

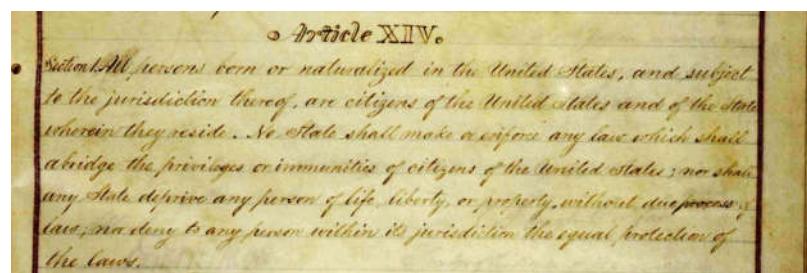
## **TITLE VI – INTENTIONAL DISCRIMINATION AND DISPARATE IMPACT**

# TITLE VI - INTRODUCTION

## **What is the law?**

**“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”**

Title VI of the Civil Rights Act of 1964; 42 U.S.C. § 2000d, et seq.

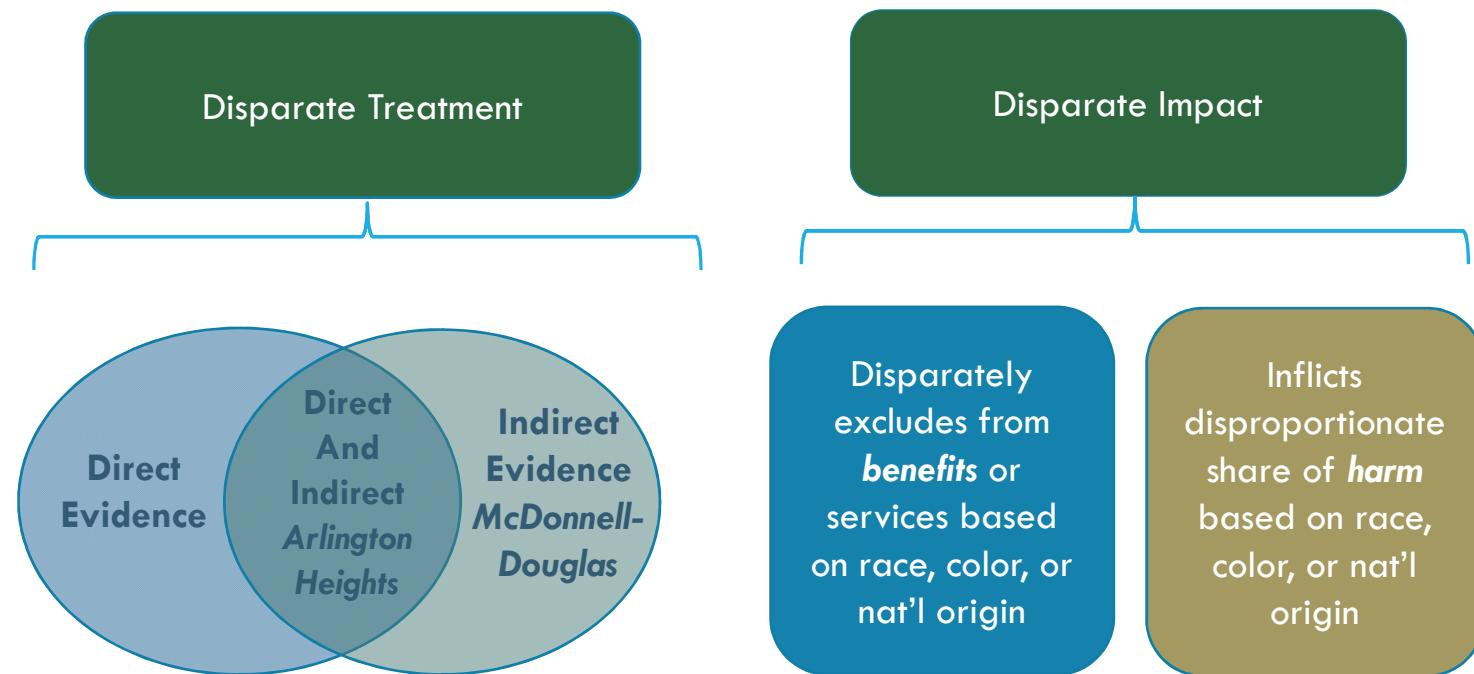


# WHAT IS PROHIBITED DISCRIMINATION UNDER TITLE VI?

- Intentional Discrimination
  - Disparate Treatment
  - Retaliation
- Disparate Impact

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person *within its jurisdiction the equal protection of the laws.*”  
U.S. Const. amend. XIV, § 1.

# WHAT IS PROHIBITED DISCRIMINATION UNDER TITLE VI?



# DISPARATE TREATMENT

## **What is Disparate Treatment?**

Similarly situated persons are treated differently because of their race, color, or national origin.

Discriminatory intent need not be the only motive, but a violation occurs when the evidence shows that the entity adopted a policy at issue “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.”

Does not require “bad faith, ill will or any evil motive.”

Evidence may be direct or circumstantial.

# DISPARATE TREATMENT

## **What are the statutory sources for Disparate Treatment?**

### **Statute**

“...on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination...”

42 U.S.C. §2000d

### **Regulations**

- Deny an individual any disposition, service, financial aid, or benefit.
- Provide services in a different manner.
- Subject to segregation or separate treatment.
- Restrict in any way the enjoyment of any advantage or privilege.
- Treat an individual differently in admission, eligibility, enrollment...or other requirement.
