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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

FAITH ACTION FOR COMMUNITY EQUITY, TOCHIRO KOCHIRO KOVAC, individually and on behalf of a class of persons in the State of Hawai'i who because of their national origins, have limited English proficiency; Plaintiffs,	Case No. 13-CV-00450 SOM RLP Civil Rights Action Class Action **STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA** (caption continued on next page)

vs.

HAWAI'I DEP'T OF TRANSPORTATION; GLENN OKIMOTO, in his official capacity as the Director of the Hawai'i Department of Transportation,

Defendants.

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INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517,[1] in order to ensure that the national origin nondiscrimination protections of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d through 2000d-7, and its implementing regulations, 28 C.F.R. Part 42, Subpart C, are applied properly in private cases alleging intentional discrimination by federally funded recipients that fail to provide language assistance services to limited English proficient (LEP) individuals.

The United States has a critical interest in ensuring that recipients of federal financial assistance, such as Defendant Hawai'i Department of Transportation ("HDOT"), provide LEP individuals a meaningful opportunity to take the Hawai'i driver's license examination.[2] That opportunity, as explained below, is guaranteed them pursuant to Title VI's statutory and regulatory prohibitions against national origin discrimination and in accordance with legal obligations binding on HDOT as a recipient of federal funds. *See, Lau v. Nichols*, 414 U.S. 563 (1974). HDOT is a recipient of significant federal financial assistance from the U.S. Department of Transportation

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

[2] By "driver's license" we refer to a license to operate a personal vehicle and not a commercial motor vehicle. Commercial Drivers Licenses, unlike the licenses at issue here, are issued pursuant to federal regulations.

(DOT), as well as a subrecipient of federal financial assistance from the U.S. Department of Homeland Security.[3]

SUMMARY OF ARGUMENT

Plaintiffs have sufficiently pleaded that HDOT has engaged in intentional discrimination on the basis of national origin, in violation of Title VI and the Equal Protection Clause of the 14th Amendment, and therefore should be allowed to conduct discovery. As is appropriate at this stage of litigation, all statements of facts and appropriate inferences should be taken in support of the position of the party opposing judgment on the pleadings. A complaint should not be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) where "[f]actual allegations [are] enough to raise a right to relief above the speculative level." *William O. Gilley Enters., Inc., v. Atl. Richfield Co.*, 588 F.3d 659, 667 (9th Cir. 2009) (citing *Bell Atl. Corp., v. Twombly*, 550 U.S. 544, 555 (2007)). *See also al-Kidd v. Ashcroft*, 580 F.3d 949, 963 (9th Cir. 2009) (distinguishing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Twombly* from cases where more than "conclusory allegations" are made in the complaint).

[3] The U.S. Department of Transportation's Federal Highway Administration alone has made available to HDOT approximately $160,000,000 in federal financial assistance for Fiscal Year 2014. *See* U.S. Dep't. of Transportation, Federal Highway Administration, Apportionment of Federal Aid Highway Program Funds for Fiscal Year 2014, Notice 4510.770 (Oct. 25, 2013) *available at* http://www.fhwa.dot.gov/legsregs/directives/notices/n4510770.cfm. The Department of Homeland Security has also provided almost $8 million dollars in subgrants to HDOT since 2009. *See e.g.* http://www.usaspending.gov (last visited March 20, 2014).

Defendants have moved to dismiss, incorrectly maintaining that the prohibition against intentional national origin discrimination cannot be implicated by a refusal to provide access to individuals who, on account of their national origin or ancestry, are limited English proficient. To the contrary, as set forth below, case law and longstanding Executive agency regulations and guidance and have clearly established that national origin discrimination may be manifested by actions that deprive people of the benefits of important programs and activities solely because of their inability to speak English. The Plaintiffs' allegations of intentional national origin discrimination, including a refusal to provide language assistance services under the circumstances alleged, are sufficient to survive a motion to dismiss on the pleadings.

BACKGROUND

Plaintiffs in this action are the nonprofit organization, Faith Action for Community Equity (FACE); Tochiro Kochiro Kovac, an LEP Chuukese citizen of the Federated States of Micronesia who lives in Hawai'i; and a class of LEP individuals of various nationalities who live in Hawai'i and are unable to read and pass the Hawai'i Department of Transportation's (HDOT) English-only written driver's license exam because they cannot speak or read English. The Plaintiffs allege that, beginning in 2009, HDOT and its Director have refused to provide translated written driver's license exams and have also prohibited the use of interpreters who could verbally translate the

questions during the exam.[4] (First Am. Compl. ¶¶ 2, 46, 86.) Thus, individuals who, on account of their national origin, are unable to read the exam in English are thereby unable to obtain a license, often suffering great economic and other harm as a result. (*Id*. at ¶¶ 47, 71-87.)

Plaintiffs allege that Defendants have attempted to justify this refusal with unsubstantiated and pretextual statements that drivers who cannot read and respond in English present safety concerns, and that the translations are "not available" for cost or other unexplained reasons. (*Id.* at ¶¶7, 68.) Yet, according to the First Amended Complaint, which must be taken as true at the motion to dismiss stage, HDOT allows illiterate individuals to take an oral exam, and continues to allow non-English-speaking individuals to drive in Hawai'i for one year with a foreign driver's license. (*Id.*) Plaintiffs further assert that HDOT is on notice of its obligation under civil rights laws and federal funding agreements to provide translations of the driver's license exam, and

