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Private Actions to Sue for Civil Rights Violations in Federally Assisted Programs After Alexander v. Sandoval

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Summary

In *Alexander v. Sandoval*, a narrow 5 to 4 majority of the U.S. Supreme Court ruled that private individuals may not sue state agencies under Title VI of the 1964 Civil Rights Act over claims of unintentional or so-called "disparate impact" discrimination. At issue in *Sandoval* was the State of Alabama's "English-only policy," requiring all aspects of its driver's license examination process, including the written portion, to be exclusively in English. In rejecting a Mexican immigrant's claim that the state policy violated Title VI because of its "disparate impact" on ethnic minorities, a five Justice majority ruled that Congress did not intend a private right of action to enforce Title VI, except as a remedy for intentional discrimination. Federal regulations prohibiting state practices that have a discriminatory impact, regardless of intent, could not provide a basis for private lawsuits. *Sandoval*, however, did not directly confront federal agency authority, previously acknowledged by the Court, to enforce Title VI compliance administratively with rules condemning practices discriminatory in their effect on protected minority groups. Thus, at least for now, "disparate impact" rules – like those mandating language assistance for non-English proficient clients of federally financed programs – may still be enforced by the government, just not by private litigants. In addition, as Justice Stevens emphasized in his *Sandoval* dissent, an alternative avenue of relief for Title VI disparate impact claims may be available under another civil rights statute, 42 U.S.C. § 1983. But given the lengths to which the Court went to address an issue on which the federal appellate courts were substantially in agreement, *Sandoval* may augur future perils for substantive agency rules condemning disparate impact under Title VI.

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In *Alexander v. Sandoval*,[1] a narrow 5 to 4 majority of the U.S. Supreme Court ruled that private individuals may not sue state agencies under Title VI of the 1964 Civil Rights Act over claims of unintentional or so-called "disparate impact" discrimination. Briefly, § 601 of Title VI enacted a prohibition on discrimination because of race, color, or national origin in any federally assisted "program or activity."[2] Responsibility for effectuating this anti-discrimination principle was lodged with federal departments and agencies that administer federal grant-in-aid programs. Specifically, such agencies are directed by § 602 of the Act to issue regulations and to undertake administrative enforcement proceedings potentially leading to termination of federal funds to any noncomplying recipient, whether a state or local government or private program sponsor. Section 602 regulations of most agencies specify policies and practices of grantees that violate Title VI, require assurances of compliance by public or private entities seeking federal funds, and provide formal procedures for complaint investigations and compliance reviews. The regulations mandate compliance with nondiscrimination requirements as a condition for continued funding and provide for possible termination of federal assistance to recipients who fail to comply. Pursuant to § 602, Title VI regulations of the Department of Justice (DOJ) and other Title VI agencies prohibit not only intentionally discriminatory practices, but also the use by recipients of "criteria or methods of administration which have the effect of subjecting individuals to discrimination."[3]

Nearly two decades ago, In *Guardians Ass'n v. Civil Service Commission*,[4] a splintered 5 to 4 majority of the Justices concluded that § 601 of Title VI demanded proof of discriminatory intent, but upheld agency implementation regulations prohibiting disparate impact discrimination under § 602. Justice White wrote for the majority that compensatory damages could be awarded only for intentional Title VI violations and that victims of disparate impact discrimination were limited to prospective relief. By

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[1]121 S. Ct 1511 (2001).

[2]42 U.S.C. § 2000d. That section provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of , or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[3]28 C.F.R. § 42.104(b)(2). See also 49 C.F.R. § 21.5(b)(2) and Guardians Ass'n v. Civil Service Comm's, 463 U.S. 582, 592 n.13 (White J.)(observing "every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination).

[4]463 U.S. 582 (1983).

way of *dicta* in *Alexander v. Choate*,[5] a case involving § 504 of the Rehabilitation Act of 1973,[6] the Court reiterated the *Guardians* finding that "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI," explaining that Congress had "delegated to the agencies in the first instance the complex determination of what sorts of disparate impact upon minorities constituted significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts."[7] Thus, prior to *Sandoval*, an implied private right of action to enforce § 601 of Title VI in intentional discrimination cases had been plainly recognized by the Supreme Court. Similarly, it seemed, Title VI agencies could take formal administrative actions to prevent practices by federal grantees that had a discriminatory effect on protected minorities. Less certain, however, was whether private litigants could sue for disparate impact discrimination since the Court had never explicitly held that such a remedy exists under the § 602 regulations.[8] Nonetheless, most federal appeals courts had allowed private rights of action to enforce Title VI regulations, including disparate impact.[9]

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[5]469 U.S. 287 (1985).

