A PROMISE DEFERRED: AN EXAMINATION OF ACCESSIBILITY'S INTERSECTION WITH RACE/ETHNICITY IN THE PHILADELPHIA TRANSIT SYSTEM AND THE NEW YORK CITY SUBWAY

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ABSTRACT

Over thirty years after the passage of the Americans with Disabilities Act, Philadelphia's rail and trolley networks and New York City's subway system are still terrible for accessibility. In New York, a mere 24–28% of stations are accessible. For people with disabilities—particularly mobility disabilities—this makes the accessible parts of the two cities' transit systems invaluable for everything from economic prosperity to general connectivity to the rest of their communities. Thus, one might wonder who has access to this vital resource. Is station accessibility split up along racial/ethnic lines? If so, what remedies might exist under Title VI and/or the ADA to fix that?

This Note employs an empirical analysis in order to answer the first question, relying on geospatial data paired with corresponding Census demographic data. The results of the linear and logistic regressions indicate that race is indeed correlated with

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accessibility levels. In Philadelphia, stations are less likely to be accessible when located in areas with higher concentrations of Black residents, and in New York City, they are less likely to be accessible when located in areas with higher concentrations of Latine and, in particular, Afro-Latine residents. The Federal Transit Administration's forthcoming revised Circular offers an opportunity to correct this problem. Failing that, however, there is likely enough evidence to warrant at least the filing of an administrative complaint under Title VI.

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> "[The] ADA is a promise to be kept." – Justin Dart, Jr.,[1] the "father of the Americans with Disabilities Act"[2]

INTRODUCTION

Ironically, but perhaps not surprisingly,[3] arguably the most public attention paid to the New York City (N.Y.C.)[4] subway system's

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1. Marco Damiani, *Celebrating the 30th Anniversary of the Americans with Disabilities Act*, AHRC NYC (July 27, 2020), https://www.ahrcnyc.org/news/celebrating-the-30th-anniversary-of-the-americans-with-disabilities-act/ [https://perma.cc/SZ33-UR6H].

2. *Remembering Disability Rights Hero Justin Dart, Jr.*, DIVERSITY & BAR, Nov. 2002, at 34, https://www.mcca.com/mcca-article/remembering-justin-dart-jr/ [https://perma.cc/VZ2K-6HZM].

3. Media sources have often failed to adequately cover issues affecting people with disabilities. Indeed, according to at least one source, when the Americans with Disabilities Act passed the Senate in 1989, *New York Times* reporter Steven A. Holmes exclaimed: "This bill seemed to come out of nowhere!" Mary Johnson, *The Consequences of Silence*, RAGGED EDGE, Nov./Dec. 1998, at 26. Although comprehensive studies discussing rates of disability coverage in the United States seem to be sparse, those that do exist confirm the historical existence of a gap in coverage of substantive issues. *See, e.g.*, Clayton E. Keller et al., *The Coverage of Persons with Disabilities in American Newspapers*, 24 J. SPECIAL EDUC. 271, 274–75 (1990) (finding that even among what was considered at the time to be a "sizeable" level of coverage, more than half of the stories were "soft" news, such as columns or "emotionally charged" pieces). Coverage has certainly increased somewhat. *See* Wendy Lu, *What Journalists Can Do Better to Cover the Disability Beat*, COLUM. JOURNALISM REV. (Sept. 5, 2017), https://www.cjr.org/the_feature/journalism-disability-beat.php [https://perma.cc/G7ZC-56TG] (noting a *New York Times* column dedicated to pieces by people with disabilities). The COVID-19 pandemic also helped boost coverage of the subject. Julia Métraux & John Loeppky, *How COVID-19 Exposes a Disability Reporting Gap*, Poynter. (Oct. 12, 2020), https://www.poynter.org/reporting-editing/2020/how-covid-19-exposes-a-disability-reporting-gap/ (on file with the *Columbia Human Rights Law Review*). However, many people still emphasize that the gap in attention persists. *Id.*; Alex Howard, *Disability Representation in Media*, RESPECTABILITY (Jan. 7, 2021), https://www.respectability.org/2021/01/disability-representation-in-media/ [https://perma.cc/Q4AN-J8WP].

Additionally, media representation of people with disabilities—and of disability-related topics—has long been criticized as problematic. *See generally, e.g.*, Lu, *supra* (discussing the media's frequent tendency to use disabled people as sources of inspiration rather than "accepting the source as a multi-faceted human being"); CHARLES A. RILEY II, DISABILITY AND THE MEDIA: PRESCRIPTIONS FOR CHANGE (2005) (examining a number of issues involving media coverage of people

inaccessibility came from a tragic accident involving a seemingly able-bodied individual. On January 28, 2019, Malaysia Goodson, aged twenty-two, died in an N.Y.C. subway station. She had entered the Seventh Avenue station in midtown Manhattan with her one-year-old daughter, pushing the baby in a stroller, when she encountered a familiar problem: there was no elevator for her to use. She picked up the stroller and tried to carry it with her as she walked down the stairs—but she ended up falling down them instead. She was found unconscious and was declared dead that evening.[5] Articles streamed in from as far as London noting and often questioning the lack of accessibility on public transit, both in N.Y.C. and elsewhere.[6] Politicians and even N.Y.C.'s Metropolitan Transportation Authority (MTA), which itself runs the city's public transportation services

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with disabilities); Beth Haller et al., *Confronting Obstacles to Inclusion: How the US News Media Report Disability*, *in* CONFRONTING OBSTACLES TO INCLUSION: INTERNATIONAL RESPONSES TO DEVELOPING INCLUSIVE EDUCATION 9 (Richard Rose ed. 2010) (examining media coverage through the lens of four news stories about autism); S.I. Rosenbaum, *The Washington Post Just Illustrated the Biggest Flaw in Disability Coverage*, POYNTER. (June 5, 2017), https://www.poynter.org/newsletters/2017/the-washington-post-just-illustrated-the-biggest-flaw-in-disability-coverage/ (on file with the *Columbia Human Rights Law Review*) (explaining the failure of media outlets to adequately cover the details and realities of public assistance programs for disabled people).

4. In this Note, "New York City" is abbreviated to "N.Y.C.," while the abbreviation "N.Y." is used to refer to New York State. That being said, the phrase "City of N.Y." refers not to the state but, rather, to N.Y.C.

5. Michael Gold & Emma G. Fitzsimmons, *A Mother's Fatal Fall on Subway Stairs Rouses New Yorkers to Demand Accessibility*, N.Y. TIMES (Jan. 29, 2019), https://www.nytimes.com/2019/01/29/nyregion/mom-subway-stairs-death-malaysia-goodson.html (on file with the *Columbia Human Rights Law Review*).

6. *E.g.*, *id.* ("[Ms. Goodson's] death has shined a light on the lack of elevator service and accessibility issues that have long plagued the city's subway system."); Cara Liebowitz, Perspective, *That Tragic New York Subway Death Didn't Surprise People with Disabilities*, WASH. POST (Feb. 2, 2019), https://www.washingtonpost.com/outlook/2019/02/02/that-tragic-new-york-subway-death-didnt-surprise-people-with-disabilities/ [https://perma.cc/EA6W-TAXD] ("Metro still has accessibility issues, including elevators that are frequently broken[,] . . . but the mere existence of elevators at every stop puts the D.C. Metro a notch above the NYC subway. It's a truly pathetic standard, but it's the standard we have to judge by nonetheless."); Nell Frizzell, *Will the Death of Malaysia Goodson Finally Lead to Accessible City Transport?*, THE GUARDIAN (Feb. 6, 2019, 2:30 PM), https://www.theguardian.com/cities/2019/feb/06/will-the-death-of-malaysia-goodson-finally-lead-to-accessible-city-transport [https://perma.cc/M8N5-FEN6].

(including the subway),[7] called for accessibility improvements.[8] However, two voices were missing from the fray: neither the MTA's acting chair nor the N.Y.C. Transit Authority's president ever called Ms. Goodson's family to offer condolences.[9] On January 30, two days after the incident, the city's chief medical examiner stated that Ms. Goodson's death was likely due to a pre-existing medical condition—and not, as many had naturally assumed, due to trauma from the fall;[10] this finding was made official about 4.5 months later.[11]

Now, over three years after Ms. Goodson's tragic fall, not that much has changed. Back then, roughly 120 stations were ADA-accessible;[12] today, about 131 are.[13] And while the MTA has made

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7. *About the MTA*, MTA, https://new.mta.info/about [https://perma.cc/9HAU-5KJS].

8. Kenneth Lovett, *In Wake of Mom's Fatal Subway Stair Fall, MTA Says Station Elevators a Top Priority*, N.Y. DAILY NEWS (Jan. 30, 2019, 11:55 AM), https://www.nydailynews.com/news/politics/ny-pol-mta-station-fall-goodson-20190130-story.html [https://perma.cc/HA7H-2MVT].

9. *Cause of Death Released for Mom Found Dead After Falling Down Subway Stairs with Baby in Stroller*, NBC N.Y. (June 11, 2019, 8:06 PM) https://www.nbcnewyork.com/news/local/cause-of-death-released-for-mom-found-dead-after-falling-down-subway-stairs-with-baby-in-stroller/ [https://perma.cc/C4XH-GRLE] [hereinafter *Cause of Death Released*] ("At an MTA board meeting in March, MTA acting chair Freddy Ferrer acknowledged that neither he nor New York City Transit Authority president Andy Byford ever called the Goodson family to offer condolences, and said it was a mistake."). The N.Y.C. Transit Authority (which often refers to itself as "New York City Transit") is the MTA subdivision tasked with running N.Y.C.'s subway and bus service. *About the MTA*, *supra* note 7 ("The MTA's operating agencies are New York City Transit, Long Island Rail Road, Metro-North Railroad, and Bridges and Tunnels."); *New York City Transit*, MTA, https://new.mta.info/agency/new-york-city-transit [https://perma.cc/TJY3-AGTN] ("We manage, maintain, and run subway and bus service in New York City.").

10. Jonathan Dienst et al., *ME: Mom in Subway Death Fall Had 'No Significant Trauma,' Appears Death Is Related to 'Pre-Existing Medical Condition'*, NBC N.Y. (Jan. 30, 2019, 5:56 PM), https://www.nbcnewyork.com/news/local/mom-dies-baby-stroller-fall-subway-stairs-new-york-city [https://perma.cc/K9B8-A7MN].

11. *Cause of Death Released*, *supra* note 9.

12. Lovett, *supra* note 8.

13. Robbie Sequeira, *Six Bronx Subway Stations Could Be ADA-Accessible Under MTA Proposal*, BRONX TIMES (Sept. 22, 2021), https://www.bxtimes.com/six-bronx-subway-stations-could-be-ada-accessible-under-mta-proposal/ [https://perma.cc/RP3V-H7QN] ("Currently, 131 out of 472 stations are ADA-

substantial promises about its plans to update its network to comply with the Americans with Disabilities Act (ADA), and has even reached a tentative settlement in a lawsuit on the matter, it remains to be seen whether or not they will be able to stay on schedule with the renovations.[14]

When Congress passed the ADA in 1990, Pat Wright, Executive Director of the Disability Rights Education and Defense Fund, was quoted as saying, "No longer will people with disabilities be second-class citizens."[15] Over thirty years after the ADA mandated that public transit be made as accessible as possible for people with disabilities,[16] one cannot help but wonder the extent to which his statement was wishful thinking. Perhaps alternatively, another question worth considering is: *which* Americans did the ADA elevate out of second-class citizenship?

The truth of the matter is this: the ADA undoubtedly created much-needed protections for people with disabilities, but there are still vast obstacles that people with disabilities are forced to grapple with, including when it comes to accessibility.[17] The Southeastern

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accessible citywide, or less than 28%, according to MTA's most recent figures."). Note that under this Note's method of determining station counts, a mere 24.4% of the system is accessible. *See infra* note 179 (detailing this Note's methods of counting stations—and noting the differences between this Note and the MTA in this regard—and this Note's methods of determining accessibility in stations).

14. *See also infra* Section I.C.3 (discussing the MTA's promises around accessibility improvements); notes 140–142 and accompanying text (explaining a tentative settlement that the MTA reached regarding accessibility in its stations).

15. Steven A. Holmes, *Rights Bill for Disabled Is Sent to Bush*, N.Y. TIMES, July 14, 1990, at 6, TIMESMACHINE.

16. 42 U.S.C. § 12162.

17. Not even public buildings constructed well after the passage of the ADA are immune to accessibility issues. For example, the Hunters Point Community Library, which opened in Queens in 2019 after a process lasting "nearly two decades," was initially praised extensively by architects and critics but soon came under intense fire from the disabled community due to its enormous lack of accessibility (e.g., there was only one elevator in the entire library, a setup that "caused bottlenecks at times"). Sharon Otterman, *New Library Is a $41.5 Million Masterpiece. But About Those Stairs.*, N.Y. TIMES (Nov. 5, 2019), https://www.nytimes.com/2019/11/05/nyregion/long-island-city-library.html (on file with the *Columbia Human Rights Law Review*); *see also* Michael Kimmelman, *Why Can't New York City Build More Gems Like This Queens Library?*, N.Y. TIMES (Sept. 18, 2019), https://www.nytimes.com/2019/09/18/arts/design/hunters-point-community-library.html (on file with the *Columbia Human Rights Law Review*) (praising the architecture of the library).

Pennsylvania Transportation Authority (SEPTA) (in Philadelphia, Pennsylvania) and the MTA (in N.Y.C.), have both been particularly slow in the "accessibilization" of their stations and services.[18] For example, barely half of Philadelphia's subway and commuter rail stations are fully accessible[19] despite the fact that the Philadelphia metropolitan area has the highest rate of disability (13.2%) out of the nation's ten biggest metro areas.[20] Meanwhile, in N.Y.C., depending on the methodology of counting stations, 24–28% of subway stations are ADA-compliant.[21]

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18. In this Note, "accessibilization" refers to the process of renovating and/or modernizing already existing stations, train cars, trams, etc., in order to make them accessible to the extent required by the relevant statutes (e.g., the ADA). Depending on the station, ideally, this might take the form of installing elevators and/or ramps, ensuring consistent or easily accessed audial announcements of incoming train times, ensuring that the platform is adequately wide for people in wheelchairs to safely move around on it, putting high-contrast strips on the edges of stairs, having the train doors consistently open at the same spots (and marking those spots with visual and tactile aids), and more. This also means making the vehicles themselves accessible—e.g., ensuring clear and consistent audial and visual announcements within the vehicles themselves, ensuring that trams do not require their users to climb steps in order to board, and more.

19. In this Note, the Port Authority Transit Corporation (PATCO) Line is excluded from any analyses of the Philadelphia transit system, as it is not operated by SEPTA. *See About PATCO: A History of Commitment*, PATCO, http://www.ridepatco.org/about/history.html [https://perma.cc/TXN6-Z5DX] (noting that "PATCO" is short for "Port Authority Transit Corporation"). Per this Note's method of counting stations, 116 of the system's 228 rail stations (i.e., roughly 51%) are accessible. *See* SEPTA, SEPTA REGIONAL RAIL & RAIL TRANSIT (2020), INTERNET ARCHIVE WAYBACK MACH. (Sept. 22, 2021), https://web.archive.org/web/20210922235408/https://septa.org/maps/pdf/septa-regional-rail-rail-transit-line-map.pdf [https://perma.cc/2JWG-FQNY] (showing the various rail stations—and showing which ones are accessible—on a map); *infra* notes 168–169 (explaining this Note's method of finalizing a list of SEPTA rail stations in Philadelphia).

20. Calculations performed based on Census data. *S1810: Disability Characteristics*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=United%20States&t=Disability&g=0100000US,%243100000&tid=ACSST1Y2019.S1810 [https://perma.cc/D29C-KZNJ]. For similar reporting based on earlier data, see Larry Eichel & Katie Martin, *Disability Rate in Philadelphia Is Highest of Largest U.S. Cities*, PEW (July 17, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/07/17/disability-rate-in-philadelphia-is-highest-of-largest-us-cities [https://perma.cc/PUZ5-Q2MH].

21. *See infra* note 179 (discussing station counts and noting that based on this Note's dataset, 24.4% of stations are accessible); Sequeira, *supra* note 13

Of course, people with disabilities are not the only ones who have long been excluded from public transit systems in the United States: people of color—particularly Black people—have also long been largely denied equal access to public transportation.[22] The fact that discrimination has long been so prevalent in public transit thus merits the question: is the accessibilization of stations being done in a manner that is racially and ethnically equitable? Thanks to the federal infrastructure bill passed in 2021,[23] the MTA is expected to receive over $10 billion in new federal funding,[24] and SEPTA is expected to receive $540 million.[25] Given this influx in capital, this is a critical moment for determining the future of these agencies' accessibilization efforts. Thus, it is especially important now that steps are taken to ensure that accessibilization is conducted in a racially and ethnically equitable manner.

This Note employs an empirical analysis to attempt to provide an answer to this question, relying on 2019 American Community Survey (ACS) data combined with geospatial data of the rail[26] and tram stops in Philadelphia and the subway stations in N.Y.C. The findings suggest that there is a disparity[27] in accessibility between

("Currently, 131 out of 472 stations are ADA-accessible citywide, or less than 28%, according to MTA's most recent figures."). In this Note, the term "subway" does not include any part of the Staten Island Railroad, which is not connected to the rest of the subway system. *See* MTA, NEW YORK CITY SUBWAY (Sept. 2021), INTERNET ARCHIVE WAYBACK MACH. (Sept. 22, 2021), https://web.archive.org/web/20210922054425/https://new.mta.info/map/5256 [https://perma.cc/5MJG-H9P9] (showing the Staten Island Railroad as separate from the rest of the subway system).

22. *See infra* Section I.B.2 (discussing some of transportation racism's extensive history in the United States).

23. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

24. Nolan Hicks & Julia Marsh, *NYC Set to Receive Billions in Funding from Infrastructure Bill*, N.Y. POST (Nov. 16, 2021, 11:45 AM), https://nypost.com/2021/11/16/nyc-set-to-receive-billions-in-funding-from-infrastructure-bill/ [https://perma.cc/4HXN-H2CB].

25. David Katz, *Bipartisan Federal Infrastructure Package Will Fund SEPTA and Delaware River Watershed*, DAILY PENNSYLVANIAN (Nov. 10, 2021, 10:52 PM), https://www.thedp.com/article/2021/11/philadelphia-to-benefit-from-bidens-infrastructure-bill-2021 [https://perma.cc/U6HR-UV5B].

26. In this Note, "rail" stops in Philadelphia include all non-trolley fixed-route stops.

27. Unless explicitly specified otherwise (e.g., through the phrase "Title VI disparate impact"), the terms "disparity" and "disparate impact" are both used in

racial and/or ethnic groups in both Philadelphia and N.Y.C. In Philadelphia, Black residents appear to have reduced access to ADA-compliant transit options, and in N.Y.C., Latine[28] residents and, particularly, Afro-Latine residents have reduced access to accessible transit.[29] The ideal solution for this would be for the Federal Transit Administration (FTA) to include specific measures combating this problem in its forthcoming revised document of binding Title VI guidance (the "Title VI Circular" or "Circular"). However, it is assumed that that will not occur. Thus, the viability of an administrative complaint on this matter is discussed, and the conclusion reached is that, relying on the data and analysis in this Note, there is likely a feasible Title VI disparate impact claim regarding the accessibilization of the Philadelphia transit system and the N.Y.C. subway.

Part I describes the relevant federal laws regarding racial and ethnic equity and the relevant federal, state, and local laws governing accessibility. It then delves into the important social issues around the intersection of race/ethnicity,[30] disability, and transit before touching on the current and future states of accessibility in the

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this Note to refer to differences borne out by the data, not to the legal standard associated with, among other laws, Title VI of the Civil Rights Act of 1964 ("Title VI").

28. This Note uses the term "Latine" to refer to the community also often called "Latino" or "Latinx." "Latine" seeks to refer to the community in a more gender-neutral way than the more traditional "Latino." Kiara Alfonseca et al., *Latinx, Latino and Hispanic: How This Ethnic Group's Label Has Sparked Debate*, ABC NEWS (Mar. 13, 2023, 12:06 PM), https://abcnews.go.com/US/latinx-latino-hispanic-linguistics-expert-explains-confusion/story?id=82273936 [https://perma.cc/3HVA-JWFD]. Another, perhaps more popular gender-neutral variant is "Latinx"; the choice between "Latine" and "Latinx" has been the subject of extensive discussion. *See, e.g.*, *Hispanic, Latino, Latinx or Latine? 2 Professors Share Their Own Preferences*, GEORGETOWN UNIV. (Oct. 14, 2022), https://www.georgetown.edu/news/hispanic-latino-latinx-or-latine-2-professors-share-their-own-preferences/ [https://perma.cc/ZZD9-9ZHT] (discussing the differences between the terms); Tess Garcia, *Latine vs Latinx? What Young People of Latin American Descent Think of These Terms*, TEEN VOGUE (Oct. 12, 2022), https://www.teenvogue.com/story/latine-vs-latinx-what-young-people-think [(same). This Note uses "Latine" because it is easier to pronounce in Spanish and fits more fluidly within everyday speech in the language.

29. *See infra* Part III (discussing findings of disparate impact among these groups).