- Deny opportunity to participate.
- Discrimination in construction site selection

49 C.F.R. § 21.5(b); 28 C.F.R. §42.104(b)

# DISPARATE TREATMENT

## **What is Disparate Treatment – Direct Evidence?**

- 1. Express classifications.** If recipient explicitly conditions receipt of benefits or services on the race, color, or national origin of the beneficiary, or directs adverse action to be taken based on race, color, or national origin, such a policy or practice constitutes an express classification.
  
- 2. Comments or Conduct by Decision-Makers.** This direct method of proof typically involves a statement from a decision-maker that expresses a discriminatory motive.

# DISPARATE TREATMENT

## **What is Disparate Treatment – Direct Evidence?**

**Express classifications** of race, color, or nat'l origin are reviewed under “strict scrutiny” standard; *narrowly tailored* to achieve a *compelling government interest*.

Establishes intent without regard to animus as a matter of law— further evidence of intent not necessary.

Related: even without express classification, overreliance on “illegitimate selection criteria” can be basis for intentional discrimination.



However, recipients may consider race, color, or nat'l origin to overcome identified or past discrimination. 49 C.F.R. §21.5(b)(vii)(7).

# DISPARATE TREATMENT

## **What is Disparate Treatment – Comments/Conduct by Decision-Makers?**

**Discriminatory Comments and Conduct** by decision-makers can be evidence, unto itself, that a decision-maker intended to discriminate.

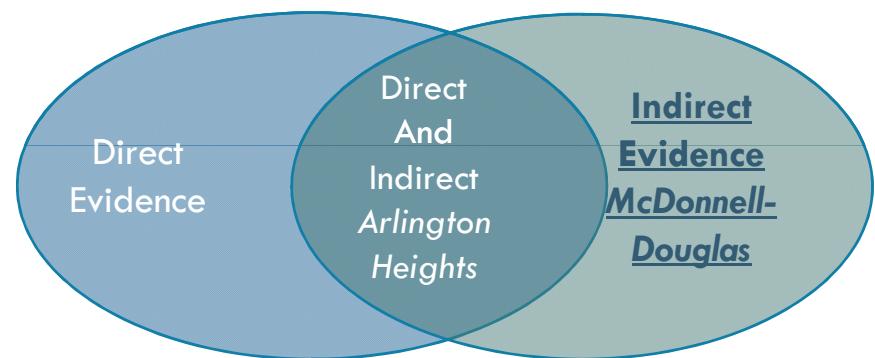
Key is whether isolated comments were **contemporaneous** and **causally related** to the challenged decision.