[4] On February 14, 2014, HDOT issued a press release stating that it would begin providing translated exams on March 17, 2014 in twelve different languages in certain exam locations. Press Release, Hawai'i Dep't of Transp., Drivers License Exams to be Offered in Multiple Languages Starting March 17 (February 14, 2014) (*available at* http://hidot.hawaii.gov/blog/2014/02/14/drivers-license-exams-offered-in-a-variety-of-languages/). Issuing a press release is not sufficient evidence that the translated exams are actually being provided or that translations will not cease again thus Plaintiffs maintain a claim for relief. *See Friends of the Earth, Inc., v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 170 (2000) (holding that the "heavy" burden of persuasion that "the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness.") (quoting *United States v. Concentrated Phosphate Export Ass'n.,* 393 U.S. 199, 203 (1968)). DOJ submits this Statement of Interest given that a controversy still exists at the time of this filing.

is aware of the adverse impact of not allowing translations or interpreters during the exam, the serious economic and other harm suffered by individuals who are unable to obtain driver's licenses in Hawai'i, and the low cost associated with translating the driver's license exams. (*Id.* at ¶¶ 70-76, 84-86.) In fact, according to Plaintiffs, HDOT has previously translated the written exam into numerous languages for less than $2000. (*Id.* at ¶¶ 39-40.) However, once HDOT added a new question to the exam, HDOT refused to continue the translations, despite offers of free translation services. (*Id.* at ¶¶ 5, 42-44, 54, 69.) Plaintiffs further contend that HDOT has never responded to complaints about these denials from LEP persons. (*Id.* at ¶ 49.)

Plaintiffs identify numerous harms associated with an LEP person's inability to obtain a driver's license, including serious limitations on access to employment, education, medical, cultural, and religious activities. (*Id.* at ¶¶ 71, 86.) As one example, the Amended Complaint asserts that Mr. Kovac commutes to and from work using several buses for a total of five hours each day, approximately four hours more than he would if he were able to drive. (*Id.* at ¶ 84.) FACE indicates that it explained to HDOT the devastating impact of withdrawal of translated exams and offered to translate the exam to minimize the cost, but HDOT rejected the offer. (*Id.* at ¶¶ 51, 54.) FACE asserts that it submitted to a local driver's licensing office more than 300 signatures on a petition requesting translations. (*Id.* at ¶ 56.) FACE states that it then provided HDOT

with a report further detailing the harm caused by an English-only exam in the absence of available translations and interpreters. (*Id*. at ¶ 58.)

Plaintiffs further allege that during a meeting on May 15, 2013 with HDOT, HDOT officials acted "disinterested and even hostile," and that the HDOT official responsible for the ultimate decision never responded to the Chuukese and Marshallese attendees but did respond to others. (*Id.* at ¶¶ 60-62.) An official allegedly questioned why those groups had moved to Hawai'i. (*Id.* at ¶ 63.)

Defendants have moved to dismiss Plaintiffs' Title VI and Equal Protection Claims, contending that Plaintiffs have not adequately pleaded intentional discrimination or sufficiently connected HDOT's refusal to continue translation services or allow interpreters to bias on the basis of national origin. As explained herein, Plaintiffs' allegations are sufficient to survive a motion to dismiss on the pleadings because they contain sufficient facts and allegations that must be taken as true at this stage of the litigation and, if proved, could establish violations of Title VI and the Constitution.

ARGUMENT

This Statement of Interest addresses areas of Title VI interpretation raised by Defendants' motion to dismiss. First, as discussed in Section A below, well-established judicial precedent, federal agency regulations interpreting Title VI, and decades of consistent interpretation of those regulations by the U.S. Department of Justice (DOJ), DOT and other federal agencies make clear that language-based discrimination

constitutes a form of unlawful intentional national origin discrimination. Second, as discussed in Section B, Plaintiffs have sufficiently pleaded intentional national origin discrimination.

A. Language-Based Discrimination Constitutes a Form of National Origin Discrimination Prohibited by Title VI

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Contrary to Defendants' assertions, federal agencies and the courts have consistently held that when a federally funded recipient's refusal to provide language assistance denies LEP persons meaningful access to the benefits of the recipient's programs or activities, that denial constitutes national origin discrimination[5] and can constitute *intentional* national origin discrimination.

As with all allegations of discrimination, discrimination can be proved using either disparate treatment or disparate impact theories. Plaintiffs who allege solely disparate impact claims under Title VI must bring those claims through the

[5] The level of language assistance services a recipient must provide is a fact-specific inquiry that includes consideration of the number and frequency of encounters with LEP individuals in the recipient's service area, the importance and impact of the program or activity on the LEP individual, and the resources appropriate to the circumstances. *See* discussion *infra* Section A.2.

administrative process; plaintiffs who complain of intentional discrimination may proceed through the administrative process and also have the right to file a private lawsuit. Plaintiffs here have alleged intentional national origin discrimination and, particularly at this stage where there has been no discovery, have sufficiently pleaded it to defeat a motion to dismiss.

1. Courts Have Consistently Found that Language-Based Discrimination Constitutes National Origin Discrimination

Longstanding and well-established federal judicial precedent holds that Title VI's prohibition against national origin discrimination covers discrimination against individuals who, on account of their national origin or ancestry, are limited in their English proficiency. Indeed, nearly forty years ago, the Supreme Court held in *Lau v. Nichols*, 414 U.S. 563, that Title VI requires language assistance services sufficient to provide LEP individuals with meaningful access to a recipient's programs and activities, and that the denial of such services constitutes national origin discrimination. In *Lau*, the Supreme Court concluded that Title VI and its implementing regulations required a federally-funded school district to provide language assistance services to ensure that LEP students were provided with meaningful access to the district's educational programs. 414 U.S. 563. That case involved a group of approximately 1,800 public school students of Chinese ancestry who did not speak English, and to whom the school system provided the same services—an education solely in English—that it provided to students who spoke English. The Court held that by failing to provide LEP Chinese-

speaking students meaningful access to educational programs, the school district's practices violated Title VI's prohibition against national origin discrimination. Specifically, the Court ruled that the school system violated Title VI by failing to provide LEP students with any language assistance services (e.g., bilingual education or other language instruction). *Id.* at 566-69. The Court observed, "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by" Title VI and its implementing regulations. *See id.* at 568.