30. In this Note, "race/ethnicity" is used to mean "race and/or ethnicity."

Philadelphia and N.Y.C. transit systems. Part II discusses the sources of the data, the variables employed, and the hypotheses made, as well as the various tactics used to organize and clean the data for analysis. Part III discusses the results of that analysis and some of the results' implications for accessibility and racial equity. Finally, Part IV discusses the potential solutions to this problem, such as the inclusion of particular provisions in the Circular currently being revised by the FTA and, failing that route, an administrative complaint alleging violations of the already-existing FTA regulations around Title VI.

I. Race/Ethnicity, Accessibility, and Transit

In order to fully understand disparate impact analysis as well as the process by which the Philadelphia and N.Y.C. transit systems arrived at their current accessibility levels, it is critical to first discuss the law governing this subject. With that in mind, Section A of this Part discusses Title VI, the ADA, and the sparse literature around their intersection before delving into state and local laws in Philadelphia and N.Y.C. However, that is not enough. Jurisprudence and legal research are quite limited with respect to Title VI and the ADA, meaning that it is particularly important to examine the social context operating behind the statutes and regulations. Race, disability, and transit all intersect in unique and important ways and have long done so far beyond the confines of Philadelphia and N.Y.C.; to that end, Section B of this Part uses examples from around the country to examine each combination of those three subjects: (1) racism[31] and disability, (2) racism and transit, and, finally, (3) disability and transit. Finally, Section C focuses back in on Philadelphia and N.Y.C. to discuss the current states of transit accessibility in both cities and the advocacy efforts residents have employed to improve them.

31. This Note defines "racism" as including discrimination based on race and/or ethnicity. *See Racism*, n., OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/157097 (on file with the *Columbia Human Rights Law Review*) (including, as part of the definition, discrimination against ethnic minorities).

A. Relevant Laws

1. Title VI

Title VI bans discrimination by any program or activity receiving federal funding[32] and authorizes federal agencies to issue regulations barring activities that have a disparate impact on protected classes, including racial and ethnic minorities.[33] This includes federal funding for local public transportation, and, accordingly, the FTA has issued regulations on the subject.[34]

Importantly, the accessibilization of the two transit networks is itself an activity of each of the transit agencies for the purposes of Title VI—indeed, in order to make stations accessible, SEPTA and the MTA both use federal funding.[35] As a result, they have an obligation under federal regulation to spend that money in a form consistent with Title VI regulations—regulations that the FTA has the ability to create and enforce as it sees fit.[36] Thus, it follows that

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32. 42 U.S.C. § 2000(d).

33. *See* Alexander v. Sandoval, 532 U.S. 275, 282 (2001) (noting the Court's explicit decision to assume, for the purposes of the case, that disparate-impact regulations under Title VI were valid); *Data Collection and Analysis*, U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN.: CIV. RTS., https://www.fhwa.dot.gov/civilrights/programs/title_vi/data_collection_analysis.cfm [https://perma.cc/6GC3-LV37] (providing instructions on how to obtain relevant racial and ethnic data for purposes of investigating potential Title VI violations).

34. 49 C.F.R. § 21.5 (2021). For an example of a specific provision explicitly banning activities with a disparate impact, see *id.* § 21.5(b)(3) ("In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose *or effect* of . . . subjecting [persons] to discrimination under any program to which this regulation applies, on the [protected] grounds . . . ." (emphasis added)).

35. *See, e.g.*, Press Release, Rep. Mary Gay Scanlon, Congresswoman Scanlon Visits SEPTA Facilities to Highlight How New Infrastructure Law Will Improve Experience for Riders and Increase Accessibility for People with Disabilities (Jan. 14, 2022), https://scanlon.house.gov/news/documentsingle.aspx?DocumentID=312 [https://perma.cc/GB8C-D5PA] (discussing the impact that federal funds will have on SEPTA's accessibility levels); Press Release, N.Y.C. Transit, MTA Announces Accessibility Projects at Eight Stations Throughout the Five Boroughs (Dec. 16, 2020, 10:54 PM), https://new.mta.info/MTA-Announces-Accessibility-Projects-at-Eight-Stations-Throughout-the-Five-Boroughs [https://perma.cc/TC92-4K5U] (giving notice of accessibility improvements that were "being funded by federal grant money").

36. 49 U.S.C. § 5334(k).

the federal government can create, promulgate, and enforce regulations requiring that accessibilizations of transit networks across the country be done in a racially and ethnically equitable manner.[37]

Importantly, the FTA has published a Circular focusing on Title VI, with guidelines governing disparate impact issues under Title VI in the context of transit.[38] In fact, notably, the FTA is currently going through the revision process for that document.[39] In the current Circular, the FTA explained that to receive an exception regarding disparate-impact rules, transit authorities must satisfy three requirements: "(1) the recipient can demonstrate a substantial legitimate justification for the program, policy, or activity; (2) there are no comparably effective alternative practices that would result in less-disparate impacts; and (3) the justification for the program, policy or activity is not a pretext for discrimination."[40] However, the determination of what constitutes a "substantial legitimate justification" appears to be left up to local transit authorities.[41]

Importantly, this set of requirements for disparate impact *exceptions* should not be confused with the framework adopted by the court system for evaluating disparate impact *claims*. Under the latter structure, a slightly different set of requirements must be met to prove a disparate impact claim under Title VI: first, an adverse disparate impact must be established (this is what courts sometimes

37. It should be noted that under *Alexander v. Sandoval*, there is never a *private* right of action to enforce Title VI disparate impact provisions. Alexander v. Sandoval, 532 U.S. 275, 275 (2001).

38. FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., FTA C 4702.1B, TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (2012), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf [https://perma.cc/DZ4G-7TJP] [hereinafter FTA CIRCULAR].

39. Title VI Implementation, 86 Fed. Reg. 60,735 (proposed Nov. 3, 2021). The FTA has submitted a request for notice and comment regarding requested changes. *Id.* This Note relies on the current version, FTA CIRCULAR, *supra* note 37, however, as the new version is not yet available.

40. FTA CIRCULAR, *supra* note 37, ch. I, at 8–9.

41. *See id.* ch. III, at 11 (noting that, when claiming that there is a substantial legitimate justification and that there are no less discriminatory alternatives, "[t]he recipient must show how both tests are met").

refer to as the "prima facie" showing).[42] With that out of the way, the organization being challenged has the chance to demonstrate a "substantial legitimate justification" that could explain the impacting practice. If such a justification does exist, the complainant must show that there is a less discriminatory alternative that would achieve the same effect.[43]

Additionally, the FTA Circular requires that transit authorities[44] "shall develop written procedures consistent with this Section to evaluate, *prior to implementation*, any and all service changes that *exceed the transit provider's major service change threshold* . . . to determine whether those changes will have a discriminatory impact based on race, color, or national origin."[45] The fact that it requires such analysis to be conducted "prior to implementation" of any "major service change[s]" speaks to the proactive nature of the FTA Circular: rather than relying on after-the-fact enforcement, its goal is to *prevent* would-be inequitable transit changes from ever going into development or implementation.[46] A problem that often arises, however, comes from the FTA's deference regarding what constitutes a "major service change." Similar to its policy of what constitutes a "substantial legitimate justification," the FTA largely allows local transit agencies to determine their own threshold, a setup that can cause problems.[47]

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42. CIV. RTS. DIV., U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL § VII, at 6, https://www.justice.gov/crt/book/file/1364106/download [https://perma.cc/5EMC-2JX7].

43. *Id.* Notably, the DOJ bans pretext discrimination as violating the legitimacy requirement of the "substantial legitimate justification" showing. *Id.* ("A violation is still established if the record shows the justification offered by the [allegedly offending] recipient was pretextual.").

44. Notably, there is an FTA-established size threshold for this requirement. FTA CIRCULAR, *supra* note 37, ch. IV, at 2.

45. *Id.* ch. IV, at 11 (emphasis added).

46. This decision to focus on preventative measures to avoid discrimination is an example of what Professor Olatunde C.A. Johnson referred to as an "equality directive." Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1363–64 (2012).

47. This setup leads to situations where agencies are often arguably incentivized to give themselves too much leeway. As one commenter described:

> The discretion granted regarding when a recipient must conduct an analysis can also allow recipients to effectively exempt themselves from the equity analysis requirement at will. The 2012 Circular requires equity analyses only for fare

That being said, the FTA does require that "[t]he threshold for analysis shall not be set so high so as to never require an analysis; rather, agencies shall select a threshold most likely to yield a meaningful result in light of the transit provider's system characteristics."[48] Furthermore, in terms of measuring disparate impact, the FTA Circular defers to the local agencies for many of the specifics but does outline a few requirements, explaining some of them as such:

> The transit provider shall develop a policy for measuring disparate impacts. The policy shall establish a threshold for determining when adverse effects of service changes are borne disproportionately by minority populations. The disparate impact threshold defines *statistically significant disparity* and may be presented as a statistical percentage of impacts borne by minority populations compared to impacts borne by non-minority populations.[49]

For the purposes of this Note, one particularly important aspect of the above-quoted guidelines is that the FTA focuses on statistical significance as the basis for Title VI disparate impact issues. However, the FTA's policies around the legal standard for disparate impact for service changes are not quite applicable to the type of issue under discussion in this Note.[50] Thus, while the analyses

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> changes and "major service changes," and allows recipients to set their own major service policy changes. In doing so, a recipient must only "engage the public in the decision making process" and cannot set the threshold "so high so as to never require an analysis."

Jerett Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 CAL. L. REV. 1131, 1162 (2013) (footnotes omitted). Notably, the fare-change basis was omitted from the FTA Circular passage above. *See supra* text accompanying note 44 (quoting the FTA Circular while omitting the fare-change basis for triggering impact evaluations).

48. FTA CIRCULAR, *supra* note 37, ch. IV, at 13.

49. *Id.* (emphasis added).

50. In particular, the FTA Circular suggests the employment of a disparate impact standard involving the calculation of "a statistical percentage of impacts borne by minority populations compared to impacts borne by non-minority populations." *Id.* However, this conception does not work as well for systemwide service modifications, such as the process of accessibilization, wherein *all* communities that use the transit network are eventually affected.

employed here do mirror the FTA's guidelines in many ways, the analyses used in this Note also deviate from some methodologies suggested by the FTA.[51]

Finally, transparency, too, can be an issue with the self-regulation regime set up by the FTA. Indeed, the MTA's Title VI policies are almost entirely unavailable,[52] and while SEPTA's Title VI policies used to be relatively easy to find, the PDF containing them has been taken down, leaving the agency's website without any explanation.[53] Nonetheless, there is evidence that the FTA has been willing to use its prerogative as an administrative enforcer to make sure that the MTA was complying with Title VI.[54] Furthermore, the FTA certainly shows no signs of relaxing its oversight; the details of its November 2021 request for notice and comment indicate that it is seeking to expand its regulatory role in the revised version of its circular.[55] The fact that the FTA seems willing to play an active role in enforcing Title VI contributes to the notion that reliance on the

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51. Importantly, the FTA does not *require* the statistical significance analysis to be conducted in a particular manner. *See id.* ("The disparate impact threshold defines statistically significant disparity and *may* be presented as a statistical percentage of impacts borne by minority populations compared to impacts borne by non-minority populations." (emphasis added)).

52. The most recent document available appears to be one found through the annals of the Federal Transit Administration's website. FED. TRANSIT ADMIN. & THE DMP GROUP, LLC, NEW YORK CITY TRANSIT TITLE VI COMPLIANCE REVIEW FINAL REPORT 36–40 (2014), https://www.transit.dot.gov/sites/fta.dot.gov/files/2021-09/nycdot-final-title-vi-review-report-2012.pdf [https://perma.cc/76LQ-MTSH] [hereinafter FTA & DMP GROUP] (detailing the attempted thresholds rejected by the FTA as well as the methodologies employed by N.Y.C. Transit in its disparate impact analyses).

53. *Compare* SERV. PLAN. DEP'T, SEPTA, SEPTA SERVICE STANDARDS AND PROCESS 30–32 (2019), INTERNET ARCHIVE WAYBACK MACH. (Feb. 27, 2022), https://web.archive.org/web/20220227125653/http://www.septa.org/service-standards/pdf/2020-service-standards-process.pdf [https://perma.cc/EL4Q-VBVY] (the backup of the document), *with 404 Error*, SEPTA, http://www.septa.org/service-standards/pdf/2020-service-standards-process.pdf [https://perma.cc/59JT-TQMW] (showing an error page at the URL where the document had previously been located).

54. *See, e.g.*, FTA & DMP GROUP, *supra* note 51 (noting the various ways in which the FTA forced the MTA to modify its policies in order to fully comply with the FTA's interpretation of Title VI).

55. *See infra* note 228 (discussing the relevant details of the FTA's request for notice and comment).

upcoming revision and, failing that, administrative complaints are likely the best solutions to the disparities discussed in this Note.[56]

2. ADA

The Americans with Disabilities Act codified comprehensive requirements for public transit agencies across the country, including that stations be made accessible.[57] The Act prioritized "key stations" (a designation assigned through regulation) to be made accessible within three years, subject to certain cost-based exceptions.[58] Through regulation and a set of standards promulgated by the Department of Justice (DOJ), the federal government has enacted specific requirements defining what actually constitutes physical accessibility.[59]

Often, members of the public may focus on what is known as "vertical access"[60]—in short, the elevators and ramps needed to ensure that people who use wheelchairs are able to access the entire system.[61] A focus on solely vertical accessibility, while helpful for ensuring the installation of critical infrastructure, nonetheless leaves out countless other aids also necessary to achieve full accessibility.

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56. *See infra* Part IV (discussing proposed solutions to this public transit issue).

57. 42 U.S.C. §§ 12141–12150.

58. 42 U.S.C. § 12147(b)(1).

59. 28 C.F.R. § 35.151 (2022); DEP'T OF JUSTICE, 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN (2010), https://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf [https://perma.cc/L369-7USE]. Of particular relevance is §§ 810.5–.10 of the Standards, *id.* at 216–18, which sets forth the specific guidelines for rail stations and platforms.

60. Ethan B. Stark-Miller, Beyond the Elevators: How the New York City Subway System Can Better Serve Blind, Deaf, and Cognitively Disabled People (Dec. 13, 2019) (capstone, City University of New York, Craig Newmark Graduate School of Journalism), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1379&context=gj_etds [https://perma.cc/JK6K-2QPN] ("Since the ADA requires stations to be accessible for wheelchair users, people usually see station accessibility in terms of installing elevators and ramps. But there is more to station accessibility than these features.").

61. *See, e.g.*, U.S. ACCESS BD., U.S. ACCESS BOARD TECHNICAL GUIDE: ACCESSIBLE ROUTES 4 (July 2015), https://www.access-board.gov/files/ada/guides/accessible-routes.pdf [https://perma.cc/77LT-AK3H]. ("Vertical access can be achieved by ramps, curb ramps, elevators or, where permitted, platform lifts."). In this Note, the terms "vertical access" and "vertical accessibility" are used interchangeably.

For example, people who cannot see generally need tactile surfaces and consistent, clear audio announcements in order to be able to use transit systems.[62]

3. Intersection of Title VI and the ADA

An area that is somewhat more nebulous is the manner in which Title VI and the ADA interact with one another.[63] As Alice Abrokwa noted, "[t]he case law has yet to clearly articulate how a plaintiff experiencing discrimination due to their race and disability together can redress the harms that come from standing in this specific intersection."[64] Furthermore, the sparse case law that *does* exist at the intersection of race and disability generally centers around employment discrimination claims based in Title VII of the Civil Rights Act of 1964.[65] Indeed, even the scholarship on the subject is extremely limited regarding intersectional disparate impact claims under Title VI and disability rights statutes, a fact made more surprising by the fairly extensive amount of research into the intersection of race and disability outside of the legal context.[66] Scholars should develop this area of the law further to fully clarify the details of the framework created by the two statutes' intersection.

4. Pennsylvania and Philadelphia Law

Unlike the N.Y.C. subway, SEPTA's system crosses through a number of cities and even states.[67] Thus, it is more difficult to

62. *See generally* Stark-Miller, *supra* note 59 (providing a more in-depth discussion of non-vertical accessibility issues on the N.Y.C. subway).

63. Crucial to any discussion of such a combination is the concept of intersectionality. *See infra* Section I.B (discussing the concept of intersectionality, as well as various intersections important to the focus of this Note).

64. Alice Abrokwa, *"When They Enter, We All Enter": Opening the Door to Intersectional Discrimination Claims Based on Race and Disability*, 24 MICH. J. RACE & L. 15, 18 (2018).

65. *Id.* at 48 ("Yet the case law analyzing intersectional discrimination claims has thus far centered on employment discrimination under Title VII of the Civil Rights Act of 1964 . . . ."). For discussion of potential causes of this focus in intersectional case law on Title VII claims, see also *id.* at 48–49 (discussing cases potentially relevant to intersectional discrimination).

66. *See also infra* Section I.B.1 (discussing the intersection of race and ethnicity with disability).

67. The commuter rail system passes through Pennsylvania, New Jersey, and Delaware. It reaches from Philadelphia, PA, into, inter alia, Wilmington, DE,

determine exactly which state and local laws apply to the entire system as a whole. That being said, most stations are located in Philadelphia, so it is worth briefly examining the relevant Pennsylvania and Philadelphia laws for accessibility.[68]

Pennsylvania has enacted legislation requiring accessibility in transit;[69] it has also enacted legislation banning a number of forms of discrimination, including (for example) discrimination on a racial basis in places of public accommodation.[70] Meanwhile, at the city level, Philadelphia has enacted protections through its civil rights ordinance.[71] This law protects people from, inter alia, discrimination in places of public accommodation on the basis of disability and/or race,[72] explicitly defining "public accommodation" to include "all facilities of and services provided by any public agency or authority[.]"[73] Thus, given that SEPTA is a public authority,[74] it is under the purview of this law.

5. New York State (N.Y.) and N.Y.C. Law

N.Y.'s laws offer fairly little in the way of accessibility protections for the subway system. In fact, the state's building laws have long exempted the subway system from the state's generalized

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and Trenton, NJ. *Compare* MTA, *supra* note 21 (the N.Y.C. subway map), *with* SEPTA, *supra* note 19 (the Philadelphia transit map).

68. SEPTA, *supra* note 19.

69. *See, e.g.*, Act of Feb. 10, 1994, Pub. L. No. 1994-3, 1994 PA. LAWS 20, *reprinted in* 74 PA. CONS. STAT. app. (2022) ("It is intended that residents of the metropolitan area may be provided with access to transportation facilities and the ability to travel within the metropolitan area regardless of disability or handicap.").

70. 43 PA. STAT. AND CONS. STAT. ANN. § 953 (West 2021); *see also id.* § 954(*l*) (defining "public accommodation, resort or amusement" to include, inter alia, "all public conveyances operated on land or water or in the air as well as the stations, terminals and airports thereof").

71. PHILA. CODE ch. 9-1100 (2021), https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-278561 [https://perma.cc/6V8R-YCS7].

72. *Id.*

73. *Id.* § 9-1102(w) (2021), https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-278569 [https://perma.cc/GT8E-XWN5].

74. *See, e.g.*, Press Release, Sen. Bob Casey, Casey Briefed by Federal Transportation Administration, SEPTA on Aging Infrastructure (July 11, 2011), https://www.casey.senate.gov/news/releases/casey-briefed-by-federal-transportation-administration-septa-on-aging-infrastructure [https://perma.cc/6VG9-AA68] (calling SEPTA a "regional municipal authority").

accessibility requirements,[75] relying instead on a list of ninety-one stations prioritized for accessibilization under the ADA's "key stations" framework.[76] However, the MTA's failure to fully comply even with that list may have caused the exemption to expire in June 2020.[77] It is important to note that while the list of prioritized

75. N.Y. PUB. BLDGS. § 51(2) (Consol. 2021). The subway exemption was created as part of a compromise resulting from a preliminary injunction barring the MTA from eliminating elevators from plans for a station renovation; *see* E. Paralyzed Veterans Ass'n v. Metro. Transp. Auth., 458 N.Y.S.2d 815 (N.Y. Sup. Ct. 1982) (explaining the support in state law for the preliminary injunction and opting to grant that injunction, a holding that eventually led to the exemption in state law); *see generally* Ctr. for Indep. of the Disabled v. Metro. Transp. Auth., 125 N.Y.S.3d 697, 705–06 (N.Y. App. Div. 2020) (describing the background of this statute and the subway exemption). In contrast, Pennsylvania and Illinois—both of which have large, not yet fully accessible transit systems—have already enacted legislation at least generally providing for some right to accessible transportation. *See, e.g.*, Act of Feb. 10, 1994, Pub. L. No. 1994-3, 1994 PA. LAWS 20, *reprinted in* 74 PA. CONS. STAT. app. (2022) ("It is intended that residents of the metropolitan area may be provided with access to transportation facilities and the ability to travel within the metropolitan area regardless of disability or handicap."); 410 ILL. COMP. STAT. 25/3 (2021) (explicitly including "stations used for specified public transportation" in its definition of new public facilities subject to accessibility requirements).

76. N.Y. TRANSP. LAW § 15-b (McKinney 2021). For more on the "key stations" framework, see *supra* note 57 and accompanying text. It is important to note that, while this list certainly took away some of the MTA's autonomy in deciding which stations to accessibilize earliest, that fact does not mean that the disparate impact of the accessibilization process should not be examined. *See infra* note 77 (describing the extent to which the MTA has had influence over the order in which stations are accessibilized).