[6]29 U.S.C. § 794.

[7]469 U.S. at 293-94.

[8]The divide among the Justices on the question when Guardians Ass'n was decided was considerable. Two Justices (Marshall and White) each argued that showing disparate impact was sufficient to prove a violation of § 601, without showing discriminatory intent. Although seven Justices rejected this conclusion, three of them (Brennan, Blackmun, and Stevens) joined Justices Marshall and White to form a majority concluding that § 602 permits federal agencies to promulgate regulations that prohibit disparate impact discrimination:

> The threshold question before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI . . . and [the] administrative regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent. Guardians, 463 U.S. at 584 (Steven J. dissenting, joined by Brennan and Blackmun, JJ.).

Two Justices (Rehnquist and White) were persuaded that although a violation might be established, only equitable relief (i.e. no monetary damages) is available for "unintentional" violations of Title VI. Two others (Powell and Burger) believed that no private remedy should be given. At least four Justices believed that both compensatory and prospective relief were appropriate.

[9]See e.g. Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999)(holding that Title VI regulations prohibiting discriminatory effects in federally funded education programs gave rise to a private right of action); Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996)(finding that Hispanic parents had a private cause of action under Title VI to challenge school district's decision to close neighborhood elementary schools and to open a new charter school; however, because parents failed to show a disparate impact, their claims were denied); New York Urban League, Inc. v. State of New York, 71 F. 3d 1031 (2d Cir. 1995)(noting that riders of the New York City Transit Authority subway and bus system, the majority of whom are protected minority group members, had a private cause of action under Title VI).

At issue in *Sandoval* was the State of Alabama's "English-only policy," requiring all aspects of its driver's license examination process, including the written portion, to be exclusively in English. In rejecting a Mexican immigrant's claim that the state policy violated Title VI because of its "disparate impact" on ethnic minorities, a five Justice majority ruled that Congress did not intend a private right of action to enforce Title VI, except as a remedy for intentional discrimination. Federal regulations prohibiting state practices that have a discriminatory impact, regardless of intent, could not provide a basis for private lawsuits. *Sandoval*, however, did not directly confront federal agency authority, previously acknowledged by the Court, to enforce Title VI compliance administratively with rules condemning practices discriminatory in their effect on protected minority groups. Thus, at least for now, "disparate impact" rules – like those mandating language assistance for non-English proficient clients of federally financed programs – may still be enforced by the government, just not by private litigants. In addition, as Justice Stevens emphasized in his *Sandoval* dissent, an alternative avenue of relief for Title VI disparate impact claims may be available under another civil rights statute, 42 U.S.C. § 1983, discussed *infra*. But given the lengths to which the Court went to address an issue on which the federal appellate courts were substantially in agreement, *Sandoval* may augur future perils for substantive agency rules condemning disparate impact under Title VI.

The *Sandoval* Decision

In 1990, the State of Alabama amended its Constitution, declaring that English is the official language of the state. Thereafter, the Alabama Department of Public Safety implemented a policy of administering driver's license examinations only in English. Martha Sandoval, representing a class of non-English speakers, filed suit arguing that the policy "had the effect" of discriminating against individuals because of their national origin in violation of DOJ's "disparate impact" regulations. As noted, those regulations, promulgated under § 602, bar recipients of federal grantees from utilizing "criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin."[10] Both a federal district court and the Eleventh Circuit agreed that Congress created a private cause of action under Title VI to enforce disparate impact regulations. The U.S. Supreme Court in a five to four decision reversed. Justice Scalia, joined by Chief Justice Rehnquist, and Justice O'Connor, Kennedy, and Thomas spoke for the majority. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, filed a dissent.

Justice Scalia's opinion noted that private rights of action to enforce a federal law must be created by Congress. In examining the Act, the Court found that the private "rights creating" language in § 601 of the Act – "no person shall be subject to discrimination" – is absent from § 602. The text and structure of § 602 focused on the regulatory role of federal agencies, not the rights of persons protected or conduct of funding recipients, and placed "elaborate restrictions" on agency enforcement and fund termination proceedings. Such factors militated against finding any congressional intent to create a "freestanding private right of action" to enforce the disparate impact regulations. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Justice Scalia rejected arguments

[10] 28 C.F.R. § 42.104(b)(2)(2000).

that courts had a "duty" to effectuate the statute's purpose by providing a private remedy, or that § 602 must be interpreted "in light of the contemporary legal context" of the 1964 Act, when implied rights of action routinely found judicial favor. "We have never accorded dispositive weight to context shorn of text . . .legal context matters only to the extent that it clarifies text."