Consistent with the holding of *Lau*, lower federal courts have held that language-based discrimination constitutes a form of national origin discrimination prohibited by Title VI. *See, e.g.*, *United States v. Maricopa Cnty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (citing *Lau*, 414 U.S. at 568); *see also Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116-17 (9th Cir. 2009) (noting that *Lau* concluded that "discrimination against LEP individuals was discrimination based on national origin in violation of Title VI"); *Jones v. Gusman*, 296 F.R.D. 416, 454 (E.D. La. June 6, 2013) ("[L]ongstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI." (citing *Maricopa Cnty.*, 915 F. Supp. 2d at 1079)); *Aghazadeh v. Maine Med. Ctr.*, No. 98-421, 1999 WL 33117182, at *7 (D. Me. June 8,

1999) (denying hospital-defendant's motion to dismiss where LEP patient-plaintiffs alleged that a failure to provide interpreter services violated Title VI); *Mendoza v. Lavine*, 412 F. Supp. 1105, 1110 (S.D.N.Y. 1976) (denying motion to dismiss in case alleging that defendants' failure to provide language assistance services violated Title VI); *Pabon v. Levine*, 70 F.R.D. 674, 677 (S.D.N.Y. 1976) (summary judgment for defendants denied in case alleging that State officials failed to provide unemployment insurance information in Spanish, in violation of Title VI).

2. DOJ, DOT and Other Federal Agencies Have Consistently Found that Language-Based Discrimination Is a Form of National Origin Discrimination

Federal agencies, for over 40 years, have interpreted the Title VI prohibition against national origin discrimination to require that LEP individuals be provided meaningful access to federally funded programs and activities. *See, e.g.*, Dep't of Health, Education, and Welfare, Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970) ("Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.").

DOJ is responsible for coordinating federal agency Title VI compliance and enforcement. *See* Executive Order No. 12250, Leadership and Coordination of

Nondiscrimination Laws, 45 Fed. Reg. 72,995 (Nov. 2 1980) ("Exec. Order No. 12250"); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124 (6th Cir. 1996); *see also* 28 C.F.R. § 42.401 ("In accord with the authority granted the Attorney General under Executive Order 12250, this subpart shall govern the respective obligations of federal agencies regarding enforcement of title VI."); 28 C.F.R. § 50.3 (setting forth guidelines for federal agencies to follow in their enforcement of Title VI). In accordance with DOJ's Title VI compliance and enforcement responsibilities, DOJ has provided written policy guidance to federal agencies regarding "compliance standards" that their recipients of federal funds must follow to ensure that the programs and activities they provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI and its implementing regulations. *See* DOJ Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50,123 (Aug. 16, 2000) ("DOJ Policy Guidance") ("This policy directive concerning the enforcement of Title VI . . . is being issued pursuant to the authority granted by Executive Order No. 12250 and Department of Justice regulations."); *see also* Executive Order No. 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000) ("Exec. Order No. 13166") (directing that each federal agency's guidance documents be consistent with the compliance standards and framework detailed in the Policy Guidance to agencies).

In order to ensure that recipients of federal financial assistance do not discriminate on the basis of individuals' national origin, DOJ's Policy Guidance to federal agencies explains that Title VI and its regulations require recipients of federal funds to ensure that LEP individuals have "meaningful access" to the "information and services [the recipients] provide." Exec. Order No. 13166, 65 Fed. Reg. at 50,124. The Guidance further makes clear that a recipient is engaged in national origin discrimination when it fails to provide adequate language assistance services to an LEP individual in ways that deny meaningful access to the recipient's programs or activities. *See* Exec. Order No. 13166, 65 Fed. Reg. 50,124 (citing *Lau*, 414 U.S. 563); *see also Nat'l Multi Hous. Council v. Jackson*, 539 F. Supp. 2d 425, 430 (D.D.C. 2008) ("Longstanding Justice Department regulations also expressly require communication between funding recipients and program beneficiaries in languages other than English to ensure Title VI compliance.").

DOT's more specific guidance to recipients of funds from DOT follows DOJ's model policy guidance. *See* DOT Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient Persons, 70 Fed. Reg. 74,087 (December 14, 2005) ("DOT LEP Guidance"). As made clear in DOT's LEP Guidance, "[w]ritten tests that do not assess English-language competency, but test competency for a particular license … for which knowing English is not required" may be considered vital documents that require translation. DOT LEP Guidance,70 Fed. Reg. at 74,095; *see*

also, Alexander v. Choate, 469 U.S. 287, 301 n.21 (1985) (the Court refers to *Lau* in analogizing meaningful access to reasonable accommodations standards).

In this case, "access" means that individuals who do not speak English must have reasonable means to demonstrate that they are qualified to secure driver's licenses provided by HDOT. As stated earlier, the level of language assistance services a recipient must provide is a fact-specific inquiry that includes consideration of the number and frequency of encounters with LEP individuals in the recipient's service area, the importance and impact of the program or activity on the LEP individual, and the resources appropriate to the circumstances. *See* DOT LEP Guidance, 70 Fed. Reg. at 74,091-92; see also U.S. Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,459 ("DOJ LEP Guidance"); DOJ Policy Guidance, 65 Fed. Reg. at 50,124-25. DOT and DOJ LEP Guidance and DOJ Policy Guidance also make clear that any claims of limited resources from large recipients or those serving a significant LEP population must be "well-substantiated" before those recipients are permitted to limit the type or breadth of language assistance services, and balanced against the harm associated with such limitations. DOT LEP Guidance, 70 Fed. Reg. at 74,092; DOJ Policy Guidance, 65 Fed. Reg. at 50,125; DOJ LEP Guidance, 67 Fed. Reg. at 41,460.