77. N.Y. PUB. BLDGS. LAW § 51 note (Consol. 2022) (Laws 1994, ch. 610, § 3); N.Y. TRANSP. LAW § 15-b (McKinney 2021) (setting a July 26, 2020, deadline for the MTA to accessibilize ninety-one specific stations and at least one hundred stations total but also creating a loophole wherein the MTA could substitute in new stations for at least some of the specific ones listed). The Broad Street station was required to be made fully accessible by July 26, 2020, *id.*, but the MTA did not meet this deadline, *MTA Accessible Stations*, MTA (Sept. 9, 2021), INTERNET ARCHIVE WAYBACK MACH. (Sept. 22, 2021), https://web.archive.org/web/20210922184006/https://new.mta.info/accessibility/stations [https://perma.cc/STJ8-DGZ6?type=image] (not listing the Broad Street station as an accessible stop). As a result, the exclusion of the subway from N.Y. State's generalized accessibility requirements *may* have expired on July 26, 2020, but the MTA may have used the loophole. Despite several attempts by the author to inquire into the law's status by calling various offices in the executive and legislative branches, however, it is still unclear if the MTA used the loophole clause or if the statute instead lapsed. Notably, one *New York Times* article claimed the MTA had met

stations certainly lessened the MTA's autonomy in choosing stations for many of its accessibilization projects, that does not diminish the validity or importance of disparate impact analysis on this topic.[78]

Meanwhile, at the city level, the N.Y.C. Human Rights Law (NYCHRL) prohibits the denial of "the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation"[79] on the basis of, inter alia, "actual or perceived race, creed, color, national origin, age, . . . [or] disability . . . ."[80] This law does include and support accessibility on the subway;[81] in fact, the NYCHRL provides broader protections than

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this statutory requirement, though it did not make explicitly clear if the MTA used the loophole (or simply made one hundred stations accessible). Michael Gold, *M.T.A. Vows to Make Subways 95% Accessible. It Will Take 33 Years.*, N.Y. TIMES (June 22, 2022), https://www.nytimes.com/2022/06/22/nyregion/nyc-subway-accessibility-disabilities-elevators.html (on file with the *Columbia Human Rights Law Review*) ("[T]he transit agency in 1994 reached an agreement with the federal government to make 100 'key stations' accessible by 2020, a goal it met.").

78. Notably, out of the 131 stations already accessible, the state law in question specified ninety-one of them for prioritization. Act of July 26, 1994, ch. 610, 1994 N.Y. Sess. Laws 1504 (McKinney). Thus, the MTA itself chose 30% of the now-accessible stations for prioritization. Beyond that, however, disparate impact analysis is concerned with the practical state of affairs rather than who is necessarily to blame for that state of affairs, and that remains true here. Whether it originated in state statute or in an MTA board meeting, the fact remains that subway stops are less likely to be accessible when they are located in neighborhoods with higher concentrations of Black and/or Latine people. Finally, the MTA has also often refused to include accessibilization in its plans for station updates and modernizations. *See infra* Section I.C.2 (discussing lawsuits stemming from the MTA's refusals to accessibilize stations when it conducts updates and modernizations). Depending on where those stations are located, such refusals might have exacerbated inequities in accessible stations' locations; further study on this subject is warranted.

79. N.Y.C. ADMIN. CODE § 8-107(4)(a)(1)(a) (2021), https://www1.nyc.gov/site/cchr/law/chapter-1.page#8-107 [https://perma.cc/G6TF-A6NB].

80. N.Y.C. ADMIN. CODE § 8-107(4)(a)(1) (2021), https://www1.nyc.gov/site/cchr/law/chapter-1.page#8-107 [https://perma.cc/G6TF-A6NB].

81. Indeed, the NYCHRL has formed the basis of at least one lawsuit against the MTA, and in 2020 an appellate-level New York court found that the state's subway accessibility exemption did not preempt the NYCHRL's accessibility mandate. Ctr. for Indep. of the Disabled v. Metro. Transp. Auth., 125 N.Y.S.3d 697, 706 (N.Y. App. Div. 2020). For more information on this case, see also *infra* note 137.

the ADA.[82] One effect of this setup is that any actions that violate the ADA[83] thus inherently also violate NYCHRL.[84] That being said, with respect to the physical requirements for rail stations, the NYCHRL conforms to the ADA requirements, meaning that the MTA must adhere to the DOJ-issued guidelines.[85]

The bottom line is that while some state and local laws can theoretically play into enforcement of rights around race/ethnicity and accessibility, the laws in question generally tend to follow the contours of federal law—in this context, the contours of Title VI and the ADA. When it comes to Title VI, the FTA uses the Circular, which is currently going through revision, to issue guidelines providing a structure for antidiscrimination policy. Under this framework, the local transit agencies are tasked with filling in the details, a responsibility which can cause some problems. Meanwhile, the administration of the ADA is more straightforward: the DOJ issues specific guidelines detailing accessibility requirements. However, the intersection between Title VI and the ADA is still very unclear; as such, it is important to examine the social context informing the issues at play nationally when it comes to disability, race/ethnicity, and transit.

B. Social Issues on the National Level

The most useful structure for understanding the importance of and context behind these concepts is the framework of intersectionality, a term originally coined by Kimberlé Crenshaw in 1989 to describe the ways in which the lived experiences of Black women were different from a mere combination of the experiences of

82. As the Second Circuit described it, "[t]here is now a one-way ratchet: . . . 'similarly worded provisions of federal and state civil rights laws [including the ADA are] . . . a floor below which the City's Human Rights law cannot fall.'" Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 278 (2d Cir. 2009) (alterations added) (quoting The Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 (2005)).

83. The specifications of what constitutes an ADA violation are detailed in the DOJ's guidelines. *See supra* note 58 and accompanying text.

84. Forsee v. Metro. Transp. Auth., No. 19-cv-4406(ER), 2020 WL 1547468, at *8 (S.D.N.Y. Mar. 31, 2020).

85. The author reached out to the NYCHRL's enforcement arm for confirmation but never received a response.

Black people generally and women generally.[86] To emphasize the importance of ensuring that the intersections of Title VI and the ADA are enforced in transit, this Section examines the intersections of pairings between racism, disability, and transit. It discusses the ways in which racism and disability interact before moving onto the intersection of racism and transit and then, finally, that of disability and transit.

1. Intersectionality: Racism and Disability

Here, Crenshaw's concept is important for understanding the ways in which the lived experiences of BIPOC[87] people with disabilities can differ from those of BIPOC people generally and those of people with disabilities generally. Historically, the field of Disability Studies has systematically failed to uplift the voices and perspectives of people of color.[88] This longstanding pattern in Disability Studies—that of ignoring and drowning out the voices of people of color—makes it even more imperative that any examinations of disability consider the ramifications of the issue's intersection with race. This becomes even more salient when one considers the impact of racist policies, such as those embodying environmental racism, for instance, which have themselves actually led to BIPOC communities, particularly Black communities, having

86. Kimberl[é] Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

87. "BIPOC" is short for "Black, Indigenous, people of color." Constance Grady, *Why the Term "BIPOC" Is So Complicated, Explained by Linguists*, VOX (June 30, 2020, 9:10 AM), https://www.vox.com/2020/6/30/21300294/bipoc-what-does-it-mean-critical-race-linguistics-jonathan-rosa-deandra-miles-hercules [https://perma.cc/57LB-9TRU].

88. Chris Bell, for example, wrote, "I would like to concede the failure of Disability Studies to engage issues of race and ethnicity in a substantive capacity, thereby entrenching whiteness as its constitutive underpinning." Chris Bell, *Is Disability Studies Actually White Disability Studies?*, *in* THE DISABILITY STUDIES READER 406, 407 (Lennard J. Davis ed., 5th ed. 2017). Other scholars have written on the importance of this topic. *See, e.g.*, Deborah Stienstra, *Race/Ethnicity and Disability Studies: Toward an Explicitly Intersectional Approach*, *in* ROUTLEDGE HANDBOOK OF DISABILITY STUDIES 376 (Nick Watson et al. eds., 2012) (exploring the ways in which people of color with disabilities have been made to feel unwanted or unseen in society, explaining that "[t]he intersections of race/ethnicity and disability often lead people to feel like they are outsiders to the mainstream society").

disproportionately high rates of disability.[89] Indeed, transit racism itself can have an impact on public health in minority communities;

89. For example, asthma rates have long been tied to issues of environmental injustice in minority communities. *See* Phil Brown et al., *The Health Politics of Asthma: Environmental Justice and Collective Illness Experience in the United States*, 57 SOC. SCI. & MED. 453, 453, 455–56 (2003) (noting the long, though apparently sometimes contested, link between the two and explaining that "[i]n this sense, environmental health is a model for intersectoral approaches to health, since so much can be done to reduce or prevent asthma through non-medical action"). Other, particularly highly publicized examples of the impact of racism on disability comes from the water crises in Flint, Michigan, and Jackson, Mississippi. *See generally, e.g.*, Jeff Karoub, *Commission: 'Systemic Racism' at Root of Flint Water Crisis*, ASSOC. PRESS (Feb. 17, 2017), https://apnews.com/article/us-news-race-and-ethnicity-mi-state-wire-flint-michigan-df42de2ec4424193866467a2981ccb51 [https://perma.cc/L5CR-SV9K] (reporting on a commission's finding that systemic racism led to the water crisis in Flint, MI); Drew Costley & Emily Wagster Pettus, *Decades of Systemic Racism Seen as Root of Jackson Mississippi Water Crisis*, PBS (Sept. 16, 2022, 1:26 PM), https://www.pbs.org/newshour/nation/decades-of-systemic-racism-seen-as-root-of-jackson-mississippi-water-crisis [https://perma.cc/WD43-M655] (explaining the ways that systemic racism led to the water crisis in Jackson, MS). For a discussion of a few specific instances of environmental racism's impact on disability, see generally Sheree Henderson & Rebecca Wells, *Environmental Racism and the Contamination of Black Lives: A Literature Review*, 25 J. AFR. AM. STUD. 134, 136 (2021) ("Environmental racism encompasses . . . violence caused by infrastructures that determine access and quality of resources and services. . . . These infrastructures can be a material embodiment of violence through racialized policies that cause adverse outcomes to marginalized communities, enforcing and reinforcing social orders at the expense of lives and health." (citations omitted)).

Note, however, that some scholars have cautioned against a wholesale merging of the two subjects. *See, e.g.*, Valerie Ann Johnson, *Bringing Together Feminist Disability Studies and Environmental Justice*, *in* DISABILITY STUDIES AND THE ENVIRONMENTAL HUMANITIES: TOWARD AN ECO-CRIP THEORY 73, 76 (Sarah Jaquette Ray & Jay Sibara eds., 2017) ("[W]e tend to conflate disability, disease, and environmental injustice. We need to disaggregate the possible results of environmental injustice . . . from the person, however they are embodied."). For a more in-depth discussion of the intersection between disability, race, and environmental racism, see generally Catherine Jampel, *Intersections of Disability Justice, Racial Justice and Environmental Justice*, 4 ENV'T SOCIO., https://par.nsf.gov/servlets/purl/10058562 [https://perma.cc/W5DC-MF52]. Finally, it is important to note that environmental racism has also contributed to COVID-19's disproportionate impact on communities of color. Anuli U. Njoku, *COVID-19 and Environmental Racism: Challenges and Recommendations*, 5 EUR. J. ENV'T & PUB. HEALTH, https://www.ejeph.com/download/covid-19-and-environmental-

for example, one group identified the higher levels of diesel buses being used in minority communities in Boston as one of the likely causes for the higher levels of asthma in those communities.[90]

2. Racism and Transit

More broadly, there is an extensive history of racism in transportation in the United States.[91] Indeed, *Plessy v. Ferguson* arose after Homer Plessy violated segregation laws while riding on a train.[92] Transit issues also played a central role in the Civil Rights Movement of the 1960s,[93] with the Montgomery Bus Boycott itself centering around the bus-based public transit system in Montgomery, Alabama.[94] Transportation racism has been directed the most at Black people, but other groups, including Latine communities, have also been targeted.[95]

This mode of racism has continued to be an enormous issue across the United States, including within public transportation specifically[96]—to name just two examples, major cities like Los

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racism-challenges-and-recommendations-10999.pdf [https://perma.cc/AWH7-G28E].

90. Brown et al., *supra* note 88, at 458.

91. It should be noted that governmental investments in private transportation have also been carried out in a racist manner. For an analysis of the racist significance of the interstate highway system, for example, see generally, e.g., Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1259–98 (2020).

92. Plessy v. Ferguson, 163 U.S. 537, 538 (1896) (describing that the case arose after Homer Plessy violated Louisiana's racial segregation laws by riding in the "whites only" section of a train).

93. *See also* Robert D. Bullard & Glenn S. Johnson, *Introduction*, *in* JUST TRANSPORTATION: DISMANTLING RACE & CLASS BARRIERS TO MOBILITY 1 (Robert D. Bullard & Glenn S. Johnson eds., 1997) ("The modern civil rights movement has its roots in transportation.").

94. *Montgomery Bus Boycott*, STANFORD UNIV., MARTIN LUTHER KING, JR., RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/montgomery-bus-boycott [https://perma.cc/P2FL-LE7W]. It is also important to note that, famously, the Montgomery Bus Boycott began after Rosa Parks refused to give up her seat to move to the back of a public bus. *Id.*

95. *See infra* notes 95–101 and accompanying text (discussing transportation racism in particular U.S. cities).

96. For a more in-depth exploration of some of the forms that public transit racism takes, see generally Christof Spieler, *Racism Has Shaped Public Transit,*

Angeles and Atlanta have engaged in racial discrimination in their transit policies. In Los Angeles, for instance, "within the bus system, . . . racial discrimination was reflected in policy. For many years, bus lines to predominantly white suburbs . . . had better service, more direct express routes, and newer buses."[97] This issue of newer buses is one shared across metropolitan areas.[98] Meanwhile, Atlanta's public transit system (MARTA) "was built on deceit, broken promises, and racism," with "disparities in service between white and [B]lack neighborhoods . . . built into MARTA's design."[99] Finally, the foundation TransitCenter has found that today in N.Y.C., "[t]ransit provides less access to opportunities for BIPOC residents than white residents" despite the disproportionate use of the subway for work commutes by BIPOC residents.[100] N.Y.C. is far from the only city, however, where BIPOC residents take public transit at a higher rate than their white counterparts; in fact, 60% of transit riders

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and It's Riddled with Inequities, KINDER INST. FOR URB. RSCH. (Aug. 24, 2020), https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities [https://perma.cc/DX7U-S57B].

97. Eric Mann, *Los Angeles Bus Riders Derail the MTA*, *in* HIGHWAY ROBBERY: TRANSPORTATION RACISM & NEW ROUTES TO EQUITY 33, 34 (Robert D. Bullard et al. eds., 2004).

98. Mark Garrett & Brian Taylor, *Reconsidering Social Equity in Public Transit*, 13 BERKELEY PLAN. J. 6 (1999) (discussing the inequities in, inter alia, bus quality). One factor sometimes contributing to this effect is the fact that some cities try to win over suburban commuters who own cars by providing nicer buses for those—generally whiter—areas. *See* Robert D. Bullard, *Introduction*, *in* HIGHWAY ROBBERY, *supra* note 96, at 1, 5 ("Whether intended or unintended, some transit providers bend over backward to accommodate their mostly white suburban commuters with plush, air conditioned, clean-fuel and handicapped-accessible buses and trains, while inner-city transit riders are saddled with dilapidated, 'dirty' diesel buses.").

99. Robert D. Bullard et al., *Dismantling Transit Racism in Metro Atlanta*, *in* HIGHWAY ROBBERY, *supra* note 96, at 49, 52, 53. Meanwhile, MARTA also failed to adequately reach out to the Latine community; in one instance, when they were required to seek public comment about a proposed fare increase, they only used English in all of the ads they ran and all of the information they provided, and they did not provide English translation services at the hearings they conducted on the matter. *Id.* at 66.

100. TransitCenter, *The New York Story*, TRANSITCENTER EQUITY DASHBOARD, https://dashboard.transitcenter.org/story/nyc [https://perma.cc/292G-EYR9] (noting that despite the decreased access to transit for BIPOC residents, "in 2019, 44% of Black residents took transit to work, as did 39% of Asian and 36% of Latine residents—compared to 24% of white residents").

nationwide are members of BIPOC communities.[101] Along this vein, one way that transit racism has taken hold has been through disproportionate funding of highways, which are often used largely by white residents, instead of public transportation, which is predominantly used by BIPOC residents.[102]

3. Disability and Transit

Meanwhile, a lack of accessible transit can create enormous problems for people with disabilities, and there is no shortage of issues when it comes to accessible transportation.[103] While there is not much polling data from the last few years on this subject, in the most recent survey of people with disabilities by Harris Interactive, released in 2010, people with disabilities were almost five times as likely (18% compared to 4%) to claim that inadequate transportation was a "major problem" for them as people without disabilities.[104] This is especially important given the fact that, nationwide, people with disabilities tend to use public transit *far* more often than people without disabilities.[105] Indeed, one sign of the lack of accessibility's

101. AM. PUB. TRANSP. ASS'N, WHO RIDES PUBLIC TRANSPORTATION 4 (2017), https://www.apta.com/wp-content/uploads/Resources/resources/reportsandpublications/Documents/APTA-Who-Rides-Public-Transportation-2017.pdf [https://perma.cc/29RG-BDJL] ("Communities of color make up a majority of riders (60%), with African-American riders comprising the largest single group (24%) within communities of color.").

102. For more information on disproportionate funding of highways and the ways that such practices intersect with race, see generally JUST TRANSPORTATION, *supra* note 96; Archer, *supra* note 90, at 1259–98.

103. For an overview of some of the various problems that people with disabilities face when trying to access public transit, see generally Jill L. Bezyak et al., *Public Transportation: An Investigation of Barriers for People with Disabilities*, 28 J. DISABILITY POL'Y STUDS. 52 (2017).

104. KESSLER FOUND. & NAT'L ORG. ON DISABILITY, POWERED BY HARRIS INTERACTIVE, THE ADA, 20 YEARS LATER, at 117 (2010), INTERNET ARCHIVE WAYBACK MACH. (Aug. 24, 2017), https://web.archive.org/web/20170824060615/http://www.2010disabilitysurveys.org/pdfs/surveyresults.pdf [https://perma.cc/494E-8UWS].

105. A study released in 2020 found that 18.4% of participants with disabilities relied primarily on public transit, in stark contrast to an ACS-provided statistic that 5.2% of Americans nationwide relied primarily on public transit. Jill Louise Bezyak et al., *Community Participation and Public Transportation Barriers Experienced by People with Disabilities*, 42 DISABILITY & REHAB. 3275, 3280 (2020).

impact on the disabled population of N.Y.C. is the disparity in subway and bus usage based on disability. Whereas disabled people rely primarily on public transit at over triple the rate of non-disabled people nationally,[106] disabled New Yorkers are actually *less* likely to use the subway than their non-disabled peers.[107] Meanwhile, New Yorkers with disabilities are *more* likely to use the bus,[108] likely at least in part because, unlike approximately 70–75% of subway stations, all of N.Y.C.'s buses are wheelchair-accessible.[109]

Furthermore, access to transit can have major impacts on the lives of people with or without disabilities. For example, a group of authors found that "individuals with longer commutes have less access to social capital,"[110] and a different inquiry "highlight[ed] the advantages of central residential locations where good jobs are readily accessible by rapid transit for white and Asian men and women and underscore the lengthy work trips that persist for [B]lack[] [people] living in the New York metropolitan area."[111] People with disabilities, particularly in N.Y.C., tend to have longer commute times than people without disabilities.[112]

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106. *Id.*

107. *Transportation*, WHERE WE LIVE NYC, https://wherewelive.cityofnewyork.us/explore-data/access-to-opportunity/transportation/ [https://perma.cc/K2YE-DXYE].

108. *Id.*

109. N.Y.C. TRANSIT, GUIDE TO ACCESSIBLE TRANSIT ON BUSES AND SUBWAYS 1 (2019), https://new.mta.info/sites/default/files/2019-03/Accessibility_Guide_8.pdf [https://perma.cc/W9CR-STYJ]. *But see infra* Section I.C.1 (discussing issues with accessibility in the buses). This forced reliance on buses is especially problematic given that the buses are far slower than the trains. *See infra* notes 120–121 (detailing the slowness of N.Y.C.'s public buses).

110. Lilah M. Besser et al., *Commute Time and Social Capital in the U.S.*, 34 AM. J. PREVENTATIVE MED. 207, 207 (2008).

111. Valerie Preston & Sara McLafferty, *Revisiting Gender, Race, and Commuting in New York*, 106 ANNALS AM. ASSOC. GEOGRAPHERS 300, 301 (2016).

112. Though thorough studies on this topic are not widespread, particularly ones focusing on N.Y.C. and/or Philadelphia, one study found that "workers with disabilities have significantly longer commutes than workers without disabilities" in a region defined as including Manhattan, The Bronx, Queens, Brooklyn, and select areas within New Jersey (the "inner ring" for N.Y.C. for the 2008–12 Census Public Use Microdata Sample). Sandy Wong et al., *Disability, Wages, and Commuting in New York*, 87 J. TRANSP. GEOGRAPHY, 2020, at 10. Seeking to explain this pattern, the authors wrote that the results "suggest[ed] that transport options are less accessible and slower for disabled workers than they are for non-disabled workers." *Id.* at 1.