In essence, the majority opinion embraced three basic propositions. First, private individuals may sue to enforce § 601 and obtain both injunctive relief and monetary damages. Secondly, the § 601 remedy applies only to claims of intentional discrimination. Third, Justice Scalia "assum[ed]," but did not decide, that although outside the scope of § 601, agency regulations under § 602 could validly proscribe activities that have a disparate impact on racial groups. But because the Title VI precedents were equivocal on the point, and because of "considerable tension" with the rule of *Regents of the University of California v. Bakke*[11] and *Guardians Ass'n* that § 601 forbids only intentional discrimination, the Court was unwilling to permit a private right of action to enforce the disparate impact regulations. "It is now clear that the disparate impact regulations do not simply apply §601 – since they indeed forbid conduct that § 601 permits – and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce those regulations." Nor could language of the regulation create a right of action that Congress did not since "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself." Accordingly, *Sandoval* leaves undisturbed, at least for the present, federal agency enforcement of Title VI regulations for federal programs incorporating a disparate impact or discriminatory effects standard. However, private actions to enforce disparate impact claims are precluded. And the ultimate question of "whether the DOJ regulation was authorized by § 602" – that is, of the validity of disparate impact analysis in the Title VI context – remains open for some future review by the Court.

Justice Stevens, in a dissenting opinion joined by Justices Souter, Ginsburg, and Breyer, argued that *Cannon v. University of Chicago*[12] had upheld disparate impact private causes of action under both Title VI and Title IX of the 1972 Education Amendments. Describing as "unorthodox" and "haphazard" the cases limiting § 601 to intentional discrimination, the dissent felt the Court had disregarded the principle of deference to the construction of a statute by the agency charged with administering it. In addition, the majority opinion was criticized for ignoring the "contemporary context" of Title VI's adoption, which supported recognition of private rights of action.

Implications

Civil rights advocates argue that many supposedly unintentional practices – like the English language requirements in *Sandoval* – have a discriminatory impact on racial and ethnic minorities, as well as women, the disabled, and other protected classes. Other examples, which have been the target of private lawsuits, include racial profiling by police, placing waste treatment plants or other environmentally toxic and undesired facilities in predominantly minority neighborhoods, height and weight hiring standards,

[11]438 U.S. 265 (1978).

[12]41 U.S. 677 (1979).

or the use of written tests and other selection procedures in employment or education. Requiring plaintiffs in such cases to uncover the "smoking gun" of discriminatory intent, these groups argue, imposes an undue burden, unlikely to be met, on private parties seeking to enforce federal nondiscrimination standards. In this respect, *Sandoval* may have broader consequences than the Court's recent sovereign immunity jurisprudence because the restriction on private disparate impact enforcement actions applies with regard to all potential Title VI defendants, whether public or private federal grantees, and not just the states. In addition, the decision may have significance beyond Title VI, applying to private suits to enforce the disparate impact regulations under other statutes, such as § 504 of the Rehabilitation Act of 1974,[13] Title II of the Americans with Disabilities (ADA),[14] and the prohibition on gender discrimination in education under the Education Amendments of 1972,[15] all of which have remedial provisions that refer to Title VI or are comparable to it. The Supreme Court, for example, has assumed without deciding that § 504 covers disparate impact discrimination,[16] and ADA's Title II expressly requires that regulations be interpreted consistently with § 504.[17] Any earlier conclusions as to a private right of action may now be ripe for separate reconsideration in light of each statute's peculiar legal and legislative history.

Moreover, beyond limiting private actions to enforce Title VI disparate impact regulations, *Sandoval* could be read as legally undermining the validity of the disparate impact standard itself. Although the Court assumed for purposes of deciding the case that the regulations were valid, that supposition is weakened by the majority's rationale for finding the agency rules insufficient to support a private right of action. The opinion states that § 601, which prohibits only intentional discrimination, creates a private right of action for claims based on that provision, alone, and its implementing regulations. Section 602, in its view, is the statutory predicate for the disparate impact regulations, but may not provide authority for a private right of action challenging any activity not unlawful under § 601. Query, however, if the § 602 disparate impact regulations are not closely enough related to § 601 to support a private right of action, are they sufficiently linked to the latter to be valid at all, since § 602 only authorizes agencies to issue rules "to effectuate the provisions" of § 601? Moreover, were the Court in some future case to transpose its recent § 5 of the Fourteenth Amendment jurisprudence, the implications may be foreseeable. That is, while Congress is constitutionally empowered to prohibit acts that are not themselves a violation of the equal protection clause – e.g. unintentional acts with racially discriminatory effects – any such "prophylactic" congressional legislation (or agency rules under Title VI) must be "congruent" and "proportional" to actual violations found to exist.[18] This standard could put most agency disparate impact regulations in some constitutional jeopardy.