In accordance with DOJ's unique role in interpreting Title VI and DOT's expertise in enforcing that statute against recipients funded by the agency, this Court should afford significant deference to both agencies' shared and longstanding interpretation that Title VI and its implementing regulations require "funding recipients to ensure LEP persons have meaningful access to the recipient's programs," and that a recipient's failure to provide language assistance services can constitute national origin discrimination. *See, e.g., Maricopa Cnty.*, 915 F. Supp. 2d at 1080 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); *see also Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) ("When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation.") (citations and internal quotation marks omitted).

B. Failure by Recipients of Federal Financial Assistance to Comply with the Nondiscrimination Requirements of Title VI, Including the Requirement to Provide Meaningful Access to LEP Individuals, May be Proof of an Intent to Discriminate

Plaintiffs here have not only pleaded acts of national origin discrimination by the Defendants, but also that such discrimination was intentional. Plaintiffs allege that HDOT and other state officials were on clear notice of their obligation, as a longstanding condition of receiving federal financial assistance, to provide meaningful access to LEP

individuals who wished to take the test for a driver's license.[6] Plaintiffs further allege that HDOT's knowledge of this requirement, years of prior translated driver's tests, the obvious and foreseeable adverse impact on LEP individuals of discontinuing such access, alleged hostility to FACE and its members, and HDOT's decision to suspend translations without good reason, are all indicia of intentional discrimination based on national origin. *See* First Am. Compl. ¶¶ 32-37, 49, 51, 58-60, 63, 70. Defendants incorrectly contend that Plaintiffs cannot bring this claim under Title VI.

1. Plaintiffs Allege Intentional Discrimination

Where, as here, private plaintiffs have adequately alleged that a recipient of federal funds intentionally and knowingly refused to continue providing LEP individuals with meaningful access to their programs through the provision of language assistance services in violation of Title VI, courts have denied motions to dismiss their claims of intentional national origin discrimination on the pleadings. *See, e.g.*, *Cabrera v. Alvarez*, No. 12-04890, 2013 WL 1283445, at *5-6 (N.D. Cal. Mar. 27, 2013); *Almendares v. Palmer*, 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003). For example, in *Cabrera*, the district court found that Spanish-speaking LEP plaintiffs stated a plausible

[6] Through guidance, technical assistance, contractual assurances, compliance reviews, and when applicable, enforcement actions, recipients of federal funds are repeatedly and clearly notified of Title VI's obligation to provide language assistance services when encountering LEP individuals. There is no question that HDOT is on notice of the obligations that attach to its receipt of funds, including its Title VI obligation to take reasonable steps to provide LEP individuals meaningful access to its programs and activities.

claim of intentional discrimination under Title VI because they alleged sufficient facts to support an inference that the federally-funded public housing authority's repeated failures to provide language assistance services "were motivated by discriminatory intent." *Cabrera*, 2013 WL 1283445, at *6. According to the plaintiffs in *Cabrera*, an employee of the defendant public housing authority told a Spanish-speaking plaintiff to "learn English now that she is in America." *Id.* at *1. Additionally, the plaintiffs alleged that the defendants had rebuffed their requests for interpreter assistance and translation services in order to be able to complain about conditions in their rental units. *Id.* at *2. Based on these two allegations, the court concluded that the plaintiffs had adequately stated a claim for intentional national origin discrimination under Title VI, and that factual development would either prove or disprove those allegations. *Id.* at *5-6 (citing, *inter alia*, 28 C.F.R. § 42.405(d)(1), which requires recipients of federal financial assistance to provide "information in appropriate languages").

Further, in *Almendares*, the court found that plaintiffs, numerous LEP Spanish-speaking food stamp beneficiaries, sufficiently stated an intentional discrimination claim under Title VI where they alleged that State officials administering a State food stamp program purposefully discriminated against them by adopting a policy or practice of distributing program materials only in English, while knowing that Spanish-speaking applicants and beneficiaries could not understand the materials. 284 F. Supp. 2d at 807-08. Consistent with longstanding precedent, the court found that even when a policy or

practice is facially neutral, that policy or practice can be motivated by intentional national origin discrimination when established through evidence of "disparate impact, history of the state action, and foreseeability and knowledge of the discriminatory onus placed upon the complainants." *Id.* at 806 (quoting *S. Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.*, 254 F. Supp. 2d 486, 497 (D.N.J. 2003)); *see also Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979) (holding that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose"); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it bears more heavily on one race than another may provide an important starting point." (citation and internal quotation marks omitted)); *Pryor v. NCAA*, 288 F.3d 548, 565 (3d Cir. 2002) (allegations that facially-neutral rule, which established scholarship and athletic eligibility criteria for incoming student athletes, was adopted to reduce the number of African-American athletes who would become eligible for athletic scholarships and compete in intercollegiate athletics as freshmen stated a claim for purposeful race discrimination in violation of Title VI).

Defendants rely heavily upon *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975), and *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983) *cert. denied* 466 U.S. 929

(1984), for the proposition that discrimination based on an inability to speak English does not constitute national origin discrimination for purposes of the Equal Protection Clause. (Defs. Mem. at 12-17.) Such reliance is inapposite for several reasons.