C. Transit Accessibility in Philadelphia and N.Y.C.

1. Current State of Transit Accessibility in Philadelphia and N.Y.C.: By the Numbers; Buses & Paratransit as Inadequate Solutions to Accessibility Issues

The rail, trolley, and bus services of SEPTA and the MTA are covered by the ADA.[113] Over thirty years after the law's passage, however, the two agencies lag far behind the rest of the country in making their systems—particularly their rail networks—accessible.[114]

To try to make up for the lack of accessibility in their rail systems, both SEPTA and the MTA have increased accessibility on buses and have established paratransit services.[115] SEPTA's buses are fully accessible,[116] and the MTA's buses are ostensibly wheelchair-accessible, a fact that the N.Y.C. agency often advertises

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113. *See* 42 U.S.C. § 12141 (defining "public transportation" for the purposes of the ADA).

114. Roughly 51% of Philadelphia's rail (i.e., non-trolley) stops are accessible. *See supra* note 19 (noting this statistic and citing the author's methodology for assessing accessibility numbers). In N.Y.C., less than 30% of the city's subway stations are ADA-accessible. *MTA Accessible Stations*, *supra* note 76. In contrast, Chicago, e.g., went from having just thirteen of the city's 139 rail stations accessible in 1991 to having one hundred accessible by 2021. *Compare* CHI. TRANSIT AUTH., ACCESSIBLE SERVICES FOR PERSONS WITH DISABILITIES (1991), CHI.-L.ORG, https://www.chicago-l.org/maps/route/maps/1991ADA.jpg [https://perma.cc/E6RL-CJMZ] (listing the thirteen stations that were fully accessible in 1991), *with Rail ('L') System Map*, CHI. TRANSIT AUTH. (2021), INTERNET ARCHIVE WAYBACK MACH. (Sept. 15, 2021), https://web.archive.org/web/20210915091155/https://www.transitchicago.com/assets/1/6/ctamap_Lsystem.pdf [https://perma.cc/M7HQ-Z85Z].

115. SEPTA's paratransit service is named CCT Connect, *CCT Connect*, SEPTA, https://www5.septa.org/travel/cct/ [https://perma.cc/8AUV-GX7F], and the MTA's is named Access-A-Ride, *Welcome to Access-A-Ride Paratransit Service*, MTA, https://new.mta.info/accessibility/paratransit [https://perma.cc/R6BL-NJUG].

116. *Vehicle Accessibility*, SEPTA, https://www5.septa.org/about/accessibility/vehicle-accessibility/ [https://perma.cc/M4K5-4SH7] (noting the buses' various accessible features, such as wheelchair ramps (or lifts) and audible stop announcements).

as meaning that the buses are a viable alternative to the subway.[117] However, neither of these options is actually an adequate accessibility replacement for rail or trolley services. In fact, the buses and paratransit services in N.Y.C. present so many issues, particularly compared to the trains, that an analyst at TransitCenter said that the MTA's emphasis on those two programs as an alternative to the subway constituted "a separate but equal kind of argument."[118]

As a start, while N.Y.C.'s buses are supposedly wheelchair-accessible, passengers in wheelchairs have long reported a wide variety of problems with riding the buses. Many have shared stories of MTA workers whose behavior ranges from inept to unfair to offensive—or even traumatic.[119] Even if the buses were fully

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117. *See* Emily Nonko, *The NYC Subway Has an Accessibility Problem—Can It Be Fixed?*, CURBED N.Y. (Sept. 21, 2017, 1:26 PM), https://ny.curbed.com/2017/9/21/16315042/nyc-subway-wheelchair-accessible-ada [https://perma.cc/MX79-H63T] ("[The] MTA touts buses and Access-a-Ride as the alternative to inaccessible subway systems").

118. Nonko, *supra* note 116.

119. The comments on one article about the N.Y.C. buses' accessibility issues are particularly illuminating. One person wrote in February 2020:

> I'm[ ]a rollator user and my biggest fear is being told to wait for the next bus! The next bus comes and I'm told the same thing! Why don't I just sit there and wait for the rush hour [to] end there [and] maybe I'd be able to get on a bus to go home like everyone else!

Colleen Brennan, Comment to *City Buses Are Wheelchair-Accessible, But Disabled Riders Still Face Obstacles*, CITY LIMITS (July 2, 2018), https://citylimits.org/2018/07/02/city-buses-are-wheelchair-accessible-but-disabled-riders-still-face-obstacles/ [https://perma.cc/6QRC-G7WM]. Another described being denied service seemingly maliciously, writing, "There have been time's [sic] when I would ask the bus driver could he lower the bus and was told no. One went so far as to tell me to use Access[-]A[-]Ride." Christine Jemison, Comment to *City Buses Are Wheelchair-Accessible, But Disabled Riders Still Face Obstacles*, CITY LIMITS (July 2, 2018), https://citylimits.org/2018/07/02/city-buses-are-wheelchair-accessible-but-disabled-riders-still-face-obstacles/ [https://perma.cc/6QRC-G7WM]. Meanwhile, one wheelchair user, taking to Twitter to vent her frustrations, said that drivers who had improperly strapped her in had, inter alia, broken her "$6000 titanium chair," which at the time was just three months old, Jessy Yates (@JessyYates), TWITTER (May 10, 2018, 11:02 AM), https://twitter.com/JessyYates/status/994593638377238529 [https://perma.cc/3ZAZ-BMA5], and "flipped [her] backwards[,]" Jessy Yates (@JessyYates), TWITTER (May 10, 2018, 11:02 AM), https://twitter.com/JessyYates/status/994593639736184832 [https://perma.cc/U2MG-FN7C]. The same person described being forcibly

wheelchair-accessible, however, that would not constitute full accessibility: for example, many (if not most) N.Y.C. buses still lack effective ways of communicating announcements to passengers with visual and/or audial disabilities, thereby greatly reducing those riders' ability to use the buses independently.[120]

Even putting aside issues of accessibility on the buses, one problem that remains is that *both* cities' buses are quite slow,[121]

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strapped down against her will by a bus driver, who told her, "[Y]ou know your [sic] a liability for us." Jessy Yates (@JessyYates), TWITTER (May 10, 2018, 11:02 AM), https://twitter.com/JessyYates/status/994593640965197824 [https://perma.cc/B3J4-HL4P]. That was the second time this rider had been called a "liability" by an MTA employee in just two days. *Id.*; Jessy Yates (@JessyYates), TWITTER (May 10, 2018, 11:02 AM), https://twitter.com/JessyYates/status/994593650159046657 [https://perma.cc/U37Z-T45K] ("@MTA we were stopped by a gate agent (after climbing the steps) that attempted to dissuade us from entering the train stating that generally she needed to call the cops or nyfd [sic] to be my escort as i [sic] was a liability."). For details about bus drivers' lack of knowledge on how to operate wheelchair ramps and lifts, see generally Jeanmarie Evelly, *City Buses Are Wheelchair-Accessible, But Disabled Riders Still Face Obstacles*, CITY LIMITS (July 2, 2018), https://citylimits.org/2018/07/02/city-buses-are-wheelchair-accessible-but-disabled-riders-still-face-obstacles/ [https://perma.cc/6QRC-G7WM].

120. The MTA claims that automated announcements will be present in "[a]ll new buses" and that the existing fleet is being "retrofitted" to include this feature. MTA, GUIDE TO ACCESSIBLE TRANSIT ON BUSES AND SUBWAYS 32, https://new.mta.info/sites/default/files/2019-12/Accessibility_Guide_8_1.pdf [https://perma.cc/BF7P-JY7M]. However, that may not even solve the problem entirely: at least in the early days of automated bus announcements, in the rare instances where the bus came equipped with that technology, drivers would often simply turn it off if they did not like listening to it. Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 401 (2001). Meanwhile, many or most buses also lack screens, meaning closed captioning is not available to communicate the driver's announcements to any members of the Deaf community using the bus. Evelly, *supra* note 118.

121. In Philadelphia, buses' scheduled speeds in 2017 were below twelve miles per hour for most of the day. SEPTA & Jarrett Walker & Assocs., *Is Transit Useful? Key Indicators*, *in* SEPTA & JARRETT WALKER & ASSOCS., PHILADELPHIA BUS NETWORK CHOICES REPORT 30, 32 (2018), INTERNET ARCHIVE WAYBACK MACH. (Mar. 2, 2022), https://web.archive.org/web/20220302135328/http://www.septa.org/service/bus/network/pdf/2018-philadelphia-choices-report-chapter-2.pdf [https://perma.cc/WZS6-A5DN]. In N.Y.C., meanwhile, in October 2021, buses traveled at a citywide average of just 7.9 miles per hour; in Manhattan, the average bus speed was six miles per hour, the slowest of the five boroughs. Kevin Duggan, *Crawling Along: MTA Bus Speeds Are Down in All Five*

especially when compared to their trains.[122] Thus, access to buses and paratransit does not erase the equity problems inherent where there are disparities—including racial/ethnic ones—in access to ADA-compliant rail stops.

Meanwhile, the paratransit systems are also significantly flawed and do not come close to offering an equally viable alternative to the rail and/or trolley networks. Beyond the initial roadblocks slowing access to the paratransit systems themselves,[123] there are a number of obstacles preventing effective use of the programs.[124] For

Boroughs, Agency Stats Show, AMNY (Nov. 14, 2021), https://www.amny.com/transit/mta-bus-speeds-slow-down-in-all-five-boroughs/ [https://perma.cc/592T-PL4F].

122. While it is difficult to find any recent data for SEPTA's trains, one SEPTA report showed that, in 2006, the non-commuter trains ran at an average of just under twenty miles per hour, and the commuter trains ran at an average of roughly twenty-seven miles per hour. DEL. VALLEY REG'L PLAN. COMM'N, SPEEDING UP SEPTA: FINDING WAYS TO MOVE PASSENGERS FASTER 8–9 (2008), https://www.dvrpc.org/reports/08066.pdf [https://perma.cc/VB6V-X2PP]. Assuming the trains are less likely than buses to change speed over the years, that means that, at least pre-pandemic, Philadelphia's commuter trains operated at over double the speed of its buses. *See supra* note 120 (discussing the speed of Philadelphia's buses). Meanwhile, one amateur analysis found that N.Y.C. subway trains, on average, travelled at 17.4 miles per hour—more than twice as fast as the city's buses. Matt Johnson, *Average Schedule Speed: How Does Metro Compare?*, GREATER GREATER WASH. (Mar. 16, 2010), https://ggwash.org/view/4524/average-schedule-speed-how-does-metro-compare [https://perma.cc/V6K6-FWY9] (finding the N.Y.C. subway's average speed to be 17.4 miles per hour); *see supra* note 120 (discussing the speed of N.Y.C.'s buses). *But see* Jen Carlson, *How Fast Can a Subway Train Go?*, GOTHAMIST (May 17, 2017), https://gothamist.com/arts-entertainment/how-fast-can-a-subway-train-go [https://perma.cc/F34F-QVX3] (citing Matt Johnson's article but nonetheless noting that, according to the MTA, "[t]here is no average speed for the city's subway trains[;] . . . it's not something they calculate, and speed limits vary throughout the system").

123. Both systems require pre-screening for eligibility. *CCT Connect Eligibility and Registration*, SEPTA, https://www5.septa.org/travel/cct/cct-connect-eligibility/ [https://perma.cc/Q3DN-B3PP] (detailing the application process for CCT connect); *How to Apply or Recertify for Access-A-Ride*, MTA (Feb. 14, 2022), https://new.mta.info/accessibility/paratransit/how-to-apply-or-recertify-for-access-a-ride [https://perma.cc/NVV9-4PQH] (detailing the application process for Access-A-Ride); *see also infra* note 129 (discussing alleged unfairness in the evaluations of Access-A-Ride's applicants).

124. For a more detailed discussion of paratransit's issues in Philadelphia and N.Y.C., see generally, e.g., FED. TRANSIT ADMIN., SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY: ADA PARATRANSIT COMPLIANCE REVIEW FINAL REPORT (Sept. 2018), https://www.transit.dot.gov/sites/fta.dot.gov/

example, with the exception of an N.Y.C. program still in a temporary status,[125] paratransit pickups must be scheduled at least one day in advance in both Philadelphia and N.Y.C.[126] Often, the systems' problems involve subjecting the riders to strict rules while giving significant deference to drivers. Furthermore, riders in both cities are

files/docs/regulations-and-guidance/civil-rights-ada/118291/septa-final-ada-paratransit-report-2018.pdf [https://perma.cc/RF8P-WPKD] (explaining in detail the findings of an FTA compliance review of CCT Connect); Charles D. Ellison, *Reality Check: Riding SEPTA While Elderly*, THE PHILA. CITIZEN (Nov. 27, 2017), https://thephiladelphiacitizen.org/reality-check-riding-septa-while-elderly/ [https://perma.cc/UB2C-ENWW] (noting that CCT Connect is "rife with issues"); Claire Perlman, *Paratransit Services in New York City Are Severely Limited and Unpredictable. They Still Cost $614 Million a Year.*, PROPUBLICA (Feb. 6, 2020, 5:00 AM), https://www.propublica.org/article/new-york-mta-paratransit-services [https://perma.cc/EGX7-VZBQ] (describing Access-A-Ride's many problems).

125. Clayton Guse, *MTA Boots Troubled Vendor from Popular Access-A-Ride Program*, N.Y. DAILY NEWS (Dec. 8, 2021, 7:05 PM), https://www.nydailynews.com/new-york/ny-mta-e-hail-on-demand-access-a-ride-curb-20211209-dx67x4mzvvgm7gn7ajpnf3cjbu-story.html [https://perma.cc/8NWR-HSVL]. SEPTA users were also briefly able to book a same-day trip via paratransit at the start of the COVID-19 pandemic. Patricia Madej, *For CCT Riders, Booking a Same-Day Trip Is a Hope. So Is Using a SEPTA Key Card.*, PHILA. INQUIRER (Sept. 1, 2020), https://www.inquirer.com/transportation/septa-cct-connect-key-card-reservations-coronavirus-20200901.html (on file with the *Columbia Human Rights Law Review*).

126. *CCT Connect*, *supra* note 114 ("There is no same-day or emergency service."); *Making a Reservation and Managing Trips*, MTA (Aug. 1, 2022), https://new.mta.info/accessibility/paratransit/making-a-reservation-and-managing-trips [https://perma.cc/A84L-RQX8] ("You must call one to two days in advance to reserve your trips."). Forcing riders to make appointments far in advance creates significant restraints on the sense of freedom of movement that paratransit is supposed to ensure for its passengers. As a SEPTA report described this sense while commenting on the importance of frequent non-paratransit bus arrivals: transit ideally evokes, among other sentiments, "the feeling of liberty you have with a private vehicle—namely that you can go anytime." SEPTA & Jarrett Walker & Assocs., *supra* note 120, at 32.

strictly penalized for being late to rides,[127] whereas paratransit drivers are allowed to arrive well past a scheduled pickup time.[128]

Finally, even once a rail or subway station is ostensibly accessible, that does not always match up with reality, especially in N.Y.C. The MTA's elevators, for instance, are notoriously prone to breaking down.[129] Additionally, there are many problems with matters of non-vertical accessibility, often including on the train itself.[130]

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127. *Traveling on CCT Connect*, SEPTA, https://www5.septa.org/travel/cct/traveling-on-cct-connect/ [https://perma.cc/77PH-WLDA] (explaining that riders are penalized for boarding the vehicle more than five minutes after the driver's arrival); MTA, ACCESS-A-RIDE NO-SHOW/LATE CANCELLATION POLICY (Sept. 7, 2021), https://new.mta.info/document/52961 [https://perma.cc/YEB5-8VH6] (same).

128. *Traveling on CCT Connect*, *supra* note 126 ("Be ready and waiting to board 10 minutes before the scheduled pickup time, and up to 20 minutes after."); *On the Day of Your Trip*, MTA (Oct. 1, 2020), https://new.mta.info/accessibility/paratransit/on-the-day-of-your-trip [https://perma.cc/6NSY-GL2M] ("Be prepared to wait up to 30 minutes after your scheduled pickup time.").

129. One report, as described by an article, found "there were more than 14,000 unplanned elevator outages [in 2018], and 840 incidents of 'entrapment,' or reports of people trapped in a broken elevator." Clayton Guse, *NYC Subway Elevators Constantly Break Down: Report*, N.Y. DAILY NEWS (Mar. 20, 2019, 8:08 PM), https://www.nydailynews.com/new-york/ny-metro-elevators-performance-stats-mta-subway-20190321-xc5utix2xfaq7fwg7sthhx45lq-story.html [https://perma.cc/8QHU-PW7B]. A 2017 audit of the system's elevators and escalators found that "only approximately one-fifth of the machines in our sample received all of their scheduled PM service assignments, and 34 percent of the assignments were not completed timely or at all[.]" CITY OF N.Y. OFF. OF THE COMPTROLLER, MD16-103A, AUDIT REPORT ON NEW YORK CITY TRANSIT'S EFFORTS TO INSPECT AND REPAIR ELEVATORS AND ESCALATORS 8 (2017), https://comptroller.nyc.gov/wp-content/uploads/documents/MD16_103A.pdf [https://perma.cc/3SBZ-VE87].

130. For instance, there are frequently auditory issues with subway announcements. One example comes from the fact that certain trains' standard station-by-station announcements (including the name of the station, the train lines operating there, and the accessibility of the station) are still given live by the conductor via the PA system; these announcements are often very hard, if not impossible, to understand. James Barron, *Subway Announcements Are Changing (Not That You Can Hear Them Anyway)*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/nyregion/subway-announcements-are-changing-not-that-you-can-hear-them-anyway.html (on file with the *Columbia Human Rights Law Review*). In contrast, other train lines have automated announcements, which are typically far easier to hear and understand. *See* NYPIRG STRAPHANGERS CAMPAIGN, STATE OF THE SUBWAYS REPORT

2. ADA Enforcement: Policy Advocacy, Administrative Complaints, and Litigation

Given the clear inadequacies of transit alternatives, it is not surprising that disabled residents of Philadelphia and N.Y.C. have fought ardently to increase accessibility in their transit systems. Over the years, advocates have spoken up—in a variety of fora—for better policies around accessibility and paratransit quality.[131] A Freedom of

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CARD 5 (2016), https://www.straphangers.org/reports/StateoftheSubways2016.pdf [https://perma.cc/RAA5-7CQ3] (detailing the different levels of clarity of subway announcements on different train lines). For a more in-depth discussion of non-vertical accessibility issues on the N.Y.C. subway, see generally Stark-Miller, *supra* note 59. An emphasis on vertical accessibility at the expense of non-vertical accessibility mirrors issues around unequal recognition of "visible" and "invisible" disabilities. *See, e.g.*, N. Ann Davis, *Invisible Disability*, 116 ETHICS 153 (2005) (noting that people with invisible disabilities sometimes "have to convince other people that they really are disabled, not seeking some special—unfair—advantage: thus, what they must do is meet a burden of proof. They thus face a double bind: either they forgo the assistance or accommodation they need . . . or . . . endure the discomfort of . . . strangers' interrogations"). This problem is certainly present in N.Y.C.: one rollator user, frustrated after being denied access to the city's paratransit service (Access-A-Ride), commented on an article about bus accessibility, writing that "if you're not missing [a] limb or your disability is not visible to the eye, forget it!! DENIED!" Colleen Brennan, Comment to *City Buses Are Wheelchair-Accessible, but Disabled Riders Still Face Obstacles*, CITY LIMITS (July 2, 2018), https://citylimits.org/2018/07/02/city-buses-are-wheelchair-accessible-but-disabled-riders-still-face-obstacles/ [https://perma.cc/J53G-4JJD].

131. *See, e.g.*, Imani Barbarin, Opinion, *Accessibility Isn't Charity — It's a Lifesaving Responsibility*, PHILA. INQUIRER (Feb. 13, 2019), https://www.inquirer.com/opinion/commentary/septa-disability-access-subway-death-20190213.html (on file with the *Columbia Human Rights Law Review*) (advocating for improved accessibility in SEPTA's transit system and paratransit service); Tom MacDonald, *SEPTA Riders with Disabilities Say One Street-Level Elevator Isn't Enough to Improve Accessibility*, WHYY (July 26, 2021), https://whyy.org/articles/septa-riders-with-disabilities-say-one-street-level-elevator-isnt-enough-to-improve-accessibility/ [https://perma.cc/K2GJ-FZ6P] (detailing a press conference held calling for more and better elevators); Carol Tannenhauser, *Subway Station Closes for Renovations, as Politicians and Activists Call It a Blown Opportunity*, W. SIDE RAG (Apr. 11, 2018, 8:40 PM), https://www.westsiderag.com/2018/04/11/subway-station-closes-for-renovations-as-politicians-and-activists-call-it-a-blown-opportunity [https://perma.cc/8LTW-67MH] (detailing protests around the MTA's decision not to include accessibilization in its remodeling of the B/C station at W. 110th St and Frederick Douglass Blvd); *Rally Held Against Shared Rides on Access-A-Ride*, N.Y. LAWS. FOR THE PUB. INT. (Aug. 25, 2021), https://www.nylpi.org/rally-held-against-

Information Act (FOIA) request by the author to the DOJ's Civil Rights Division revealed a number of complaints submitted regarding accessibility of the two transit systems—two regarding the trolleys in Philadelphia, two about the railways in Philadelphia, and one against the MTA. Four of the five were referred to the Department of Transportation; one of the trolley complaints was referred to the U.S. Attorney's Office.[132] A follow-up FOIA request sent to the FTA revealed at least four complaints submitted over the last three years regarding accessibility in the SEPTA and/or MTA transit systems writ large, with two of the complaints having been referred in from the DOJ.[133] Finally, a separate follow-up request submitted to the Department of Transportation's Office of the Secretary (OST), whose FOIA team handles at least some requests relating to civil rights,[134] revealed that OST did not have any relevant records.[135]

Meanwhile, a different form of legal action around this topic has played out much more publicly, as residents of both cities have turned to the courts, relying on litigation to improve accessibility. Notably, SEPTA appears to have steered clear of such controversy since its loss in federal district court and, eventually, the Third Circuit in a lawsuit stemming from a failure to accessibilize a station undergoing renovation.[136] However, the MTA has continued practices questionable under the ADA and NYCHRL, leading to more litigation.[137] The lawsuits, generally relying on one or both of those

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shared-rides-on-access-a-ride/ [https://perma.cc/SXR9-2W3J] (detailing a protest held about shared rides under Access-A-Ride, the N.Y.C. paratransit service).