Stray remarks are not direct evidence but are still important evidence to consider.

# DISPARATE TREATMENT

If direct evidence unavailable, then two other indirect methods can be used. *McDonnell Douglas* test:

1. Essential Elements (prima facie case):
  - a. Member of protected class.
  - b. Eligible as beneficiary for federally-assisted program.
  - c. Rejected despite eligibility.
  - d. Similarly situated beneficiaries received benefit.
2. Next, agency determines whether legitimate, nondiscriminatory reason exists.
3. Then, investigating agency must determine whether reason offered is a pretext for discrimination and whether a less discriminatory alternative exists.

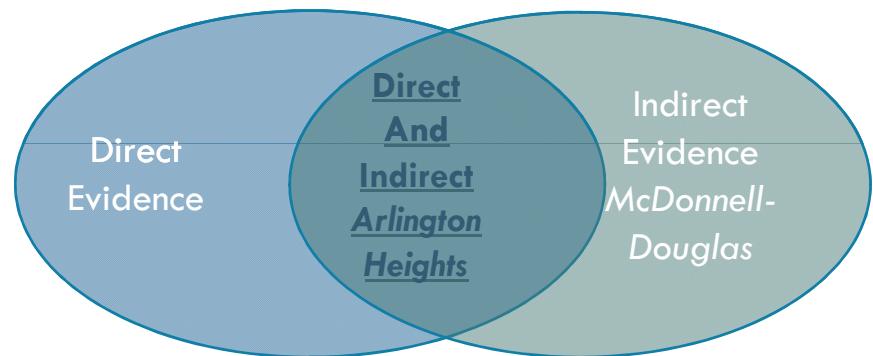


# DISPARATE TREATMENT

**What is Disparate Treatment – Direct + Indirect Evidence, the *Arlington Heights* standard?**

Examination of “totality of relevant facts” and factors, including, but not limited to:

- Statistics showing pattern of discriminatory effects;
- Historical background of the decision and other decisions on comparable matters;
- Sequence of events leading to the decision, compared to other decisions on comparable matters;
- Departures from normal procedures or substantive conclusions;
- Relevant legislative or administrative history; and
- Consistent pattern of actions of decision-makers that impose much greater harm on one group.



# DISPARATE IMPACT – LEGAL SOURCES

Notable correction by Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001). U.S. Supreme Court Held Title VI statute does not allow for private lawsuits based on **disparate impact**. The private right of action is only for **disparate treatment**.

However, the Sandoval Court also recognized federal agencies **may pass disparate impact regulations, which are enforceable under administrative law by those agencies**.



# DISPARATE IMPACT – LEGAL SOURCES

## Statute

“...on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination...”

[Private right of action limited by *Sandoval*, but agencies authorized to create disparate impact regulations]

42 U.S.C. §2000d.

## Regulations

“A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, **may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination** because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.”