In *Frontera,* the Sixth Circuit affirmed a judgment on the merits against the plaintiffs in an equal protection challenge to the Cleveland Civil Service Commission's and the Commissioner of Airports' failure to provide Spanish language assistance services for a civil service exam. 522 F.2d at 1220 (Plaintiff's poor showing on civil service exam in English did not justify substituting him for the person who obtained the highest score). The *Frontera* court addressed only "disproportionate impact" evidence in the context of employment examinations.[7] *See id.* at 1217-1219 & n.2. The court observed that the "evidence is clear that the Commission does not intentionally discriminate against Spanish language persons." *Id*. at 1218 n.2. Here, unlike in *Frontera,* the Plaintiffs allege intentional national origin discrimination; provide specific examples of actions and comments that, if true, could prove intentional bias on the basis of national origin against people who do not speak English on the part of employees of HDOT; and do not rely solely upon HDOT's failure to provide language services for

[7] *Frontera* also specifically distinguishes Title VI from its holding stating that "[s]tatutes have been enacted which provide exceptions to our nation's policy in favor of the English language and to protect other interests and carry out the policies of the Fourteenth Amendment." *Id.* at 1220; *see also Id.*at 1220 fn.3 (citing 42 U.S.C. § 2000d as interpreted by 45 C.F.R. § 80.3(b)(1) and *Lau*); *cf. Id.* at 1218 (noting that plaintiffs had not raised, and court expressed no opinion on, potential Title VII claims).

LEP persons. This same critique applies to Defendants' reliance on *Soberal-Perez v. Heckler*, a case in which the Second Circuit held that impact without any other evidence is not sufficient to prove intent. 717 F.2d 36; (*See* Defs. Mem. at 15-16).

Further, neither the *Frontera* nor *Soberal-Perez* plaintiffs, unlike Plaintiffs here, alleged that the defendant had been on notice of the civil rights requirement to provide meaningful access to LEP individuals, nor of the impact of a failure to do so. HDOT, on the other hand, is obligated under Title VI to provide LEP individuals meaningful access to its programs and activities and has not alleged – and could not allege -- that these are requirements of which they were unaware. Clearly, HDOT could not deny its notice of these requirements given longstanding contractual assurances with U.S. Department of Transportation, and other federal agencies, that are attached to the millions of dollars in federal funds it receives each year.[8]

[8] *See, e.g.*, Hawai'i Dep't of Trans., Office of Civil Rights, Title VI Program, *State of Hawai'i Dep't of Transp. Language Access Plan* (2011) ("HDOT Language Access Plan"), *available at* http://hidot.hawaii.gov/administration/files/2013/01/language-access-plan-2011.pdf; Hawai'i Dep't of Transp. *Your Rights Under Title VI of the Civil Rights Act of 1964* Brochure ("HDOT Your Title VI Rights Brochure"), *available at* http://hidot.Hawai'i.gov/administration/files/2013/01/title6brochure-3-17-10.pdf (2010) (identifying HDOT's responsibility to assess and address the needs of LEP individuals); Hawai'i Dep't of Transp. *Title VI Program Plan*, January 1, 2009 ("HDOT Title VI Program Plan"), *available at* http://hidot.Hawai'i.gov/administration/files/2013/01/2005-title6-plan.pdf (2009) (including Title VI assurance; instructions to collect data regarding languages spoken in a service area to determine compliance with Title VI; and a section devoted to language access obligations under Title VI).

Unlike the allegations in *Frontera* and *Soberal-Perez*, Plaintiffs allege that HDOT knew that Title VI obligated it to provide language services, had previously provided translations for approximately 8 years, (First Am. Compl. ¶¶ 39-42), and refused to continue to do so despite knowing the obvious adverse impact on and significant harm caused to substantial numbers of LEP individuals and FACE's offers to provide free translations. Plaintiffs further allege that state officials acted "disinterested and even hostile" during a meeting with FACE, that an HDOT official asked why Marshallese and Chuukese people had moved to Hawai'i, and described negative treatment that seemed to be directed toward Chuukese and Marshallese members of the FACE delegation, causing one Micronesian member of FACE to begin "tearing up because she was humiliated by the way HDOT officials were treating them." (*Id*. ¶¶ 60-64.) Plaintiffs' sufficiently pleaded allegations should survive Defendant's motion to dismiss, and Plaintiffs should be permitted to proceed with discovery to more fully develop the intent evidence. These allegations, if proven, could establish intentional national origin discrimination by Defendants in a violation of Title VI.

2. Impact Evidence Can Be an Element of Intent

Here, the Plaintiffs have alleged impact as an element of intent, not as a stand alone claim as suggested by Defendants. (Defs. Mem. at 22-24). Disparate impact evidence—such as proof that the policy of refusing to provide non-English speakers the opportunity to take a driver's license test primarily affects individuals of foreign national

origins or ancestry—is relevant to intentional discrimination claims and is often one necessary piece of the puzzle in an intent case.

Defendants improperly rely upon *Alexander v. Sandoval*, 532 U.S. 275 (2001) to refute Plaintiffs' claims. In *Sandoval*, the Supreme Court addressed only whether a private right of action exists to enforce the disparate impact regulation promulgated pursuant to Section 602 of Title VI. The Court concluded that the regulation at issue did not give rise to private rights of action to enforce it. *See Id.* at 293. The Court, however, did not disturb *Lau*'s holding that Title VI requires recipients to provide LEP individuals with meaningful access, and that a denial of meaningful access constitutes national origin discrimination. *See id.* at 279; *see also,* Defs. Mem. at 15 (implicitly conceding that *Lau* remains good law). Further, neither the Circuit Court nor the Supreme Court in *Sandoval* discussed the application of the alleged facts to a claim of intentional discrimination. Indeed, they could not, because the trial court had expressly "reserved ruling on the equal protection claim," *Sandoval v. Hagan*, 197 F.3d 484, 491 (11th Cir. 1999).