132. E-mail from April N. Freeman, FOI/PA Unit, Civ. Rts. Div., Dep't of Just., to Henry Goldberg, Author of this Note (Sept. 2, 2022, 1:46 PM EDT) (on file with the *Columbia Human Rights Law Review*).

133. Email from Nancy Sipes, FTA FOIA Office, to Henry Goldberg, Author of this Note (Jan. 11, 2023, 11:03 AM EST) (on file with the *Columbia Human Rights Law Review*).

134. *DOT Organizations and FOIA Contacts*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/individuals/foia/dot-organizations-and-foia-contacts [https://perma.cc/4CN5-HEAD].

135. Email from Kristen Ellis, DOT/OST FOIA Analyst, to Henry Goldberg, Author of this Note (Jan. 27, 2023, 3:20 PM EST) (on file with the *Columbia Human Rights Law Review*).

136. Disabled in Action of Pa. v. Se. Pa. Transp. Auth., 655 F. Supp. 2d 553 (E.D. Pa. 2009), *aff'd* 635 F.3d 87 (3d Cir. 2011) (granting summary judgment in favor of the plaintiffs).

137. For example, in 2019, Disability Rights Advocates, an advocacy group based in N.Y.C., filed a class-action suit against the MTA and the City of N.Y.,

two statutes, have been grounded in a variety of rationales: for example, some rely on the general lack of accessible stations;[138] others stem from instances where the MTA remodeled one or more stations without accessibilizing them;[139] and at least one case rests on the MTA's failure to maintain the elevators it had already installed.[140]

The most significant development in this front recently has been a settlement agreement reached for two class-action suits brought against the MTA (one in federal court and one in state

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alleging that all of the station renovations that had been completed without making stations accessible were in violation of the ADA. Forsee v. Metro. Transp. Auth., No. 19-cv-4406(ER), 2020 WL 1547468 (S.D.N.Y. Mar. 31, 2020). In the only opinion released thus far in the lawsuit, the court denied the City of N.Y.'s motion to dismiss for failure to state a claim. *Id.* at *8. Notably, this case—whose name has changed to *De La Rosa v. Metropolitan Transportation Authority*—has since been settled. *See infra* notes 140–142 and accompanying text (discussing the settlement in more detail).

138. Stephen Nessen, *Lawsuit Against MTA over Accessibility Attains Class-Action Status with More Than 500,000 Plaintiffs*, GOTHAMIST (Feb. 25, 2021), https://gothamist.com/news/lawsuit-against-mta-over-accessibility-attains-class-action-status-more-500000-plaintiffs [https://perma.cc/A5KY-LRXL]. One of these suits was a 2017 suit filed in state court alleging failure to uphold the NYCHRL; in 2020, the Appellate Division upheld the lower court's refusal to dismiss the case, Ctr. for Indep. of the Disabled v. Metro. Transp. Auth., 125 N.Y.S.3d 697, 702, 709 (N.Y. App. Div. 2020), and in February 2021, the lawsuit reached class-action status, Nessen, *supra*. In 2022, a settlement agreement was reached in this case, together with the parties in *De La Rosa* (the case previously known as *Forsee*). Press Release, Disability Rts. Advocs., Disability Advocates and MTA Reach Historic Settlement to Make the NYC Subway Accessible to People Who Need Stair-Free Access (June 22, 2022), https://dralegal.org/press/mta-settlement/ [https://perma.cc/S7YZ-3N7J]; *see infra* notes 140–142 and accompanying text (discussing the settlement in more detail and providing citations to the filed settlement documents).

139. *See, e.g.*, Bronx Indep. Living Servs. v. Metro. Transp. Auth., 358 F. Supp. 3d 324, 329–30 (S.D.N.Y. 2019) (granting plaintiffs' motion for partial summary judgment on the grounds that the MTA had been bound under the ADA to include accessibility improvements when it replaced a station's stairs); for details on federal intervention in this case, see *infra* note 216.

140. Brooklyn Ctr. for Indep. of the Disabled v. Metro. Transp. Auth., 11 F.4th 55 (2d Cir. 2021) (vacating the district court's granting of summary judgment in favor of the MTA and remanding accordingly). For more information about the issues with the MTA's current elevators, see *supra* note 128 and accompanying text.

court).[141] The settlement set up a timeline for accessibilization: "in addition to the 81 stations currently slated for accessibility in the 2020-2024 Capital Program, 85 more stations will be accessible by 2035, another 90 by 2045, and the final 90 by 2055."[142] The City of N.Y. was not a party to the settlement but was dismissed as a defendant pursuant to a stipulation of dismissal.[143]

3. SEPTA's and the MTA's Most Recent Commitments to Accessibility

While this advocacy and litigation clearly shows the issues with the two transit authorities' accessibility levels, SEPTA and the MTA have nonetheless been making at least some progress. The two organizations have been taking rather different approaches. SEPTA has not made any significant announcements around large accessibility commitments as of late; rather, it has been focusing on station-by-station accessibilization, as well as the inclusion of accessibilization in any wholesale station updates.[144] The MTA,

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141. The settlement agreement was filed both in federal court, Settlement Agreement, Forsee v. Metro. Transp. Auth., *sub nom* De La Rosa v. Metro. Transp. Auth., No. 19-cv-4406(ER) (S.D.N.Y. Sept. 27, 2022) [hereinafter *De La Rosa* Settlement Agreement], ECF No. 159-1, and in state court, Exhibit 1, Ctr. for Indep. of the Disabled v. Metro. Transp. Auth., No. 153765/2017 (N.Y. Sup. Ct. Sept. 27, 2022), NYSCEF No. 244 [hereinafter *Ctr. for Indep. of the Disabled* Settlement Agreement].

142. Press Release, Disability Rts. Advocs., *supra* note 137*; see also* Gold, *supra* note 76 (discussing the settlement). The MTA's current chief, Janno Lieber, stated that accessibilizing some of the subway stations in the remaining 5% of the system is not feasible at this time due to structural issues—but that he hoped that future technologies would change that fact. Kevin Duggan, *MTA Settles Lawsuits, Agrees to Make 95% of Subway Stations Accessible by 2055*, AMNY (June 22, 2022), https://www.amny.com/transit/mta-settles-lawsuits-agrees-to-make-95-of-subway-stations-accessible-by-2055/ [https://perma.cc/7B5P-CNYQ].

143. *De La Rosa* Settlement Agreement, *supra* note 140, at 25–26, 32 (lacking the City of N.Y.'s signature on the settlement agreement but then stipulating the City's dismissal); *Ctr. for Indep. of the Disabled* Settlement Agreement, *supra* note 140, at 24–25, 31 (same).

144. *See, e.g.*, SEPTA, *Erie Station Accessibility Improvements*, I SEPTA PHILLY (July 26, 2021), https://iseptaphilly.com/blog/eriestation [https://perma.cc/UMB2-RJDN] (expressly focusing on accessibilizing a station); Jason Laughlin, *SEPTA Commits $34 Million to Build New Ardmore Train Station*, PHILA. INQUIRER (June 28, 2019), https://www.inquirer.com/news/ardmore-train-station-new-septa-regional-rail-amtrak-20190628.html (on file with the *Columbia Human*

meanwhile, committed in 2019 to spending billions to make as many as seventy stations newly accessible as part of a broader station improvement project.[145] Although the MTA did pause this plan,[146] assumedly as a result of COVID-19, it has since resumed it.[147] The MTA's biggest commitment, however, came from its decision in 2022 to end two class-action lawsuits by signing a settlement agreement requiring 95% of the subway system to be accessibilized by 2055.[148]

All of these commitments to accessibilization by the MTA are fantastic news. However, they are also reminders of the importance of ensuring that the selection of stations for accessibilization is done equitably. For example, the MTA stated at one point that one of its goals was to ensure that all New Yorkers were within two stops of an accessible station.[149] However, the distance required to travel two stations away differs drastically in different parts of the city,[150]

Rights Law Review) (including accessibilization in the broader plan for upgrading a station).

145. *See* Stephen Nessen, *Andy Byford 'Ecstatically Happy' over MTA's 'Largest Ever' $51.5 Billion Capital Plan*, GOTHAMIST (Sept. 16, 2019), https://gothamist.com/news/andy-byford-ecstatically-happy-over-mtas-largest-ever-515-billion-capital-plan [https://perma.cc/U2M8-26ZB] ("The 2020-2024 capital plan calls for . . . new elevators in 70 stations . . . .").

146. *See* Nessen, *supra* note 137 ("The MTA has paused its current capital plan, which would have added 70 more accessible stations . . . .").

147. Press Release, Metro-North R.R., MTA Announces Completion of Third Avenue Bridge Renewal Project in Mt. Vernon – Fourth Bridge Opened by MTA in Mt. Vernon in Three Years (Aug. 10, 2021, 7:45 PM), https://new.mta.info/press-release/mta-announces-completion-of-third-avenue-bridge-renewal-project-mt-vernon-fourth [https://perma.cc/CSE6-T8UU].

148. *See supra* notes 140–142 and accompanying text (discussing the settlement in more detail).

149. Press Release, N.Y.C. Transit, Avenue H Station on Q Line Now Fully Accessible (July 15, 2021, 5:15 PM), https://new.mta.info/press-release/avenue-h-station-q-line-now-fully-accessible [https://perma.cc/STV8-PXUS].

150. For example, walking from the Woodlawn station two stops down along the 4 line, to the Bedford Park Boulevard station, takes twenty-four minutes, but it takes merely nine minutes to walk from the 23rd St stop to the 34th St / Penn Station stop (two stations away on the 1/2/3 line). *Compare* Walking Directions from Woodlawn Station to Bedford Park Boulevard Station, GOOGLE MAPS, https://goo.gl/maps/N2RrRuGwrm2hyQt97 [https://perma.cc/NEY3-KPEM] (showing a twenty-four-minute walking time), *with* Walking Directions from 23 St to 34 St - Penn Station, GOOGLE MAPS, https://goo.gl/maps/aLL7HZdAoYsiH64JA [https://perma.cc/F2U5-FL6U] (showing a nine-minute walking time).

meaning that while the MTA's goal here is certainly admirable and an important step in the correct direction, it may implicate more equity issues than first meets the eye. As a result, it is vital to ensure that the accessibilization process takes place in an equitable manner. As the analysis shows, the data bears out this exact concern.[151]

4. Philadelphia's Trolleys[152]

Philadelphia has a trolley problem. The city operates eight tram routes, which, in FY2019, carried slightly over 15% of the transit network's non-bus passengers.[153] However, not one of the 317 locations for boarding the trolleys[154] is accessible. That is because the trolleys *themselves* are not accessible.[155] To its credit, SEPTA has announced plans to acquire new trolley cars, which will seemingly be ADA-compliant.[156] However, this process is expected to take five to seven years, and given that SEPTA does not even currently have enough trolleys to run on all of its routes, it is doubtful that the entire fleet will be accessible anytime soon.[157] In fact, it is not even clear if all routes will be serviced by the new, accessible cars—or if they will only be deployed in certain areas.

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151. *See infra* Part III (showing that there is a statistically significant difference in accessibility based along racial and ethnic lines).

152. SEPTA officially refers to the vehicles in question as "trolleys." *See, e.g.*, *Trolley Lines*, SEPTA, https://www5.septa.org/travel/routes/?service=trolley [https://perma.cc/583L-AXXP] (referring to the lines as "[t]rolley [l]ines"). However, in this Note, the term "trolley" is used interchangeably with the terms "tram" and "streetcar."

153. In total, on average, the trolleys carried nearly eighty thousand passengers per weekday. *2019 SEPTA Ridership Data*, NATRONICS.ORG (Sept. 2021), https://natronics.org/2021/septa_ridership/ [https://perma.cc/FB7S-4NZU].

154. This number was reached using analysis of the data collected for this Note.

155. *See* DEL. VALLEY REG'L PLAN. COMM'N, MODERN TROLLEY STATION DESIGN GUIDE: SEPTA SUBURBAN TRANSIT DIVISION 3 (2018), https://www.dvrpc.org/Reports/17010.pdf [https://perma.cc/SH9S-N2CE] ("Passengers in wheelchairs cannot board SEPTA's trolleys, and passengers with other mobility challenges . . . can only do so with difficulty.").

156. Tom MacDonald, *SEPTA Starts Process of Replacing More Than 100 Trolleys*, WHYY (May 15, 2022), https://whyy.org/articles/septa-starts-process-replacing-more-than-100-trolleys/ [https://perma.cc/CRH9-D5WC] (describing the announcement and noting that the new trolleys were expected to have space on board for wheelchairs).

157. *Id.*

Even before it announced its concrete plans to purchase new trolleys, SEPTA had also been seeking not only to update the trolleys themselves but also to update their routes and stops[158] and build new stations,[159] a process that may not be completed until 2034.[160] One source of this focus on building trolley stations at the expense of quicker accessibilization may be found in a December 2017 report by the Delaware Valley Regional Planning Commission (DVRPC),[161] "the federally designated Metropolitan Planning Organization for the Greater Philadelphia region."[162] The report claims that "[n]ew vehicles will require new, ADA-compliant stations, which will offer new amenities for passengers."[163] While this decision to reinvest in their trolley system as a whole is laudable, it is patently false that SEPTA would *need* upgraded stations to achieve at least a bare level of ADA compliance in their trolley system.[164] By apparently drawing SEPTA's attention away from the need to acquire fully accessible vehicles, this focus on the stations rather than on the trolleys themselves has thus seemingly delayed the accessibilization of the trolley system by several years.

158. *See, e.g.*, DEL. VALLEY REG'L PLAN. COMM'N, MODERN TROLLEY STATION DESIGN GUIDE: SEPTA CITY TRANSIT DIVISION, at vi (2017), https://www.dvrpc.org/Reports/15014.pdf [https://perma.cc/KLQ8-2ADC] ("At existing trolley stops, passengers board from the street at each intersection, but modern trolley *stations* will be . . . spaced efficiently—approximately every quarter mile to provide faster service to passengers.").

159. *Id.*

160. *SEPTA's Trolley Modernization Project Underway (Updated)*, W. PHILLY LOCAL (Sept. 22, 2021), https://www.westphillylocal.com/2021/09/22/septas-trolley-modernization-plan-learn-more-this-thursday-at-40th-st-trolley-portal/ [https://perma.cc/9WQX-QD3K] ("The planning phase of the project is expected to conclude by 2023, after which the design phase will begin. The construction phase is expected to start in 2028 and may take about six years.").

161. *Id.*

162. *About DVRPC*, DEL. VALLEY REG'L PLAN. COMM'N, https://dvrpc.org/about [https://perma.cc/SM7A-GBUD].

163. DEL. VALLEY REG'L PLAN. COMM'N, *supra* note 157, at vi.

164. In Toronto, e.g., the low-floor streetcars have built-in ramps that deploy whenever a passenger using a mobility device needs to board or exit the vehicle. *See, e.g.*, Toronto Transit Commission, *Accessibility: Boarding and Exiting the Low-Floor Streetcar*, YOUTUBE (Nov. 9, 2017), https://www.youtube.com/watch?v=ELRxc6Jliuo (on file with the *Columbia Human Rights Law Review*) (showing that the streetcar functions for people with mobility aids, even on an open street lacking a raised platform).

Finally, it is worth clarifying that the goal of this Note is not to argue against any progress that SEPTA or the MTA has made and/or is currently making in improving their systems, including the accessibility thereof. Each individual accessibilization is itself a victory for people with disabilities—one more place where, at least if the elevators and other relevant facilities are functioning, they have the full access they are guaranteed under law. Rather, the goal of this Note is to argue that it is vital that transit agencies ensure that the rest of their stations are accessibilized in an order that does not unfairly benefit any specific racial or ethnic groups. The data and analysis in this Note show that such rules are indeed necessary, as without safeguards, there has been a racially disparate approach to accessibilization.

II. Methodology

A. Data Collection, Organization, and Cleaning

To be able to measure the existence or lack thereof of racial disparity[165] in the accessibility of stations, a system was needed for gauging the racial makeups of various stations' users. Without that type of data easily available, the author decided to map Census tracts onto geospatial data of each city's stations. Using one technique for Philadelphia and a different one for N.Y.C.,[166] each station had one or more Census tracts assigned to it. Then, the author exported the resulting data into Excel, at which point the station-tract data was cross-referenced with detailed demographic data from the Census Bureau about each tract in order to create a demographic profile of each station. Full details of this process and the other steps taken for each city are below.

165. In this Note, unless explicitly specified otherwise, "racial disparity," "ethnic disparity," and "disparate impact" both refer to a statistically significant difference in accessibility based along racial or ethnic lines, not a legal standard associated with, e.g., Title VI.

166. For a detailed explanation of why different strategies for assigning Census tracts were used, see *infra* note 177 and accompanying text.

1. Philadelphia

The author first downloaded the station data from SEPTA's page on ArcGIS.[167] The rail stations came pre-coded, including for accessibility; however, the accessibility data was outdated and needed to be updated by manually checking the list against SEPTA's transit map.[168] The list also contained one redundancy, which was removed.[169] Finally, it is worth noting that the PATCO Line's stations

167. SEPTA GIS DATA PORTAL, https://gis-septa.hub.arcgis.com/ [https://perma.cc/SFC2-4TQC]. The trolley stops were included for multiple reasons. First, as the City of Philadelphia itself has acknowledged, the quality of the trolleys is "a matter of equity and racial justice." CITY OF PHILA., THE PHILADELPHIA TRANSIT PLAN: A VISION FOR 2045, at 114 (2021), https://www.phila.gov/media/20210222110702/OTIS-Philadelphia-Transit-Plan.pdf [https://perma.cc/7YHG-WYZC]. This same report immediately thereafter noted that "SEPTA's trolley network service area is 59% people of color and connects these neighborhoods to opportunities in Center City and University City." *Id.* The idea that trolley quality in Philadelphia is a matter of racial equity and justice is not an uncommon sentiment. *See, e.g.*, Thomas Fitzgerald, *SEPTA Says It Will Forge Ahead with Trolley Modernization in Ambitious Capital Budget*, PHILA. INQUIRER (Apr. 26, 2021), https://www.inquirer.com/transportation/septa-trolley-modernization-capital-budget-market-frankford-line-bus-infrastructure-20210426.html (on file with the *Columbia Human Rights Law Review*) ("Upgrading the Reagan-era trolley cars to carry more people and to comply with the Americans with Disabilities Act has long been on the agency's wish list. The project is viewed as a matter of transit equity."); *Members of Congress: Earmark Funding for Trolley Modernization Today*, 5TH SQUARE (Mar. 17, 2021), https://www.5thsq.org/trolley_mod_action [https://perma.cc/9MDX-9TM9] (arguing that trolley modernization "is a matter of equity and racial justice" and noting that the trolleys "serve lower-income, higher-minority communities, connecting these neighborhoods to opportunities in Center City and University City"). Second, like the rail stations, the trolley routes are, by their very nature, immobile; even if a trolley stop is moved from one intersection to the next, the trolley will nonetheless continue to pass through both intersections.

168. *See* SEPTA, *supra* note 19 (the Philadelphia transit map).

169. The redundancy in question came from the 69th Street Transportation Center station, which was listed twice: once as part of the Norristown High Speed Line and once as part of the Market-Frankford Line. Those two lines intersect at that station, and the station is listed only once on the SEPTA map. *Id.* Thus, given that the map is a representation of how customers are meant to use the system, the author eliminated one of the two station listings. *See also infra* note 179 (discussing similar decisions made when organizing the N.Y.C. data).

were excluded from this Note's analysis, as they are not operated by SEPTA.[170]

The trolley stops, meanwhile, were not coded for accessibility, but the trolleys themselves are not accessible,[171] meaning that no stop or station can offer accessible trolley boarding. Notably, there are some problems with relying on a binary system of accessibility coding, including assumptions around continuous functionality.[172] The data was scrubbed of redundancies, and then, finally, these stations were combined with the rail stations to form one data set.

Next, the author assigned Census tracts based on how long it would take to drive from the nearest station to any given point, with the maximum distance set to a fifteen-minute drive. These proximity zones were mutually exclusive.[173] This decision to split up station areas in this manner was made in order to more accurately reflect the nature of much of the usage of the Philadelphia system: lots of the stations are part of a commuter rail network, rather than simply an

170. SEPTA, *supra* note 19 (noting that the PATCO Line is "not a SEPTA service").

171. Over the phone, a SEPTA employee informed the author that the trolleys themselves are not accessible. This was also confirmed in a report by the Delaware Valley Regional Planning Commission. DEL. VALLEY REG'L PLAN. COMM'N, MODERN TROLLEY STATION DESIGN GUIDE: SEPTA SUBURBAN TRANSIT DIVISION 3 (2018), https://www.dvrpc.org/Reports/17010.pdf [https://perma.cc/44RY-PD3T] ("Passengers in wheelchairs cannot board SEPTA's trolleys, and passengers with other mobility challenges . . . can only do so with difficulty.").