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[13]28 U.S.C. § 794.

[14]42 U.S.C. § 12131.

[15]20 U.S.C. §§ 1681 et seq.

[16] 469 U.S. 287 (1985).

[17]42 U.S.C. § 12134(b).

[18]See City of Boerne v. Flores, 521 U.S. 507 (1997); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).

A question left unanswered by *Sandoval* is whether there may be an alternative statutory route for redressing claims of disparate impact discrimination in federally assisted programs. Justice Stevens' dissent indicated that plaintiffs in the case had a separate cause of action under 42 U.S.C. § 1983, a Reconstruction-era civil rights law, permitting private individuals to sue governmental officials – or others acting "under color of law" – for violation of any "right, privilege, or immunity" secured by the federal Constitution or "laws." It remains unsettled, however, whether § 1983 reaches violations of agency regulations, and the *Sandoval* majority did not address the issue. Moreover, § 1983 claims require a showing that any alleged deprivation of federal right was perpetrated by "state actors," so that discrimination by private organizations receiving federal funds, though subject to Title VI, would not be covered. Allowing a § 1983 action, therefore, could lead to the arguable anomaly of making Title VI disparate impact regulations enforceable against governmental defendants, but not private recipients of federal largesse. Another approach, perhaps, is suggested by the dissent's assertion that facially neutral actions having a disparate impact may be evidence of intentional discrimination,[19] which remains actionable even in the majority's view. Justice Scalia, on the other hand, appears to invite a "clear statement rule" as the test for private causes of action against states "and "perhaps nonfederal state actors generally,"[20] which could pose an added limitation on both Title VI and § 1983 actions. And the majority opinion foreshadows another argument, that by providing for administrative termination of funds for disparate impact violations, § 602 may evidence congressional intent to preclude any private right of action.[21]

Nonetheless, since *Sandoval*, a U.S. district court in New Jersey has determined that a § 1983 action is appropriate for private individuals to enforce "environmental justice" claims pursuant to Title VI regulations of the Environmental Protection Agency. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,[22] a citizens' group sued the state environmental agency for issuing an air permit to a cement facility in a predominantly minority community. Less than a week before the Supreme Court decided *Sandoval*, the district court granted the plaintiffs' request for a preliminary injunction, ruling that the agency failed to consider the totality of the circumstances surrounding the operation of the proposed facility, and that plaintiffs established a prima facie case of disparate impact discrimination based on race and national origin in violation of EPA regulations under § 602. *South Camden* did not involve any claims of intentional discrimination.

In light of *Sandoval*, the *South Camden* court reconsidered its prior ruling, but found that private citizens may still enforce the § 602 disparate impact regulations through a § 1983 action. In so holding, the court noted that Justice Scalia acknowledged that the validity of the § 602 regulations themselves were not contested in *Alexander*, but were instead presumed to be valid. Furthermore, the court observed that there was a "critical distinction" between Congress' intent to create a private right of action under § 602 of the Act, which the *Sandoval* Court found did not exist, and the "very different

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[19]121 S. Ct. at 1530, n. 13 (Stevens J., dissenting).

[20]Id. at 1520-21.

[21]Id. at 1523.

[22]145 F. Supp.2d 505 (D.N.J. 2001).

question" of whether Congress intended to create such a remedy under § 1983. Therefore, the *South Camden* court concluded that the *Sandoval* ruling was limited to foreclosing private rights of action under § 602.

The approach taken by the *South Camden* court necessarily depends on the validity of the § 602 disparate impact regulations – an issue explicitly questioned, but not decided by the Supreme Court in *Sandoval*. Until the High Court revisits the question, and determines whether or not these regulations exceed statutory authority provided by Title VI, the future of disparate impact claims based on unintentional discrimination – whether in the context of English-only rules, environmental justice, or otherwise – remains uncertain. Of course, because the issue is one of statutory rather than constitutional interpretation, Congress may address it, as it did when it responded to a series of Court decisions narrowing the scope of federal equal employment opportunity law with passage of the Civil Rights Act of 1991.[23]

[23]P.L. 102-166, 105 Stat. 1071 (1991).