federal poverty level,³⁴⁵ the MTA’s fare increase policies have a very real impact on their daily lives, with potentially devastating consequences for upward mobility. By implementing bi-annual fare hikes, but providing no alleviation to the neediest New Yorkers, the MTA, along with city and state officials that remain unwilling to prioritize funding such an initiative, are complicit in, and contribute to, the institutionalization of poverty.³⁴⁶

Fare increases, left unchecked, are the most harmful to those who need the most help. Fortunately, equity directives, like FTA’s Title VI guidance document exist to counter these potentially adverse impacts.³⁴⁷ They serve as a promising tool for transit advocacy groups in New York City in their fight for reduced fares. Monitoring the MTA and FTA through citizen audits,³⁴⁸ which can

³⁴⁴ *Text of Bill de Blasio’s Inauguration Speech*, N.Y. TIMES (Jan. 1, 2014), <https://www.nytimes.com/2014/01/02/nyregion/complete-text-of-bill-de-blasios-inauguration-speech.html>.

³⁴⁵ *Transit Crisis*, *supra* note 4, at 28.

³⁴⁶ *See id.*; *see also* Fitzsimmons, *Advocates for New York’s Working Poor Push for Discounted Transit Fares*, *supra* note 177; Whitford, *MTA Keeps Single Ride At \$2.75 But Will Raise Monthly To \$121*, *supra* note 66; Lancman & Jones, *supra* note 12.

³⁴⁷ Olatunde C.A. Johnson, *Private Enforcement*, *supra* note 14, at 1313 (citing U.S. Dep’t of Transp., Fed. Transit Admin., 2012 Circular FTA C 4702.1B, *supra*, note 16 at IV-11).

³⁴⁸ *See* Rahman, *supra* note 264.

be formally embedded in FTA's regulatory process, not only can help contribute to more effective enforcement of Title VI regulations, but perhaps more significantly, can help ensure the future political prioritization of this issue by both the MTA and city and state government officials.