49 C.F.R. § 21.5(b); 28 C.F.R. §42.104(b).

# DISPARATE IMPACT – LEGAL SOURCES

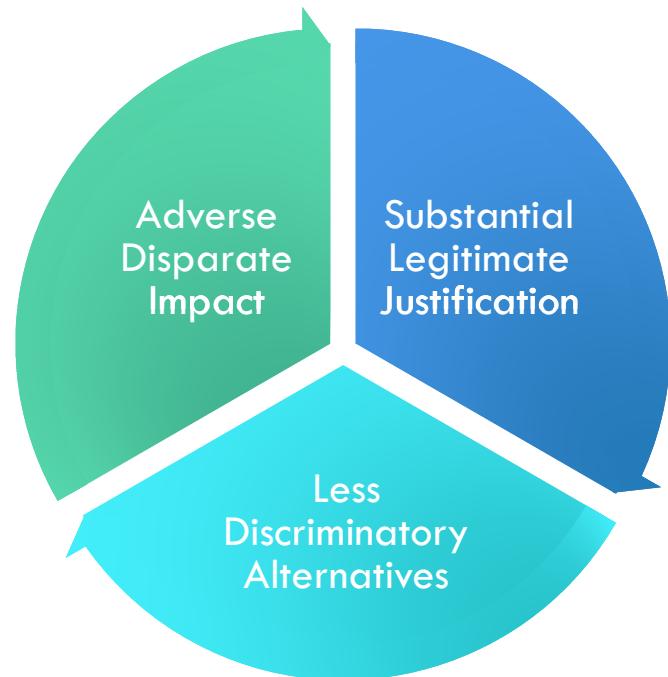
Therefore:

- Recipients are responsible for ensuring nondiscrimination regarding disparate impact.
- Persons may file complaints with federal agencies against recipients.
- Federal agencies may initiate compliance reviews; and Federal agencies may find recipients non-compliant, resulting in potential loss of federal funding.

# DISPARATE IMPACT

**What are the elements of disparate impact?**

1. facially neutral procedure or practice;
2. Disproportionate, adverse impact based on race, color, or nat'l origin on a population or populations; and
3. Practice lacks a substantial legitimate justification.
  - Causal connection between policy and the impact. Often through statistical data.
  - No less discriminatory alternative.



# DISPARATE IMPACT

Title VI analysis involves pairing two things:

**Demographics + Impact or Benefit**

For example:

1. Decennial Census + Noise Impacted Residences
2. ACS + Vital Documents to be Translated
3. Relocatee Demographic Surveys + Relocation Financial Data
4. Public Meeting Demographics + Overall Area Population

# DISPARATE IMPACT

## General Application

Applies to benefits **and** burdens.\*

Analysis not sequential: substantial legitimate justification can be determined at any time.

FHWA-funded state actions frequently entail multiple potential impacts.

- Air Quality
- Noise
- Contracting
- Community Cohesion
- Safety
- Right-of-Way / Relocation
- Public Meeting Solicitation
- Public Comments
- Environmental Mitigation
- Temporary traffic and pedestrian routes

# DISPARATE IMPACT

## General Application

Benefits and burdens aren't compared like a balance sheet or a scale – benefits don't necessarily "cancel out" burdens.

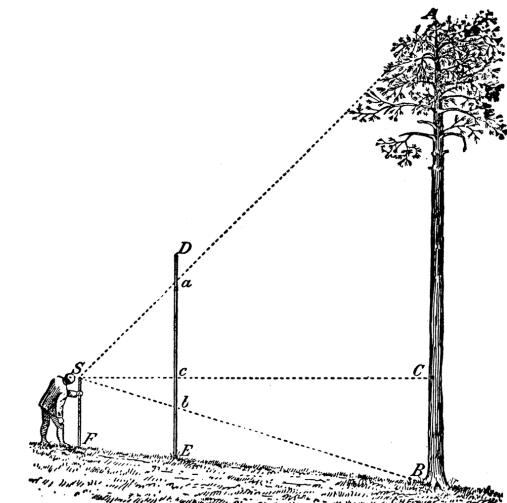
- If mitigation **directly** reduces a burden's impact then it can be compared. E.g. sound walls can directly reduce noise impacts.
- **But** if benefits don't directly reduce a burden, then they are separate considerations for Title VI. E.g. improving a park doesn't mitigate poor air quality.