172. For example, the elevators in stations "fall out of repair quite frequently[,]" leaving passengers relying on them forced suddenly to seek alternatives. MacDonald, *supra* note 130. For a more detailed analysis of elevator outage data in SEPTA's system, see, e.g., Ather Sharif, *Relying on SEPTA Elevators? Here Are Some Things You Should Know About.*, MEDIUM (May 4, 2019), https://athersharif.medium.com/relying-on-septa-elevators-here-are-some-things-you-should-know-about-e378df7bc7e5 [https://perma.cc/K4GW-9APF]; *see also infra* notes 181–182 and accompanying text (noting similar problems with using a binary system for the MTA's accessibility); *supra* note 128 and accompanying text (discussing issues with N.Y.C.'s elevators).

173. In other words, the zones did not overlap. Any given point was assigned solely to the station with the shortest commute by car. That being said, Census tracts were assigned to all corresponding stations: for example, if a tract contained areas assigned to Station A *and* areas assigned to Station B, then the population profiles for Stations A and B would *both* contain that tract's population data.

intra-city transportation network.[174] Indeed, some of the commuter rail stops are in other cities—and some are even in other states.[175] After determining the network map, Census tracts were overlaid, and a spatial join was employed so that each station would have its corresponding Census tracts assigned to it.[176] Finally, the author cross-referenced the resulting dataset with the Census Bureau's 2019 ACS five-year estimates[177] on race, ethnicity, and disability for each tract in order to build a demographic profile for each station.

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174. *See* SEPTA, *supra* note 19 (showing the commuter rail network). One difference between commuter rail networks and intra-city networks is that commuter rail networks are more likely to incentivize their riders to, e.g., use their stations in conjunction with personal transportation methods such as driving. Åsa Bergman et al., *Modeling Access Mode Choice for Inter-Suburban Commuter Rail*, 14 J. PUB. TRANSP. 23, 24 (2011) ("Walk access dominates city transit and, consequently, most urban access mode choice studies focus on walking. Commuter rail riders, however, often live or work, or both, in the suburbs and depend on non-walk modes for train access." (citations omitted)). Philadelphia is no exception. *Parking*, SEPTA, https://www5.septa.org/travel/parking/ [https://perma.cc/8FWE-B5G5] ("Many Regional Rail and Norristown High-Speed Line Stations, as well as several other locations, offer parking facilities for commuters.").

175. The commuter rail system extends into New Jersey and Delaware. It reaches Wilmington, DE, and Trenton, NJ. SEPTA, *supra* note 19.

176. Tracts that only slightly touched the network map were eliminated to minimize distortions of the data. Additionally, it should be noted that while each individual *point* in the area was assigned to just one station, that did not mean that the Census tracts themselves were each assigned to one station. Many, if not most, of the tracts were split into two or more station areas, meaning that the data from those were actually assigned to multiple stations. This approach mirrors that of an analysis method mandated by the FTA. FTA CIRCULAR, *supra* note 37, ch. IV, at 8 ("[Transit providers must prepare a] base map of the transit provider's service area that overlays Census tract, Census block or block group, traffic analysis zone (TAZ), or other locally available geographic data with[, inter alia,] transit facilities . . . .").

177. *C02003: Detailed Race*, U.S. CENSUS BUREAU, https://data.census.gov/table?text=C02003 (select "Geography," then "Census Tract," then select all Census tracts for the following counties—in Delaware: New Castle; in Maryland: Cecil; in New Jersey: Burlington, Camden, Gloucester, Hunterdon, Mercer, and Salem; and in Pennsylvania: Bucks, Chester, Delaware, Montgomery, and Philadelphia; after that, click the gray area to the right of the sidebar; then, finally, choose "2019: ACS 5-Year Estimates Detailed Tables" from the dropdown above the table area) (on file with the *Columbia Human Rights Law Review*) (offering tract-level data on race); *B03002: Hispanic or Latino Origin by Race*, U.S. CENSUS BUREAU, https://data.census.gov/table?text=B03002 (same instructions) (on file with the *Columbia Human Rights Law Review*) (offering

2. New York City

For N.Y.C., while much of the process was the same as it was for Philadelphia, certain dissimilarities required a slightly different strategy. Rather than assigning Census tracts through mutually exclusive zones based on how long it would take to drive to or from a station, the N.Y.C. tracts were assigned based on their physical distance to each station. Specifically, each station was assigned all Census tracts containing any land within a two-hundred-meter radius. This different approach was meant to reflect the differing uses of the two cities' systems.[178]

As with Philadelphia, the first step for N.Y.C. was to download geospatial data of the city's rail (here, more specifically,

tract-level data on Latine populations); *S1810: Disability Characteristics*, U.S. CENSUS BUREAU, https://data.census.gov/table?text=S1810 (same instructions) (on file with the *Columbia Human Rights Law Review*) (offering tract-level data on disability). 2019 ACS data was used because, at the time of analysis, it was the most recent data available at the level of detail needed. Notably, the FTA has said that transit authorities "may use American Community Survey (ACS) data [for analyses conducted] between decennial censuses." FTA CIRCULAR, *supra* note 37, ch. IV, at 8.

178. Proportionally speaking, Philadelphia's system has a much larger emphasis on commuters than the N.Y.C. subway. In fact, SEPTA has implicitly stated this fact by launching a strategy ("SEPTA Forward") to transition the system to one commonly used for all types of transit, not just commuting. MacDonald, *supra* note 155. This can also be seen in, e.g., the fact that there are dedicated commuter lines in SEPTA's map and only two subway lines in the SEPTA system, SEPTA, *supra* note 19 (showing the network of commuter lines and showing only two subway lines in Philadelphia), and in the fact that the N.Y.C. subway operates nonstop, whereas SEPTA does not, *compare* Stephen Nessen, *24-Hour Subway Service Resumes in New York City*, GOTHAMIST, (May 17, 2021), https://gothamist.com/news/24-hour-subway-service-resumes-new-york-city [https://perma.cc/2QL4-9UX3] (noting that the subway operates twenty-four hours per day, seven days per week), *with Schedules*, SEPTA, http://www4.septa.org/schedules/ [https://perma.cc/W2RY-E9YL] (providing links for accessing the various lines' schedules, all of which show that the system does not run twenty-four hours per day, seven days per week). Additionally, there are many more lines in N.Y.C. than there are in Philadelphia, meaning that someone in N.Y.C. might, e.g., feasibly have two or more "home" subway stations based on where in the city they are going and the routes that those stops' trains take. *Compare* MTA, *supra* note 21 (the N.Y.C. subway map), *with* SEPTA, *supra* note 19 (the Philadelphia transit map); *see also supra* note 173 (explaining other ramifications of these differences).

subway) stations,[179] export that data to a spreadsheet-compatible format, and remove redundant entries.[180]

The author then began assigning the appropriate values for the variables, first creating a variable for accessibility ("accessibility"), relying on a *mostly* binary format.[181] This way of

179. The data was downloaded through N.Y.C.'s "NYC OpenData" site. *Subway Stations*, NYC OPENDATA, https://data.cityofnewyork.us/Transportation/Subway-Stations/arq3-7z49 [https://perma.cc/QB64-7V27].

180. One station—the 7 train's "Mets–Willets Point" stop—had an associated population of zero and was thus excluded from any population-based analyses. Most adjustments, however, came from determinations regarding what constitutes a single "station." The MTA counts some stations that appear as one dot on its subway map as multiple stations forming a "station complex," such as in the case of the A/C/E trains' 14th St stop and the L train's 8th Ave stop. *Compare Subway and Bus Ridership for 2020*, MTA, https://new.mta.info/agency/new-york-city-transit/subway-bus-ridership-2020 [https://perma.cc/LW3K-ULTU] (mentioning the A/C/E trains' 14th St stop and the L train's 8th Ave stop as two separate stations that form a single station complex), *with* MTA, *supra* note 21 (showing those two stops as a single dot). The author eliminated all but one of the stations as redundant; additionally, on a case-by-case basis, when the MTA's subway map showed two or more stations as being extremely close to one another and/or connected, the author eliminated as redundant all but one of the stations. In both these examples, even though the MTA map is not always proportional with respect to distance, the author relied on the map because it represents a schematic vision of how the subway is to be utilized. If two stations' dots on the map are touching and are listed as being connected—or are, in fact, the same dot—then that indicates that the MTA expects its passengers to treat them virtually as one station.

This way of analyzing the data also created important variances compared to the MTA's data—and compared to the statistics sometimes published on the basis of that data. For example, the final list used for analysis contained 444 stations; in contrast, the MTA officially totals the number of subway stations at 472, *Subway and Bus Ridership for 2020*, *supra*. Furthermore, in this Note's dataset, 104 of the 444 stations were fully accessible and nine were partially accessible, with the overall proportions showing accessibility in 24.4% of the system. However, reports on accessibility list different statistics and often conflict among themselves. *See, e.g.*, Sequeira, *supra* note 13 (writing in September 2021 that 131 of 472 stations were accessible); Clayton Guse, *MTA Commits to Make 95% of NYC Subway Stations Accessible with Elevators and Ramps over Next 40 Years*, N.Y. DAILY NEWS (June 22, 2022, 12:24 PM), https://www.nydailynews.com/new-york/ny-mta-subway-accessibility-2055-20220622-4a6wg7qb7bd6bcy4w7zahkxihu-story.html [https://perma.cc/J883-CR2R] (writing in June 2022 that 126 of 472 stations were accessible).

181. If a station was listed as having the accessibility symbol on the MTA map, it was marked as accessible ("1"). If it did not have the accessibility symbol,

determining accessibility undoubtedly has its flaws. Namely, it gives the MTA too much credit by assuming that each station's elevators are all fully functioning all the time.[182] Furthermore, there are numerous issues with other accessibility facilities on the subway system.[183] The next variable was fully binary and was assigned based on the potential that the MTA may have viewed a specific spot as potentially being particularly useful or valuable to tourists ("tourist_interest"). The author assigned the values subjectively ("1" for places likely more important to tourists and "0" for places likely less important to tourists), trying to approximate which stations might be perceived this way by the MTA. This process was undoubtedly problematic, as there were few objective criteria to rely on, but at least a few standards were used in making the determinations.[184]

The third variable focused on whether a given station was an interchange.[185] The idea of this variable was to represent the number of other lines to which a passenger entering a given station would

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it was marked as inaccessible ("0"). Some stations are only accessible in one direction; those were assigned "0.5" for this variable. Meanwhile, some stations are only accessible for certain lines; the proportion of accessible lines was assigned as the accessibility value. The decision to include values other than 0 and 1 was an important determination because it affected the options available for statistical regressions later on. It shifted the methodology for N.Y.C. from a logistic regression to a linear regression. *See infra* notes 204–205 and accompanying text (discussing the impact of the decision to include values other than 0 and 1).

182. In reality, the elevators are extremely fraught. *See supra* note 128 (providing statistics about the issues with the system's elevators).

183. *See supra* note 129 and accompanying text (describing a number of different forms of accessibility issues on the subway).

184. One factor considered was tourist transportation: any stations important for people trying to enter or leave N.Y.C. (e.g., Penn Station) were counted. Stations serving professional sports stadiums, (e.g., the stop at Yankee Stadium) were also counted. Many of the stations counted for this variable were in Manhattan, as that is where lots of the city's classic tourist spots are located. *See, e.g.*, Lana Law, *22 Top-Rated Tourist Attractions in New York City*, PLANETWARE (Feb. 15, 2022), https://www.planetware.com/tourist-attractions-/new-york-city-us-ny-nyc.htm [https://perma.cc/V285-6QBH] (listing twenty-two tourist attractions, all but two of which are in Manhattan).

185. This variable, termed "other_lines_for_transferring," ranged from values of zero to values of 4.333 (four and one third).

have the option of transferring after exiting their train.[186] The fourth and fifth variables, meanwhile, were binary. The fourth focused on the presence of express stops,[187] and the fifth identified stations located at the ends of lines.[188]

The author then imported shapefiles of N.Y.C.'s Census tracts into ArcGIS and spatially joined them to the station data, assigning to each station any tracts located within two hundred meters. The results were exported into a spreadsheet, organized, and cross-referenced with 2019 ACS data for the City's tracts[189] in order to create a demographic profile for each station.

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186. A station without interchanges to other lines (as is the case, e.g., for the 1 train's Houston St stop) received a value of 0, as did stations where lines were running parallel but not newly intersecting (as is the case, e.g., for the B/C trains' 81st St / Museum of Natural History stop). Meanwhile, the C/S trains' Franklin Ave station, e.g., received a value of 1. Places where lines newly intersected before running parallel immediately thereafter, such as the A/B/C/D trains' 145th St station, were treated as a typical intersection (in that instance, the value assigned was 1). The end of a train route also counted as an "intersection" if other trains kept going past it: e.g., the A/C/1 trains' 168th St station received a value of 2 because someone riding on the C train but intending to travel to the A train's 175th St station would be forced to transfer to the A train at that station despite the fact that the C train did not diverge per se from the A train's path after that station.

187. The variable was named "express." Express stations were assigned 1 and non-express stations assigned 0. Stations only serving as express stops in one direction during peak hours, such as the Hunts Point Ave station in The Bronx, were also assigned values of 1. Along the J/Z line, during peak hours, the J and Z trains skip different stations in Brooklyn. MTA, *supra* note 21. Because neither train makes all stops, all stops were classified as "local" rather than express. Thus, these stations were all assigned a value of 0 for the express variable.

188. The variable was named "terminal" (named after "terminal stations"). Stations located at the ends of lines were assigned 1, and non-terminal stations were assigned 0. Stations where only one line ended, regardless of if it was running in parallel with another, were counted as terminal stations—thus, e.g., the 168th St station along the MTA's A/C/1 lines was assigned a value of 1.

189. *C02003: Detailed Race*, U.S. CENSUS BUREAU, https://data.census.gov/table?text=C02003 (select "Geography," then "Census Tract," then select all Census tracts for the following counties in New York: Bronx, Kings, New York, and Queens; after that, click the gray area to the right of the sidebar; then, finally, choose "2019: ACS 5-Year Estimates Detailed Tables" from the dropdown above the table area) (on file with the *Columbia Human Rights Law Review*) (offering tract-level data on race); *B03002: Hispanic or Latino Origin by Race*, U.S. CENSUS BUREAU, https://data.census.gov/table?text=B03002 (same instructions) (on file with the *Columbia Human Rights Law Review*) (offering

B. Hypothesis

The hypothesis being tested was that there exists a statistically significant relationship between the surrounding demographics of a station and the accessibility of that station. In particular, the hypothesis posits that stations with higher concentrations of Black and/or Latine populations living around them are less likely to be accessible. A statistically significant correlation of those racial variables with accessibility would indicate the likely existence of a racial disparity in accessibilization.[190]

III. Analysis and Results

A. Introduction

Before beginning the regression-based analysis, it is worth first examining the data visually. Data visualization can serve as an invaluable tool for improving one's sense of a dataset writ large.[191] Furthermore, in regression-heavy analyses, it presents an opportunity to step beyond the numbers and examine the data more broadly, often enabling patterns to be more easily introduced and spotted before delving into the raw numbers involved.[192]

It is for this reason that the next page contains ten charts: five for Philadelphia and five for N.Y.C., each containing one racial

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tract-level data on Latine populations); *S1810: Disability Characteristics*, U.S. CENSUS BUREAU, https://data.census.gov/table?text=S1810 (same instructions) (on file with the *Columbia Human Rights Law Review*) (offering tract-level data on disability). For an explanation of why 2019 ACS data was used, see *supra* note 176.

190. It is important to note that the lack of a "statistically significant" relationship does not mean that there is no relationship or trend whatsoever. Rather, a lack of statistical significance means that the data in question do not produce substantive *evidence* that the input variable (race) has a nonzero effect on the output variable (accessibility). MICHAEL LEWIS-BECK, DATA ANALYSIS: AN INTRODUCTION 38 (1995) ("Convincing repeated rejections of the null hypothesis offer important cumulative evidence of the nature of the relationship between an X and a Y, and certainly, in principle, they can lead to the specification and testing of rival nonzero hypotheses.").

191. Antony Unwin et al., *Introduction*, *in* HANDBOOK OF DATA VISUALIZATION 4, 4 (Chun-houh Chen et al. eds., 2008) ("Graphics provide an excellent approach for exploring data and are essential for presenting results.").

192. *Id.* at 9 ("Sets of graphs can be particularly useful for revealing the structure in datasets and complement modelling efforts.").

variable graphed against accessibility.[193] In the background of each chart, a scatterplot shows the distribution of stations, with each point representing a station's population[194] charted against its accessibility. Each dot in the background represents an individual station, with the accessibility variable scattered randomly somewhat in order to improve readability. On each chart, there are three vertical lines marking accessibility[195] with corresponding percentage markers. What the graphs show is a basic representation of racial disparity.[196] The most important piece to note is that, as the gaps between the overall median and the other two medians grow, so does the general level of accessibility disparity. To that end, the charts show that groups including Black Philadelphians as well as Latine and Afro-Latine New Yorkers appear to have substantially disparate access compared to other groups. This pattern is also confirmed by statistical regressions.[197]

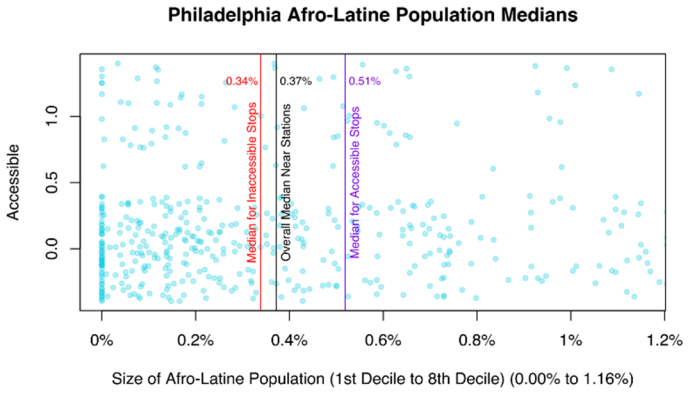
193. The horizontal axis was determined based on the deciles of that graph's racial and/or ethnic variable. Both cities' graphs run from the first decile (tenth percentile) to the eighth decile (eightieth percentile).

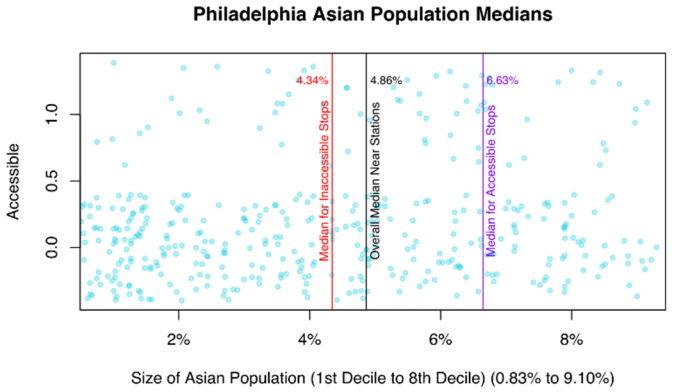
194. Throughout this Note, "population" refers not to the number of individuals in a given group but, rather, to that group's percentage size within the total people living within the relevant area. Here, the relevant area for each station would be all Census tracts paired with that station.

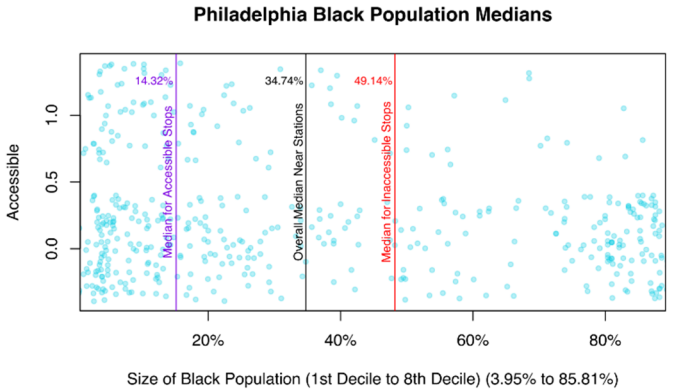
195. The lines are as follows: one is for the median population percentage of the racial/ethnic variable across all stations (black); one is for across accessible stations (purple); and one is for across inaccessible stations (red).

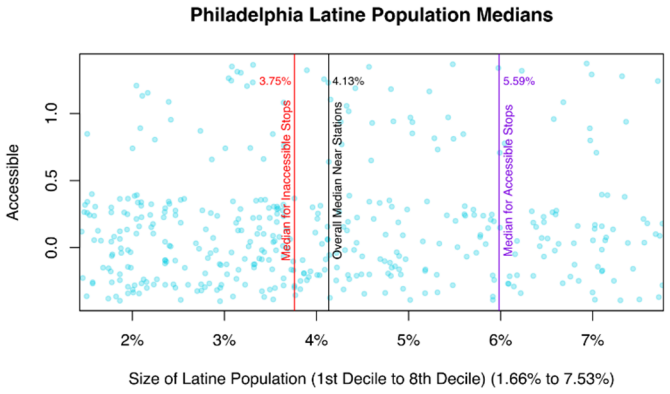
196. It is worth reiterating here that this Note is not about racial or ethnic disparities in transit opportunities writ large. Rather, this note is about disparities in access to ADA-compliant rail and/or trolley transit.

