TITLE VI DISPARATE IMPACT ANALYSIS
What are our goals today?

1. Introduce the types of prohibited discrimination under Title VI
2. Describe the elements of Disparate Treatment
3. Describe the elements of Disparate Impact
WHAT IS PROHIBITED DISCRIMINATION UNDER TITLE VI?

What is discrimination under Title VI?

• Disparate Treatment
• Disparate Impact
• Retaliation

“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

Disparate Impact

Disparately excludes from benefits or services based on race, color, or nat’l origin

Inflicts disproportionate share of harm based on race, color, or nat’l origin

Direct Evidence

Direct And Indirect Evidence

McDonnell-Douglas

Indirect Evidence

Arlington Heights
### What are the statutory sources for Disparate Impact?

<table>
<thead>
<tr>
<th>Statute</th>
<th>Regulations</th>
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<tbody>
<tr>
<td>“…on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination…”</td>
<td>“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, <strong>may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination</strong> 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.”</td>
</tr>
<tr>
<td>[Private right of action limited by Sandoval, but agencies authorized to create disparate impact regulations]</td>
<td>49 C.F.R. § 21.5(b); 28 C.F.R. §42.104(b)</td>
</tr>
<tr>
<td>42 U.S.C. §2000d</td>
<td></td>
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What are the statutory sources for Disparate Impact?

- Notable correction by Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001)

U.S. Supreme Court Held the Title VI statute does not allow for private lawsuits based on **disparate impact**. The private right of action is only for **disparate treatment**.
What are the statutory sources for Disparate Impact?

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

- 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.

Why is this important? Recipients have used *Sandoval* to argue federal agencies lack authority (jurisdiction) over disparate impact discrimination.
What are the *prima facie* 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.
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
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.
Establishing Disparate Impact

**Disparate, adverse impacts** are established using **statistical data**, to determine whether the policy or practice is **disproportionate** and **causally related** to the adverse impacts.

While “there is no rigid mathematical threshold of disproportionality that must be met to show disparate impact,” Title VI disparate impact analyses must address whether a causal connection can be shown.
Establishing Disparate Impact

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

<table>
<thead>
<tr>
<th>Demographic Group</th>
<th># of Persons Affected</th>
</tr>
</thead>
<tbody>
<tr>
<td>African-American</td>
<td>500</td>
</tr>
<tr>
<td>Hispanic</td>
<td>30</td>
</tr>
<tr>
<td>Asian</td>
<td>5</td>
</tr>
<tr>
<td>White</td>
<td>500</td>
</tr>
</tbody>
</table>

Which population would you say is the most disproportionately affected?
What do we mean by “disproportionate?”

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

<table>
<thead>
<tr>
<th>Demographic Group</th>
<th># of Persons Affected</th>
<th>Total in Project Area</th>
<th>% Affected of Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>African-American</td>
<td>500</td>
<td>9000</td>
<td>5.56%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>30</td>
<td>30</td>
<td>100.00%</td>
</tr>
<tr>
<td>Asian</td>
<td>5</td>
<td>10</td>
<td>50.00%</td>
</tr>
<tr>
<td>White</td>
<td>500</td>
<td>2500</td>
<td>20.00%</td>
</tr>
</tbody>
</table>

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.
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?
Substantial Legitimate Justification (SLJ)

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

1. The challenged policy was necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission.

2. The justification bears 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.
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.
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.
What are the statutory sources for Disparate Treatment?

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

42 U.S.C. §2000d  
49 C.F.R. § 21.5(b); 28 C.F.R. §42.104(b)
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.
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).
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.
**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.