In addition, since *Soberal-Perez* and *Frontera* were decided, courts have held, appropriately, that statistical evidence of discriminatory impact on a particular race or national origin is a key indicator of intent, when combined with other factors. (*Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 702-05 (9th Cir. 2009) ("where challenged governmental policy is "facially neutral," proof of

disproportionate impact on an identifiable group, such as evidence of "gross statistical disparities," can satisfy the intent requirement where it tends to show that some invidious or discriminatory purpose underlies the policy" (citing *Arlington Heights*, 429 U.S. at 264-66)). In the instant case, undeniable notice[9] to a recipient of the longstanding Title VI requirement to provide meaningful access to LEP persons [10] and the foreseeable adverse impact and harm caused by revoking such access, combined with evidence of discriminatory impact against nation-origin-minority LEP persons, are all indicia of intentional national origin discrimination by Defendants. *See Arlington Heights*, 429 U.S. at 267; *Almendares*, 284 F. Supp. 2d at 806.

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[9] As a condition to the award of federal financial assistance, recipients of federal financial assistance must enter into a written contract assuring their compliance with Title VI and agreeing to comply with the requirements imposed by the agency awarding the funds. *See* 49 C.F.R. § 21.7 (Department of Transportation) (requiring assurances); *see e.g.*, Certificate and Assurances for Highway Safety Grants, Fiscal Year 2014, Standard Assurances, Appendix A, at Exhibit A; Standard HDOT Title VI Assurances, http://hidot.Hawai'i.gov/administration/files/2013/01/2005-title6-plan.pdf, at 33; *see also, Lau*, 414 U.S. at 569 ("The Federal Government has power to fix the terms on which its money allotments . . . shall be disbursed.") (citation omitted); *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605-606 (1986) (observing that a recipient's acceptance of federal financial assistance "triggers coverage under the nondiscrimination provision[s]" of Title VI).

[10] *See, e.g.*, HDOT Language Access Plan; HDOT Your Title VI Rights Brochure (identifying HDOT's responsibility to assess and address the needs of LEP individuals); HDOT Title VI Program Plan, at 33- 38, (including Title VI assurance; instructions to collect data regarding languages spoken in a service area to determine compliance with Title VI; and a section devoted to language access obligations under Title VI).

CONCLUSION

For the foregoing reasons, the Court should deny the defendants' motion to dismiss the Title VI and Equal Protection Claims on the pleadings. The Plaintiffs' allegations are sufficient to plead intentional national origin discrimination in violation of Title VI and the Equal Protection Clause. Plaintiffs should be permitted to proceed and engage in discovery on these claims.

Dated: Washington, D.C., March 28, 2014

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General
Civil Rights Division, U.S. Department of Justice

By: /s/ Bernadette Brennan
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

FAITH ACTION FOR COMMUNITY EQUITY; TOCHIRO KOCHIRO KOVAC, individually and on behalf of a class of persons in the State of Hawaii who, because of their national origins, have limited English proficiency; Plaintiffs, vs. HAWAII DEPARTMENT OF TRANSPORTATION; GLENN OKIMOTO, in his official capacity as the Director of the Hawaii Department of Transportation, Defendants.	Case No. CV-13-00450 SOM-RLP Civil Rights Action Class Action **DECLARATION OF BERNADETTE BRENNAN**

DECLARATION OF BERNADETTE BRENNAN

I, BERNADETTE BRENNAN, declare as follows:

1. I am a United States Department of Justice Attorney assigned to this matter.

2. I make this declaration from information available to me in my official capacity. This Declaration is submitted in support of the attached *Statement of Interest of the United States of America*.

3. Attached as Exhibit "A" is a true and correct copy of the cited: Appendix A to Part 1200 – Certification and Assurances for Highway Safety Grants (23 U.S.C. Chapter 4) for the State of Hawai'i for the Fiscal Year 2014.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: March 28, 2014, at Washington, D.C.

/s/ Bernadette Brennan
BERNADETTE BRENNAN

APPENDIX A TO PART 1200 –
CERTIFICATION AND ASSURANCES
FOR HIGHWAY SAFETY GRANTS (23 U.S.C. CHAPTER 4)

State: Hawaii Fiscal Year: 2014

Each fiscal year the State must sign these Certifications and Assurances that it complies with all requirements including applicable Federal statutes and regulations that are in effect during the grant period. (Requirements that also apply to subrecipients are noted under the applicable caption.)

In my capacity as the Governor's Representative for Highway Safety, I hereby provide the following certifications and assurances:

GENERAL REQUIREMENTS

To the best of my personal knowledge, the information submitted in the Highway Safety Plan in support of the State's application for Section 402 and Section 405 grants is accurate and complete. (Incomplete or incorrect information may result in the disapproval of the Highway Safety Plan.)

The Governor is the responsible official for the administration of the State highway safety program through a State highway safety agency that has adequate powers and is suitably equipped and organized (as evidenced by appropriate oversight procedures governing such areas as procurement, financial administration, and the use, management, and disposition of equipment) to carry out the program. (23 U.S.C. 402(b)(1)(A))

The State will comply with applicable statutes and regulations, including but not limited to:

- 23 U.S.C. Chapter 4 - Highway Safety Act of 1966, as amended
- 49 CFR Part 18 - Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments
- 23 CFR Part 1200 – Uniform Procedures for State Highway Safety Grant Programs

The State has submitted appropriate documentation for review to the single point of contact designated by the Governor to review Federal programs, as required by Executive Order 12372 (Intergovernmental Review of Federal Programs).