# DISPARATE IMPACT

## Establishing Disparate Impact

- “No rigid mathematical threshold of disproportionality that must be met to show disparate impact.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–95 (1988).
- Sometimes, disparate effect of policy or practice so obvious or predictable that comparative statistics are unnecessary (*Lau v. Nichols*, 414 U.S. 563, 568 (1974), but data is still necessary to establish.
- **However, disparate impacts** are often established using **statistical data and analyses**, to determine whether the policy or practice is **disproportionate** on a population and **causally related** to the adverse impacts. *Darensburg v. Metro. Transp. Comm.*, 636 F.3d 511, 520–22 (9th Cir. 2011).



# DISPARATE IMPACT

## Establishing Disparate Impact

Let's say you know the following number of persons are adversely affected by a project:

Demographic Group	# of Persons Affected
African-American	500
Hispanic	30
Asian	5
White	500



Which population would you say is the most disproportionately affected?

# DISPARATE IMPACT

## Establishing Disparate Impact

Right – we can't say anything about the proportion without knowing the totals for each population!

Demographic Group	# of Persons Affected	Total in Project Area	% Affected of Group
African-American	500	9000	5.56%
Hispanic	30	30	100.00%
Asian	5	10	50.00%
White	500	2500	20.00%

Now we can see that Hispanic persons have the highest **proportion** of adversely affected persons compared to other groups – even though Hispanics are not the largest **population**. The Disparate Impact analysis would focus on those and similar groups. This topic is discussed more in later training sessions.

# DISPARATE IMPACT

## Establishing Disparate Impact

**Relevant comparator population** – agencies must “take into account the correct population base and its racial makeup.” See *Darensburg v. Metro. Transp. Comm’n*, 636 F.3d 511, 519 (9th Cir. 2011).

E.g. Comparator population for a road project would not be transit project or transit user population data. Alternately, whether to compare a project area population to an entire metro area population will depend on the facts

Central question is: to which persons does this policy or practice apply or affect?

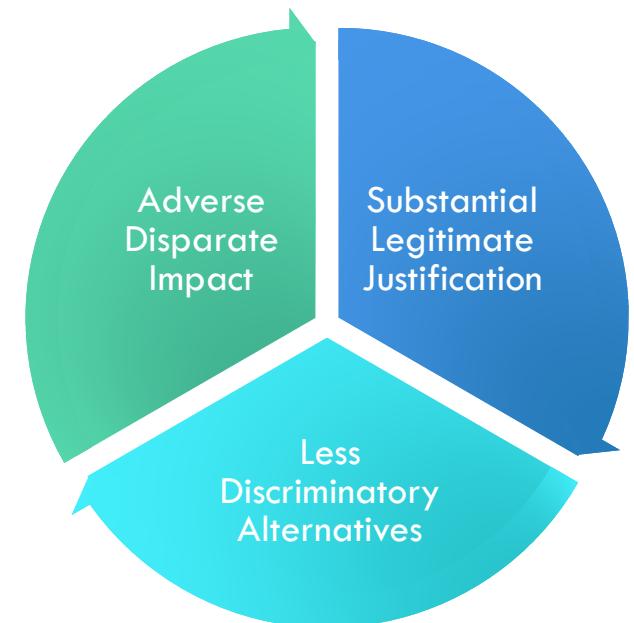
# DISPARATE IMPACT

## Substantial Legitimate Justification (SLJ)

A SLJ determination is highly fact-sensitive and based on two main criteria:

1. Was the challenged policy necessary to meeting a **goal** that was **legitimate, important, and integral** to the [recipient's] **institutional mission.**"
2. Does the justification bear a **manifest demonstrable relationship** to the challenged policy or practice.

SLJ must be supported with **objective data and information**, rather than self-serving, subjective statements.



# DISPARATE IMPACT

## Less Discriminatory Alternatives (LDAs)

If SLJ is shown, then agency must determine whether there exists a less discriminatory alternative that is **feasible** and **meets the established legitimate objectives** of the agency.

Alternatives should be evaluated on **equal criteria** for comparison and must **adequately meet the established need**. An alternative that is not adequate is not a fair comparator.

Some actions may require the development of alternatives by statute/regulation, such as some construction projects during environmental review.