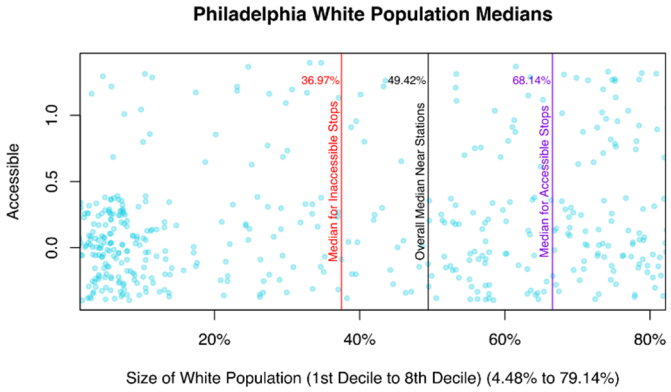
197. *See infra* Sections III.B–.C (showing the results of the regressions).

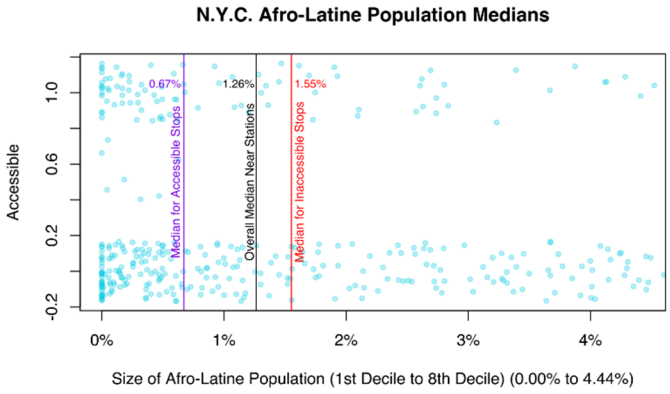

Philadelphia Afro-Latine Population Medians
Accessible
0.0
0.5
1.0
0.34%
Median for Inaccessible Stops
0.37%
Overall Median Near Stations
0.51%
Median for Accessible Stops
0%
0.2%
0.4%
0.6%
0.8%
1%
1.2%
Size of Afro-Latine Population (1st Decile to 8th Decile) (0.00% to 1.16%)

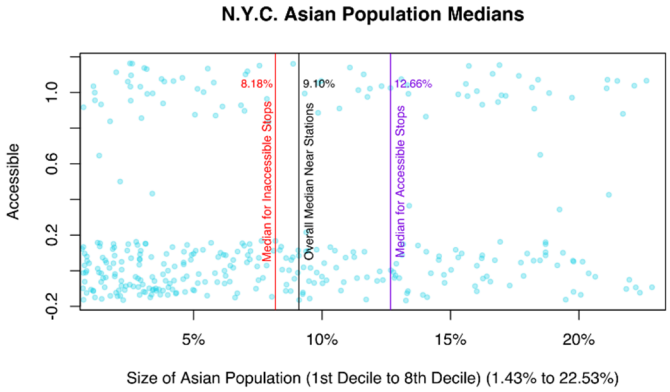

Philadelphia Asian Population Medians
Accessible
0.0
0.5
1.0
4.34%
Median for Inaccessible Stops
4.86%
Overall Median Near Stations
6.63%
Median for Accessible Stops
2%
4%
6%
8%
Size of Asian Population (1st Decile to 8th Decile) (0.83% to 9.10%)

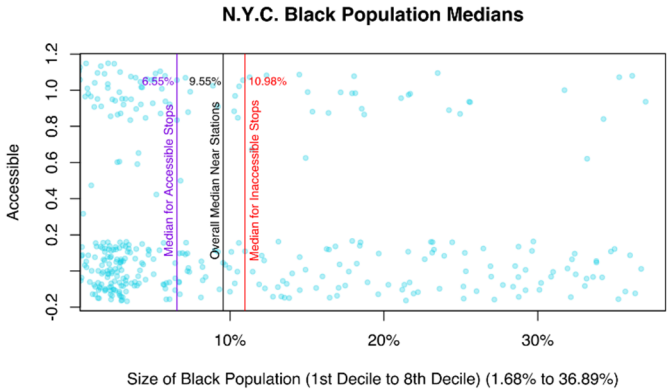

Philadelphia Black Population Medians
Accessible
0.0
0.5
1.0
14.32%
Median for Accessible Stops
34.74%
Overall Median Near Stations
49.14%
Median for Inaccessible Stops
20%
40%
60%
80%
Size of Black Population (1st Decile to 8th Decile) (3.95% to 85.81%)

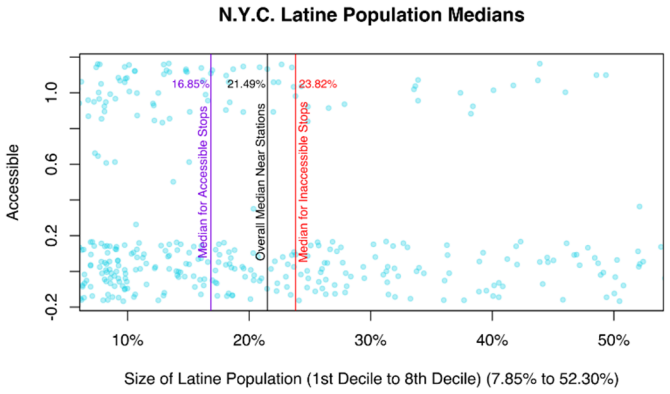

Philadelphia Latine Population Medians
Accessible
0.0
0.5
1.0
3.75%
Median for Inaccessible Stops
4.13%
Overall Median Near Stations
5.59%
Median for Accessible Stops
2%
3%
4%
5%
6%
7%
Size of Latine Population (1st Decile to 8th Decile) (1.66% to 7.53%)

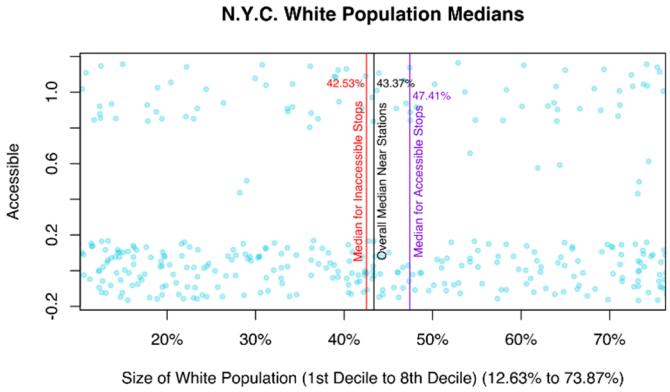

Philadelphia White Population Medians
Accessible
0.0
0.5
1.0
36.97%
Median for Inaccessible Stops
49.42%
Overall Median Near Stations
68.14%
Median for Accessible Stops
20%
40%
60%
80%
Size of White Population (1st Decile to 8th Decile) (4.48% to 79.14%)


N.Y.C. Afro-Latine Population Medians
Accessible
1.0
0.6
0.2
-0.2
0.67%
1.26%
1.55%
Median for Accessible Stops
Overall Median Near Stations
Median for Inaccessible Stops
0%
1%
2%
3%
4%
Size of Afro-Latine Population (1st Decile to 8th Decile) (0.00% to 4.44%)


N.Y.C. Asian Population Medians
Accessible
1.0
0.6
0.2
-0.2
8.18%
9.10%
12.66%
Median for Inaccessible Stops
Overall Median Near Stations
Median for Accessible Stops
5%
10%
15%
20%
Size of Asian Population (1st Decile to 8th Decile) (1.43% to 22.53%)


N.Y.C. Black Population Medians
Accessible
1.2
1.0
0.8
0.6
0.4
0.2
-0.2
6.55%
9.55%
10.98%
Median for Accessible Stops
Overall Median Near Stations
Median for Inaccessible Stops
10%
20%
30%
Size of Black Population (1st Decile to 8th Decile) (1.68% to 36.89%)


N.Y.C. Latine Population Medians
16.85%
21.49%
23.82%
Median for Accessible Stops
Overall Median Near Stations
Median for Inaccessible Stops
Accessible
-0.2
0.2
0.6
1.0
10%
20%
30%
40%
50%
Size of Latine Population (1st Decile to 8th Decile) (7.85% to 52.30%)


N.Y.C. White Population Medians
42.53%
43.37%
47.41%
Median for Inaccessible Stops
Overall Median Near Stations
Median for Accessible Stops
Accessible
-0.2
0.2
0.6
1.0
20%
30%
40%
50%
60%
70%
Size of White Population (1st Decile to 8th Decile) (12.63% to 73.87%)

B. Philadelphia

In Philadelphia, the problematic nature of the disparate impact in availability of accessible transit is further compounded by the level of usage of the city's transit system by different racial groups. Black residents of the city use the transit system to go to work at more than double the rate of the city's Asian and Latine residents—and at more than triple the rate of the city's white residents.[198] Despite this fact, the results of the logistic regressions[199] showed a clear pattern: Black residents of Philadelphia have substantially lower rates of access to ADA-compliant public transit.

The Philadelphia dataset utilized an entirely binary variable for accessibility.[200] Because the analysis was intended solely to show if any disparate impact existed, the only fully relevant explanatory variable for the regressions was race. If the regressions show that race has a statistically significant correlation with accessibility, then that indicates the presence of a disparate impact. Because none of the racial regressions returned results wherein multiple racial groups were estimated to have a similarly sized correlation with accessibility, it was not necessary to search for confounding factors by running a regression using multiple racial explanatory variables. Thus, each regression was run separately, with one explanatory

198. TransitCenter, *The Philadelphia Story*, TRANSITCENTER EQUITY DASHBOARD, https://dashboard.transitcenter.org/story/philadelphia [https://perma.cc/L58T-WRDT] ("In 2019, 21% of Black residents took transit to work, as did 10% of Asian and Latine residents—compared to only 6% of white residents.").

199. Logistic regressions were appropriate because the accessibility variable for Philadelphia was fully binary. *See, e.g.*, ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTI-LEVEL/HIERARCHICAL MODELS 109 (R. Michael Alvarez et al. eds., Cambridge Univ. Press 2007) ("Linear regression directly predicts continuous data y from a *linear predictor* . . . . Logistic regression predicts $\Pr(y = 1)$ for binary data from a linear predictor . . . ."); *see also infra* note 199 (discussing the binary nature of the accessibility variable for Philadelphia).

200. This was because, in contrast to N.Y.C., all stations either had all lines fully accessible or had no lines fully accessible. *Compare* SEPTA, *supra* note 19 (showing that all stations are either fully accessible or not at all accessible), *with* MTA, *supra* note 21 (showing that some stations were fully accessible for certain trains but not others); *see also supra* note 180 (discussing this Note's method of recording the nonbinary nature of accessibility levels in N.Y.C.'s subway stations).

variable used at a time. The coefficients represent the estimated degree of the effect that the introduction of the variable had on the outcome variable (accessibility).[201] Statistical significance, represented in the tables below by asterisks, is based on the *Pr* value. Data entries with lower corresponding *Pr* values[202] are given more asterisks. A rating of three asterisks represents greater than 99.9% confidence in a correlation; a rating of two represents greater than 99% confidence; and a rating of one represents greater than 95% confidence.

The resulting regressions yielded stark results showing a clear and highly statistically significant correlation between an increase in the size of the Black population and a decrease in the likelihood that the community's stop is accessible.[203] In fact, relying on the regression's predicted values for the dataset, the maximum possible increase in per-capita Black residents causes the likelihood of station accessibility to plummet from 37% (the station with the fewest Black residents) to a mere 6% (the station with the most Black residents)—a drop of thirty-one percentage points. Regressions were also run based on the size of the population with disabilities; that factor did not correlate with accessibility in a statistically significant manner.

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201. In the logistic regressions—unlike in the linear context—the coefficient is the amount of the change in the log-odds ratio. The log-odds ratio is defined as the natural log of $p/(1-p)$, where p is equal to the probability of the outcome variable being equal to 1. In other words, here, p would be equal to the probability that a station is accessible. Logically, it should be added, $1-p$ is equal to the mutually exclusive alternative: that the outcome variable equals 0—or, to put it another way, that a station is inaccessible. Thus, here, the log-odds ratio is the natural log of the quotient found by dividing the probability that a station is accessible by the probability that a station is inaccessible.

In contrast, linear regressions' variable values represent the slope—or, alternatively, rate of change—of the fitted variable.

202. These values are often referred to as "p-values," but this Note does not use that term; this is in order to avoid any confusion between those values and the logistic regressions' probability values, which are assigned to the variable p.

203. In this Note, the strength or weakness of a statistical relationship refers to its statistical significance, whereas the size of a statistical relationship describes the magnitude of the change in accessibility associated with different populations.

P1: Logistic Regressions of Racial/Ethnic Demography on Expected Accessibility Levels in Philadelphia

	White Population	***Black Population***	***Asian Population***	***Latine Population***	***Afro-Latine Population***	***Population with Disabilities***
Intercept (Std. Error)	– 2.24 *** (0.22)	– 0.51 *** (0.15)	– 1.87 *** (0.17)	– 1.84 *** (0.15)	– 1.67 *** (0.14)	– 0.99 ** (0.32)
Estimate (Std. Error)	1.82 *** (0.36)	– 2.27 *** (0.37)	7.80 *** (1.72)	6.73 *** (1.26)	45.69 *** (11.95)	– 2.51 (2.24)
Intercept: Odds Ratio	0.11	0.60	0.15	0.16	0.19	0.37
Estimate: Odds Ratio	6.18	0.10	2,445.76	835.96	$6.95*10^{19}$	0.08
Fitted Probability for Minimum Population Value	0.10	0.37	0.13	0.14	0.16	0.25
Fitted Probability for Maximum Population Value	0.38	0.06	0.79	0.95	0.58	0.14
Probability Change	0.28	– 0.31	0.66	0.81	0.42	– 0.11
No. of observations	542	542	542	542	542	542
*** = $Pr < 0.001$; ** = $Pr < 0.01$; * = $Pr < 0.05$						

Some may argue that the trolley stations, which occur at a higher density in a given area than their rail counterparts, are overrepresented in the dataset used above. To address this concern, the author also ran regressions limiting the trolley data to every other trolley stop and even every third trolley stop. The trolley stops that were used were selected based on the order originally presented in the SEPTA-created dataset, meaning that any given stop in the dataset was generally located next to the stops that were geographically closest. Thus, using every second and every third stop

was still roughly representative of the area covered by the trolleys. The results are below.

P2: Logistic Regressions of Racial/Ethnic Demography on Expected Accessibility Levels in Philadelphia (Rail and Every Other Trolley Station)

	White Population	***Black Population***	***Asian Population***	***Latine Population***	***Afro-Latine Population***	***Population with Disabilities***
Intercept (Std. Error)	– 1.58 *** (0.24)	– 0.25 (0.16)	– 1.44 *** (0.18)	– 1.37 *** (0.16)	– 1.22 *** (0.15)	– 0.74 * (0.33)
Estimate (Std. Error)	1.34 *** (0.38)	– 1.86 *** (0.39)	8.20 *** (2.00)	6.50 *** (1.44)	46.82 *** (12.95)	– 0.97 (2.30)
Intercept: Odds Ratio	0.21	0.78	0.24	0.25	665.71	0.48
Estimate: Odds Ratio	3.82	0.16	3,636.06	0.30	$2.17*10^{20}$	0.38
Fitted Probability for Minimum Population Value	0.17	0.44	0.19	0.21	0.23	0.31
Fitted Probability for Maximum Population Value	0.43	0.11	0.87	0.96	0.69	0.26
Probability Change	0.26	– 0.33	0.68	0.75	0.46	– 0.05
No. of observations	384	384	384	384	384	384
*** = $Pr < 0.001$; ** = $Pr < 0.01$; * = $Pr < 0.05$						

P3: Logistic Regressions of Racial/Ethnic Demography on Expected Accessibility Levels in Philadelphia (Rail and Every Third Trolley Station)

	White Population	*Black Population*	*Asian Population*	*Latine Population*	*Afro-Latine Population*	*Population with Disabilities*
Intercept (Std. Error)	– 1.27 *** (0.25)	– 0.11 (0.17)	– 1.27 *** (0.20)	– 1.13 *** (0.16)	– 1.00 *** (0.16)	– 0.66 * (0.34)
Estimate (Std. Error)	1.15 ** (0.40)	– 1.70 *** (0.41)	8.87 *** (2.23)	6.08 *** (1.49)	46.69 *** (13.72)	0.08 (2.35)
Intercept: Odds Ratio	0.28	0.90	0.28	0.32	438.71	0.51
Estimate: Odds Ratio	3.144	0.18	7,113.44	0.37	$1.90*10^{20}$	1.08
Fitted Probability for Minimum Population Value	0.22	0.47	0.22	0.25	0.27	0.34
Fitted Probability for Maximum Population Value	0.46	0.15	0.92	0.96	0.74	0.34
Probability Change	0.24	– 0.32	0.70	0.71	0.47	0.00
No. of observations	331	331	331	331	331	331
*** = $Pr < 0.001$; ** = $Pr < 0.01$; * = $Pr < 0.05$						

Making these changes did, as expected, decrease the size of the impact that race had on accessibility levels, but, as the data tables below show, it left the statistical significance of the coefficients largely unaffected; more specifically, the coefficients for the Black population, while smaller, are still of the same general level of statistical significance.[204] Furthermore, there continued not to be a statistically significant correlation between disability levels and accessibility.

204. This implies that, while the depth or, perhaps, size of the harm might be slightly lower in these circumstances, the level of correlation between the two variables is still as strong as in the prior regression.

Even if one considers the final regression, using only one third of the trolley stations, the implications of the results are still highly troubling: the corresponding logistic regression model for this dataset indicates that when the Black population is equal to its minimum among the various stations—0.56%—the probability of a station's being accessible is roughly 0.47 (47%). However, when the Black population is increased to its maximum value among the various stations—96.71%—the probability of a station's being accessible decreases to just 0.15 (15%)—a drop to less than one third of its prior value. Thus, the findings regarding Philadelphia matched this Note's hypothesis: stations with a higher percentage of Black people living nearby were less likely to be accessible.

C. New York City

Meanwhile, the nature of the N.Y.C. data necessitated a different approach from the Philadelphia analysis. Because the accessibility variable for N.Y.C. was not completely binary, given the significant number of stations with partial accessibility,[205] the data required the use of a linear, rather than a logistic, regression.[206] First, the author tested each racial variable individually against the accessibility variable to see if any had a substantial correlation.

N1: Linear Regressions of Racial/Ethnic Demography on Expected Accessibility Levels in N.Y.C.

205. For example, the 50th St C/E station is only accessible in the southbound direction. *MTA Accessible Stations*, *supra* note 76.

206. *See supra* note 198 and accompanying sources. It would have been possible to simplify the stations' accessibility values into being fully binary, thereby allowing for a logistic regression, but the author chose not to do so in order to most accurately reflect the nature of the data being analyzed.

	White Population	*Black Population*	*Asian Population*	*Latine Population*	*Afro-Latine Population*
Intercept (Std. Error)	0.19 *** (0.04)	0.28 *** (0.03)	0.20 *** (0.03)	0.30 *** (0.03)	0.29 *** (0.03)
Estimate (Std. Error)	0.12 (0.08)	– 0.16 (0.09)	0.33 * (0.14)	– 0.19 * (0.09)	– 2.12 ** (0.77)
Modeled Accessibility Probability for Minimum Population Size	0.20	0.28	0.20	0.30	0.29
Modeled Accessibility Probability for Maximum Population Size	0.30	0.14	0.47	0.13	– 0.01
Probability Change	0.10	– 0.14	0.27	– 0.17	– 0.30
No. of observations	443[207]	443	443	443	443
Multiple R^2	0.005	0.008	0.01	0.01	0.02
Adjusted R^2	0.002	0.006	0.01	0.008	0.01
*** = *Pr* < 0.001; ** = *Pr* < 0.01; * = *Pr* < 0.05					

The results showed a fairly statistically significant correlation between an increased Latine population and a decrease in accessibility. However, the most jarring result is the one associated with the Afro-Latine variable. With over 99% confidence, the maximum possible increase in the Afro-Latine population is

207. As noted previously, one station (the 7 train's stop at Mets–Willets Point) had an associated population of zero and was thus excluded from any population-based analyses. *See supra* note 179 (mentioning this exception).

associated with a drop of thirty percentage points in the modeled probability that the associated station is accessible.

Next, the author tested a number of other potentially relevant variables against accessibility to see which, if any, would reveal a statistically significant correlation. The results are below.

N2: Linear Regression of Expected Accessibility Levels in N.Y.C. Based on Concurrent Consideration of Station Variables (Variables Considered All at Once)

	Intercept / General Data	***Tourist Interest***	***Other Lines for Transfer***	***Express***	***Terminal***	***Population with Disabilities***
Intercept/ Estimate	0.15 **	0.20 ***	0.08 **	0.25 ***	0.39 ***	– 0.34
(Std. Error)	(0.05)	(0.06)	(0.03)	(0.05)	(0.06)	(0.39)
No. of observations	443					
Multiple R^2	0.25					
Adjusted R^2	0.25					
*** = *Pr* < 0.001; ** = *Pr* < 0.01; * = *Pr* < 0.05						

Notably, the size of the disabled population living near each station did not correlate in a statistically significant manner with accessibility. However, the rest of the variables' correlation with accessibility was more statistically significant than that of most of the racial/ethnic variables. Additionally, as shown below, the most statistically significant racial/ethnic variable from before (that of the Afro-Latine population) loses its statistical significance when it is added to this multivariate regression, as shown below.