FEDERAL FUNDING ACCOUNTABILITY AND TRANSPARENCY ACT (FFATA)

The State will comply with FFATA guidance, OMB Guidance on FFATA Subward and Executive Compensation Reporting, August 27, 2010, (https://www.fsrs.gov/documents/OMB_Guidance_on_FFATA_Subaward_and_Executive_Compensation_Reporting_08272010.pdf) by reporting to FSRS.gov for each sub-grant awarded:

- Name of the entity receiving the award;
- Amount of the award;

- Information on the award including transaction type, funding agency, the North American Industry Classification System code or Catalog of Federal Domestic Assistance number (where applicable), program source;
- Location of the entity receiving the award and the primary location of performance under the award, including the city, State, congressional district, and country; and an award title descriptive of the purpose of each funding action;
- A unique identifier (DUNS);
- The names and total compensation of the five most highly compensated officers of the entity if:
  (i) the entity in the preceding fiscal year received—
    (I) 80 percent or more of its annual gross revenues in Federal awards;
    (II) $25,000,000 or more in annual gross revenues from Federal awards; and
  (ii) the public does not have access to information about the compensation of the senior executives of the entity through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986;
- Other relevant information specified by OMB guidance.

NONDISCRIMINATION
(applies to subrecipients as well as States)

The State highway safety agency will comply with all Federal statutes and implementing regulations relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (Pub. L. 88-352), which prohibits discrimination on the basis of race, color or national origin (and 49 CFR Part 21); (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681-1683 and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and the Americans with Disabilities Act of 1990 (Pub. L. 101-336), as amended (42 U.S.C. 12101, et seq.), which prohibits discrimination on the basis of disabilities (and 49 CFR Part 27); (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. 6101-6107), which prohibits discrimination on the basis of age; (e) the Civil Rights Restoration Act of 1987 (Pub. L. 100-259), which requires Federal-aid recipients and all subrecipients to prevent discrimination and ensure nondiscrimination in all of their programs and activities; (f) the Drug Abuse Office and Treatment Act of 1972 (Pub. L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (g) the comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (Pub. L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (h) Sections 523 and 527 of the Public Health Service Act of 1912, as amended (42 U.S.C. 290dd-3 and 290ee-3), relating to confidentiality of alcohol and drug abuse patient records; (i) Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. 3601, et seq.), relating to nondiscrimination in the sale, rental or financing of housing; (j) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (k) the requirements of any other nondiscrimination statute(s) which may apply to the application.

THE DRUG-FREE WORKPLACE ACT OF 1988(41 USC 8103)

The State will provide a drug-free workplace by:

- Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;
- Establishing a drug-free awareness program to inform employees about:
  - The dangers of drug abuse in the workplace.
  - The grantee's policy of maintaining a drug-free workplace.
  - Any available drug counseling, rehabilitation, and employee assistance programs.
  - The penalties that may be imposed upon employees for drug violations occurring in the workplace.
  - Making it a requirement that each employee engaged in the performance of the grant be given a copy of the statement required by paragraph (a).
- Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will –
  - Abide by the terms of the statement.
  - Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction.
- Notifying the agency within ten days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction.
- Taking one of the following actions, within 30 days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted –
  - Taking appropriate personnel action against such an employee, up to and including termination.
  - Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.
- Making a good faith effort to continue to maintain a drug-free workplace through implementation of all of the paragraphs above.

BUY AMERICA ACT
(applies to subrecipients as well as States)

The State will comply with the provisions of the Buy America Act (49 U.S.C. 5323(j)), which contains the following requirements:

Only steel, iron and manufactured products produced in the United States may be purchased with Federal funds unless the Secretary of Transportation determines that such domestic purchases would be inconsistent with the public interest, that such materials are not reasonably available and of a satisfactory quality, or that inclusion of domestic materials will increase the cost of the overall project contract by more than 25 percent. Clear justification for the purchase of non-

domestic items must be in the form of a waiver request submitted to and approved by the Secretary of Transportation.

POLITICAL ACTIVITY (HATCH ACT)
(applies to subrecipients as well as States)

The State will comply with provisions of the Hatch Act (5 U.S.C. 1501-1508) which limits the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

CERTIFICATION REGARDING FEDERAL LOBBYING
(applies to subrecipients as well as States)

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

3. The undersigned shall require that the language of this certification be included in the award documents for all sub-award at all tiers (including subcontracts, subgrants, and contracts under grant, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

RESTRICTION ON STATE LOBBYING
(applies to subrecipients as well as States)

None of the funds under this program will be used for any activity specifically designed to urge or influence a State or local legislator to favor or oppose the adoption of any specific legislative proposal pending before any State or local legislative body. Such activities include both direct and indirect (e.g., "grassroots") lobbying activities, with one exception. This does not preclude a State official whose salary is supported with NHTSA funds from engaging in direct communications with State or local legislative officials, in accordance with customary State practice, even if such communications urge legislative officials to favor or oppose the adoption of a specific pending legislative proposal.

CERTIFICATION REGARDING DEBARMENT AND SUSPENSION
(applies to subrecipients as well as States)

Instructions for Primary Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded*, as used in this clause, have the meaning set out in the Definitions and coverage sections of 49 CFR Part 29. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR Part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification , in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR Part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the list of Parties Excluded from Federal Procurement and Non-procurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR Part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of record, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or Local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the Statements in this certification, such prospective participant shall attach an explanation to this proposal.

Instructions for Lower Tier Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded*, as used in this clause, have the meanings set out in the Definition and Coverage sections of 49 CFR Part 29. You may contact the person to whom this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR Part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion -- Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions. (See below)

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR Part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered

transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Non-procurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR Part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion -- Lower Tier Covered Transactions:

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

POLICY ON SEAT BELT USE

In accordance with Executive Order 13043, Increasing Seat Belt Use in the United States, dated April 16, 1997, the Grantee is encouraged to adopt and enforce on-the-job seat belt use policies and programs for its employees when operating company-owned, rented, or personally-owned vehicles. The National Highway Traffic Safety Administration (NHTSA) is responsible for providing leadership and guidance in support of this Presidential initiative. For information on how to implement such a program, or statistics on the potential benefits and cost-savings to your company or organization, please visit the Buckle Up America section on NHTSA's website at www.nhtsa.dot.gov. Additional resources are available from the Network of Employers for Traffic Safety (NETS), a public-private partnership headquartered in the Washington, D.C. metropolitan area, and dedicated to improving the traffic safety practices of employers and employees. NETS is prepared to provide technical assistance, a simple, user-friendly program kit, and an award for achieving the President's goal of 90 percent seat belt use. NETS can be contacted at 1 (888) 221-0045 or visit its website at www.trafficsafety.org.

POLICY ON BANNING TEXT MESSAGING WHILE DRIVING

In accordance with Executive Order 13513, Federal Leadership On Reducing Text Messaging While Driving, and DOT Order 3902.10, Text Messaging While Driving, States are encouraged to adopt and enforce workplace safety policies to decrease crashed caused by distracted driving, including policies to ban text messaging while driving company-owned or -rented vehicles, Government-owned, leased or rented vehicles, or privately-owned when on official Government business or when performing any work on or behalf of the Government. States are also encouraged to conduct workplace safety initiatives in a manner commensurate with the size of the business, such as establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving, and education, awareness, and other outreach to employees about the safety risks associated with texting while driving.

ENVIRONMENTAL IMPACT

The Governor's Representative for Highway Safety has reviewed the State's Fiscal Year highway safety planning document and hereby declares that no significant environmental impact will result from implementing this Highway Safety Plan. If, under a future revision, this Plan is modified in a manner that could result in a significant environmental impact and trigger the need for an environmental review, this office is prepared to take the action necessary to comply with the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) and the implementing regulations of the Council on Environmental Quality (40 CFR Parts 1500-1517).

SECTION 402 REQUIREMENTS

The political subdivisions of this State are authorized, as part of the State highway safety program, to carry out within their jurisdictions local highway safety programs which have been approved by the Governor and are in accordance with the uniform guidelines promulgated by the Secretary of Transportation. (23 U.S.C. 402(b)(1)(B))

At least 40 percent (or 95 percent, as applicable) of all Federal funds apportioned to this State under 23 U.S.C. 402 for this fiscal year will be expended by or for the benefit of the political subdivision of the State in carrying out local highway safety programs (23 U.S.C. 402(b)(1)(C), 402(h)(2)), unless this requirement is waived in writing.

The State's highway safety program provides adequate and reasonable access for the safe and convenient movement of physically handicapped persons, including those in wheelchairs, across curbs constructed or replaced on or after July 1, 1976, at all pedestrian crosswalks. (23 U.S.C. 402(b)(1)(D))

The State will provide for an evidenced-based traffic safety enforcement program to prevent traffic violations, crashes, and crash fatalities and injuries in areas most at risk for such incidents. (23 U.S.C. 402(b)(1)(E))

The State will implement activities in support of national highway safety goals to reduce motor vehicle related fatalities that also reflect the primary data-related crash factors within the State as identified by the State highway safety planning process, including:

- Participation in the National high-visibility law enforcement mobilizations;
- Sustained enforcement of statutes addressing impaired driving, occupant protection, and driving in excess of posted speed limits;
- An annual statewide seat belt use survey in accordance with 23 CFR Part 1340 for the measurement of State seat belt use rates;
- Development of statewide data systems to provide timely and effective data analysis to support allocation of highway safety resources;
- Coordination of Highway Safety Plan, data collection, and information systems with the State strategic highway safety plan, as defined in 23 U.S.C. 148(a).

(23 U.S.C. 402(b)(1)(F))

The State will actively encourage all relevant law enforcement agencies in the State to follow the guidelines established for vehicular pursuits issued by the International Association of Chiefs of Police that are currently in effect. (23 U.S.C. 402(j))

The State will not expend Section 402 funds to carry out a program to purchase, operate, or maintain an automated traffic enforcement system. (23 U.S.C. 402(c)(4))

I understand that failure to comply with applicable Federal statutes and regulations may subject State officials to civil or criminal penalties and/or place the State in a high risk grantee status in accordance with 49 CFR 18.12.

I sign these Certifications and Assurances based on personal knowledge, after appropriate inquiry, and I understand that the Government will rely on these representations in awarding grant funds.

Signature Governor's Representative for Highway Safety

JUN 17 2013
Date

Glenn M. Okimoto, Ph.D.

Printed name of Governor's Representative for Highway Safety

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

FAITH ACTION FOR COMMUNITY EQUITY; TOCHIRO KOCHIRO KOVAC, individually and on behalf of a class of persons in the State of Hawaii who, because of their national origins, have limited English proficiency; Plaintiffs, vs. HAWAII DEPARTMENT OF TRANSPORTATION; GLENN OKIMOTO, in his official capacity as the Director of the Hawaii Department of Transportation, Defendants.	Case No. CV-13-00450 SOM RLP Civil Rights Action Class Action **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known address:

Served Electronically through CM/ECF on March 28, 2014:

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DATED: March 28, 2014 at Washington D.C.

/s/ Bernadette Brennan
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