N3: Linear Regression of Station Variables & Afro-Latine Population Size on Expected Accessibility Levels in N.Y.C. (Variables Considered All at Once)

	Intercept / General Data	*Tourist Interest*	*Other Lines for Transfer*	*Express*	*Terminal*	*Population with Disabilities*	*Afro-Latine Population*
Intercept/ Estimate	0.14 **	0.19 ***	0.08 **	0.25 ***	0.39 ***	– 0.14	– 0.69
(Std. Error)	(0.05)	(0.06)	(0.03)	(0.05)	(0.06)	(0.46)	(0.82)
No. of observations	443						
Multiple R^2	0.25						
Adjusted R^2	0.24						
*** = $Pr < 0.001$; ** = $Pr < 0.01$; * = $Pr < 0.05$							

As shown above, the Afro-Latine population variable loses its statistical significance when combined with the non-racial/ethnic explanatory variables. That change indicates that the racial/ethnic disparities in accessibility *may* be the results of decisions to focus on accessibilizing stations based on the non-racial/ethnic explanatory variables. This begs the question: is there a statistically significant link between the racial/ethnic variables and the statistically significant non-racial/ethnic explanatory variables? In other words, are there racial/ethnic disparities in the populations that live near stations qualifying for those non-racial/ethnic variables?

N4: Regressions for Potential Correlations Between Racial/Ethnic Demographics and Statistically Significant Accessibility Explanatory Variables in N.Y.C.[208]

208. In this table, each pair of intercept and explanatory variable estimate represents a separate regression conducted, with the proportion of the racial and/or ethnic group as the dependent variable. For example, the "– 3.62 ***" and "3.21 ***" values near the top left of the table represent the results of a regression in which the tourist interest factor was the independent variable and the white population proportion was the dependent variable.

Notably, the meaning of the estimates varies based on the explanatory variable being examined, as some were binary and therefore merited use of logistic regressions. *See supra* note 200 (discussing the meaning of logistic regressions' variable estimates).

	Tourist Interest (Logistic)	***Other Lines for Transfer (Linear)***	***Express (Logistic)***	***Terminal (Logistic)***
White Population				
Intercept	– 3.62 ***	0.10	– 1.99 ***	– 2.20 ***
(Std. Error)	(0.42)	(0.08)	(0.28)	(0.33)
Explanatory Variable Estimate	3.21 ***	0.53 ***	0.74	0.04
(Std. Error)	(0.65)	0.14	(0.51)	(0.62)
Multiple R^2; Adjusted R^2	n/a	0.03; 0.03	n/a	n/a
Black Population				
Intercept	– 1.45 ***	0.42 ***	– 1.53 ***	– 2.30 ***
(Std. Error)	(0.18)	(0.05)	(0.17)	(0.22)
Explanatory Variable Estimate	– 2.99 **	– 0.40 *	– 0.54	0.57
(Std. Error)	(0.95)	(0.16)	(0.60)	(0.65)
Multiple R^2; Adjusted R^2	n/a	0.01; 0.01	n/a	n/a
Asian Population				
Intercept	– 2.14 ***	0.26 ***	– 1.66 ***	– 2.20 ***
(Std. Error)	(0.20)	(0.05)	(0.18)	(0.22)
Explanatory Variable Estimate	1.49	0.56 *	0.14	0.13
(Std. Error)	(0.90)	(0.26)	(0.90)	(1.10)
Multiple R^2; Adjusted R^2	n/a	0.01; 0.008	n/a	n/a
Latine Population				
Intercept	– 0.46	0.55 ***	– 1.39 ***	– 1.85 ***
(Std. Error)	(0.27)	(0.06)	(0.21)	(0.25)
Explanatory Variable Estimate	– 7.11 ***	– 0.72 ***	– 0.88	– 1.21
(Std. Error)	(1.48)	(0.16)	(0.62)	(0.79)
Multiple R^2; Adjusted R^2	n/a	0.04; 0.04	n/a	n/a
Afro-Latine Population				
Intercept	– 1.20 ***	0.46 ***	– 1.53 ***	– 2.05 ***
(Std. Error)	(0.18)	(0.05)	(0.17)	(0.21)
Explanatory Variable Estimate	– 48.11 ***	– 5.05 ***	– 5.01	– 6.15
(Std. Error)	(11.33)	(1.42)	(5.30)	(6.64)
Multiple R^2; Adjusted R^2	n/a	0.03; 0.03	n/a	n/a
No. of observations (all regressions)	443	443	443	443
*** = Pr < 0.001; ** = Pr < 0.01; * = Pr < 0.05				

Based on this table, the intersections variable is the non-racial explanatory variable most closely correlated with the racial variables. This may be the source of the disparate impact: whether or not it was conscious of the varying racial effects that such a decision would have, if the MTA did decide to prioritize intersections of subway lines, that would have then led to the disparate impact that has occurred.[209] In any case, the results of the analysis show that, regardless of the MTA's and SEPTA's intents, there is a statistically significant disparity in terms of accessibility across racial and ethnic groups. In Philadelphia, stations are generally less likely to be accessible when they are located in neighborhoods with higher percentages of Black residents, and in N.Y.C., they are less likely to be accessible when located in neighborhoods with higher percentages of Latine and, especially, Afro-Latine residents.[210]

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209. This effect may not make it *inherently* wrong for the MTA and/or the New York State Legislature to prioritize intersections—after all, accessibilizing intersections makes the station easier to navigate overall. Rather, it indicates that the groups choosing which stations to accessibilize next should ensure that they are simultaneously balancing out any racial and ethnic inequities that a focus on intersections reveals.

210. *See supra* notes 197–208 and accompanying text (discussing the findings underlying these assertions).

The data also mirrors a pattern found by Valerie Preston and Sara McLafferty: the pair found that white and Asian people were more likely to have better access to jobs through transit, and the data in this Note shows that those same groups are more likely to be situated near accessible stations. Preston & McLafferty, *supra* note 110, at 301. Interestingly, the findings of racial disparity in Philadelphia might appear to be in tension with at least one group's study of the city, which found that "unlike most large regions, transit offers greater access to opportunities for BIPOC residents [of the Philadelphia area] than white residents." TransitCenter, *The Philadephia Story*, *supra* note 197. Of course, it is important to note that this Note is discussing transit *accessibility* disparities, not a more generalized inequity in transit opportunities. Meanwhile, this Note's findings for N.Y.C. more closely align with patterns discussed by that same group, which found that "[i]n most regions, there is a significant racial access gap: The average white resident can access many more jobs using transit compared to the average Black or Latine resident." TransitCenter, *The New York Story*, *supra* note 99. In any case, it should be noted that these studies focused on transit overall, not accessible transit specifically.

D. Data Conclusions

In summary, the data shows that in both Philadelphia and N.Y.C., there is a statistically significant disparate impact based on race/ethnicity. In Philadelphia, the stations with higher Black populations were less likely to be accessible. This pattern holds true even after reducing the number of trolley stations included in the dataset. In N.Y.C., stations with larger Latine and (especially) Afro-Latine populations were less likely to be accessible. In N.Y.C., certain other factors, such as whether a station was an express stop, appeared to have stronger correlations to accessibility than race/ethnicity. However, the end result was still a racially/ethnically disparate impact—moreover, these other factors do not rule out intentional discrimination per se. Finally, for both cities, the size of the population with disabilities did not correlate in a statistically significant manner with accessibility. These results suggest that some form of regulatory action is necessary in order to prevent this disparate impact from continuing moving forward.

IV. Proposed Solutions

A. Federal Action over State/Local Action

To ensure that the remainder of the accessibilization of Philadelphia transit and the N.Y.C. subway takes place in a racially equitable manner, federal action—not merely state and/or local action—is necessary.[211] To that end, firstly, it is important to note that, under *Alexander v. Sandoval*, there would be no private right of action for any disparate impact claims.[212] However, the government would still be able to bring a suit to hold SEPTA and the MTA accountable to relevant regulations.[213] Furthermore, the

211. There are a number of reasons federal action is needed; perhaps most importantly, the MTA and SEPTA systems, between them, span across four states. As a result, the racial and ethnic disparities in accessibilization are an interstate issue and thus merit federal attention. The four states are New York, Pennsylvania, New Jersey, and Delaware. SEPTA, *supra* note 19; MTA, *supra* note 21.

212. Alexander v. Sandoval, 532 U.S. 275, 275 (2001). For an overview of some of the shortcomings of an overreliance on the private attorney general model, see generally Johnson, *supra* note 45, at 1354–57.

213. CIV. RTS. DIV., U.S. DEP'T OF JUST., *supra* note 41, § VII, at 5 ("Following *Sandoval*, the Civil Rights Division issued a memorandum . . . that

promulgation of regulations at the federal level would likely bring more attention to the issue of accessibilization inequity than rules at the state and/or local level would. Finally, the threat of a lawsuit brought by the DOJ (or the threat of intervention by the DOJ in an existing case)[214] would likely be more persuasive to SEPTA and the MTA than the threat of any suits that their respective states or cities might file. To that end, given the intransigence of the MTA in following accessibility law,[215] any plaintiffs hoping to merely use the threat of a lawsuit and thus avoid protracted litigation would certainly need as much firepower on their side as possible in order to do so.[216] This is further underscored by the willingness in recent years of the Department of Justice to become involved in ADA suits against the MTA.[217]

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clarified and reaffirmed federal government enforcement of the disparate impact regulations. The memorandum explained that although Sandoval foreclosed private judicial enforcement of Title VI the regulations remained valid and funding agencies retained their authority and responsibility to enforce them.").

214. While there does not appear to be much data available around the frequency with which the DOJ takes action against transit agencies for ADA violations, the Department nonetheless has shown at least some willingness relatively recently to crack down on the MTA's refusal to accessibilize. Specifically, in 2018, the Southern District of New York's U.S. Attorney filed a complaint-in-intervention in *Bronx Independent Living Services v. Metropolitan Transportation Authority*. Press Release, Disability Rts. Advocs., US Department of Justice Joins DRA Suit Against the MTA, https://dralegal.org/press/us-department-of-justice-joins-dra-suit-against-the-mta/ [https://perma.cc/RW3S-EDM8]; Press Release, Dep't of Just., U.S. Att'y's Off., S. Dist. of New York, U.S. Attorney Announces Suit Against the MTA and New York City Transit Authority for Failure to Make a Bronx Subway Station Accessible After a Full Renovation (Mar. 13, 2018), https://www.justice.gov/usao-sdny/pr/us-attorney-announces-suit-against-mta-and-new-york-city-transit-authority-failure-make [https://perma.cc/A2H6-EE4N]; *see also* Bronx Indep. Living Servs. v. Metro. Transp. Auth., 358 F. Supp. 3d 324, 329–30 (S.D.N.Y. 2019) (granting plaintiffs' motion for partial summary judgment on the grounds that the MTA had been bound by the ADA to include accessibility improvements when it replaced a station's stairs).

215. *See supra* notes 136–142 (listing and explaining lawsuits resulting from the MTA's refusal to abide by accessibility requirements, as well as a recent settlement by the MTA addressing two such lawsuits).

216. At this time, very little information is available regarding administrative complaints filed against the MTA and/or SEPTA. Using a FOIA request sent to the DOJ, the author managed to obtain a small amount of information on this matter. *See supra* text accompanying note 131 (discussing the details of the response to the FOIA request).

217. *See supra* note 216 (citing the DOJ's intervention in a 2018 case).

For the Philadelphia transit system, spatial constraints place massive practical limitations on non-federal action. SEPTA's system spans three states and multiple cities.[218] Thus, while the City of Philadelphia, for example, could likely issue regulations governing the stops located within its borders, it would probably be unable to issue rules governing the accessibilization of SEPTA as a whole. There is a body tasked under an interstate compact with administering SEPTA's services in Pennsylvania and New Jersey;[219] however, that is the exact body that at one point recently had issued plans to delay accessibilization of Philadelphia's trolleys for another decade.[220] Thus, it is extraordinarily unlikely that the group would decide to issue regulations that would directly counter those plans.

Meanwhile, non-federal action is similarly unlikely in N.Y.C. for multiple reasons. First, N.Y. still exempts the subway from its state-level accessibility requirements,[221] indicating that Albany is taking a hands-off approach and is unlikely to step in to ensure racial/ethnic equity in accessibilization. Additionally, N.Y.C. has been reluctant to enforce NYCHRL's codified transit accessibility requirements, implying it is unlikely to promulgate and enforce other, new regulations relating to the subject. For example, in 2020, the Southern District of New York rejected a motion to dismiss a suit about subway accessibility naming the City as a defendant, holding that "Plaintiffs have met their burden here—which is relatively modest at the pleading stage—of alleging that their injury is fairly traceable to the City's failure to act" and noting that "it is sufficient for a plaintiff to plead facts indicating that a defendant's actions had a 'determinative or coercive effect upon the action of someone else' [here, the MTA] who directly caused the alleged injury."[222] As a result, it would be impractical to attempt to rely on the City to go a

218. The system goes through Pennsylvania, New Jersey, and Delaware. SEPTA, *supra* note 19. The N.Y.C. subway, in contrast, is confined to the City of N.Y. MTA, *supra* note 21.

219. The group is the Delaware Valley Regional Planning Commission. *About DVRPC*, *supra* note 161.

220. *See supra* Section I.C.4 (discussing the issues with Philadelphia's plans around its trolleys).

221. N.Y. PUB. BLDGS. § 51(2) (Consol. 2021); *see supra* notes 74–75 and accompanying text (discussing the exemption).

222. Forsee v. Metro. Transp. Auth., No. 19-cv-4406(ER), 2020 WL 1547468, at *7 (S.D.N.Y. Mar. 31, 2020) (citations omitted); *see also supra* notes 140–142 and accompanying text (discussing the settlement of that lawsuit).

step further and actually create regulations around the accessibility requirements in order to make them more equitable.

Thus, due to the particular advantages that the DOJ and FTA have for ensuring compliance, the practical spatial constraints with respect to SEPTA, and the reluctance of the City of N.Y. to enforce any sort of accessibility rules at the local level, federal action would be preferable to local action. The question thus becomes: what *kind* of federal action? In an ideal world, the FTA would use the forthcoming revision of its Title VI Circular to add an "equality directive" explicitly targeting disparities in accessibilization and to strengthen its requirements for Title VI compliance.

B. The Ideal Scenario: Inclusion in the Forthcoming Revised Circular

Even if an administrative complaint might be viable under the current guidelines, given the fact that the FTA is already currently revising its Circular,[223] the ideal solution would be to include in that revision several measures that would erase any doubt about the FTA's enforcement ability on Title VI disparate-impact accessibilization claims. First, the FTA should clarify its policy by adopting measures explicitly aimed at forcing transit agencies to preemptively confront disparities in accessibility when choosing which stations, facilities, and/or vehicles to accessibilize earliest.[224] Second, the FTA, rather than deferring to local authorities, should establish its own specific standards for (A) what constitutes a substantial legitimate interest as well as (B) the threshold where disparities may be substantial enough to trigger disparate impact considerations. Clarifying those definitions would help ensure that transit agencies do not try to avoid Title VI compliance by defining these terms overly leniently.[225] While some of these changes may

223. The FTA announced in November 2021 that it is revising its Circular. Title VI Implementation, 86 Fed. Reg. 60,735 (proposed Nov. 3, 2021).

224. Such an "equality directive," forcing preemptive action, already exists in the current Circular in a relatively *generalized* form, applying to "any and all service changes that exceed the transit provider's major service change threshold, as well as all fare changes." FTA CIRCULAR, *supra* note 37, ch. IV, at 11; *see supra* notes 44–45 and accompanying text (explaining what an "equality directive" is and discussing its relevance in context of the Circular).

225. *See supra* note 46 and accompanying text (discussing the ways in which the FTA's guidelines incentivize agencies to define terms leniently).

seem far-fetched, the FTA actually seems potentially poised to add specific requirements to, inter alia, the concepts from Part (B) of the second suggestion.[226] However, even if the FTA does add those requirements, it still might not implement any of the other changes, meaning it is necessary to examine whether an administrative complaint would succeed under the current Circular.

C. A More Practical Solution: Administrative Complaints

The FTA has not shied away from enforcing its Title VI guidelines.[227] Thus, the important question with respect to the potential efficacy of administrative complaints is not if the FTA would enforce a complaint it found valid but, rather, if the FTA could actually conclude that the order of accessibilization thus far has violated Title VI.

In this context, for a program to violate Title VI, it must involve a "major service change."[228] Seeing as accessibilization involves the fundamental modification of nearly every single station in the system, it almost certainly must qualify as a major service change. Next, the courts' multi-part test for Title VI disparate impact is applied.[229] First, there must be a prima facie showing of disparate impact. The FTA's more specific (but nonbinding) suggestions for what it considers to be disparate impact do not quite apply, however,[230] meaning that the primary remaining constraint on any analysis for the existence of Title VI disparate impact is the binding guideline that the threshold must be based on statistical

226. Title VI Implementation, 86 Fed. Reg. 60,735, 60,737 (proposed Nov. 3, 2021) ("Should FTA provide additional guidance on facility equity analyses, including public participation, disparate impact thresholds, cumulative effects, or timeframes?"). In addition, the notice asks for feedback on if the FTA should be more specific with respect to its definitions relating to Title VI disparate impact. The notice also asks whether equity analyses should be made available more quickly to avoid problems where agencies, though forced to conduct analyses before projects begin, are sometimes not forced to report the results of those analyses until after the projects have already begun. *Id.*

227. For more about some of the FTA's enforcement actions, see *supra* notes 53–55 and accompanying text.

228. FTA CIRCULAR, *supra* note 37, ch. IV, at 11.

229. *See supra* notes 41–42 and accompanying text (describing the courts' method of evaluating disparate impact claims under Title VI).

230. *See supra* note 49 (noting that the FTA does not require any particular method for calculating statistical significance).

significance.[231] Given that (1) the Philadelphia results showed with 99.9% confidence that the maximum possible increase in Black population can be associated with a drop from a 37% likelihood of accessibility to a mere 6% likelihood[232] and that (2) the N.Y.C. results showed with 99% confidence that the maximum possible increase in the size of the Afro-Latine population is associated with a drop from a 29% accessibility probability to an accessibility probability of just 0.004%,[233] the data certainly seems to support virtually any threshold of statistical significance.

The second inquiry is relatively easy here: the less discriminatory alternative would have been to accessibilize the stations in a more equitable manner. Thus, what remains is the third inquiry for a disparate-impact claim: whether or not there is a substantial legitimate justification. Here, particularly given the generally deferential treatment that the FTA gives transit agencies in determining certain priorities, SEPTA and, especially, the MTA would likely be able to make an adequate showing.[234] However, the FTA could reasonably find that both transit authorities could have employed less discriminatory alternatives, meaning that a disparate impact claim could be valid. For example, one especially persuasive argument is that SEPTA could have simply invested in low-floor trams with deployable ramps, thereby making the vast majority of their stops instantly accessible.[235]

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231. FTA CIRCULAR, *supra* note 37, ch. IV, at 13.

232. *See supra* Table P1 (showing this result).

233. *See supra* Table N1 (showing this result).

234. For example, the MTA could point to the goal of making the entire system traversable—by prioritizing stations where multiple lines intersect—as a substantial legitimate justification. *See also infra* note 237 (discussing the theoretical details of such an argument).

235. *See supra* note 163 and accompanying text (discussing the relative simplicity of making streetcar routes accessible). For the MTA, an argument could simply be that, while the agency certainly was justified in prioritizing *some* intersection points, it did not have to prioritize them quite so heavily. Such an argument obviously necessitates a line-drawing exercise, but if the question is "how heavily is *too* heavily?" then, at the very least, it seems apparent that a drop as drastic as the one associated with the Afro-Latine population shows that the importance of intersections was weighted too heavily.

CONCLUSION

Thus, the data conclusively shows that there is a substantial and statistically significant disparate impact in the way that accessibilization has been conducted in the Philadelphia and N.Y.C. transit systems. Regardless of whether any intentionality existed, there is at least a significant disparate impact. For a number of reasons, including, for example, spatial constraints and the reluctance of the MTA when it comes to complying voluntarily with federal and local laws, federal action is necessary to address this problem. The ideal response would be for the FTA to incorporate in its revised Circular a number of changes combating this effect, including clarifying the existing equality directive on facility equity to more explicitly include accessibilization efforts. But given the FTA's fairly strong history of enforcement recently and the pro-enforcement posture expressed in its Federal Register notice, a good alternative solution would be to instead file an administrative complaint alleging that the order in which stations and facilities were accessibilized constituted a violation of the FTA's Title VI regulations.

Justin Dart, Jr., described the ADA as "a promise to be kept."[236] But as this Note has shown, Philadelphia and N.Y.C. have often deferred and denied that promise for certain racial and ethnic minorities—whether intentionally or not—for over thirty years. SEPTA and the MTA have had more than ample opportunity to address this problem on their own, and they have failed to do so. The federal government must tighten its Title VI regulations to ensure that moving forward, the rights that the ADA promised all Americans can truly become rights for all.

236. Damiani, *supra* note 1.