In a narrow 5 to 4 decision issued on April 24, 2001, the U.S. Supreme Court significantly curtailed the scope of one of our nation’s most important civil rights laws and eliminated a longstanding weapon for battling discrimination. The Court held in *Alexander v. Sandoval* that private parties may not sue to enforce regulations promulgated under Title VI of the Civil Rights Act of 1964 that prohibit federally funded programs from employing policies or practices that have the effect of discriminating on the basis of race or ethnicity. As a result, private suits under Title VI and its implementing regulations can now be brought only for intentional discrimination. If plaintiffs cannot prove intentional discrimination, they cannot sue under Title VI or its regulations, even if they can prove that the challenged action has a discriminatory impact for which no justification can be shown.

The Supreme Court’s decision in *Sandoval* abruptly reversed nearly three decades of precedent, including the unanimous views of all nine federal appeals courts to address the issue. Title VI prohibits programs and activities receiving federal funds from discriminating against any person on the basis of race, color or national origin. The federal courts had long read Title VI and its regulations to imply a private right of action for both intentional and disparate impact discrimination. The ability to sue for “disparate impact” discrimination is important because it reaches a broad range of conduct—plaintiffs do not need to show intentional mistreatment; they need only show that minorities are disproportionately injured by a policy or practice and that such disparate effects cannot be justified. To retain this valuable legal tool against discrimination, *Trial Lawyers for Public Justice* (TLPJ) joined a coalition of public interest groups in an *amicus* brief in *Sandoval* urging the Supreme Court to preserve private suits under Title VI’s disparate impact regulations. The Court, however, eliminated them.

The implications of the *Sandoval* decision are significant for a wide range of civil rights cases being litigated throughout the country, including “environmental justice” cases that challenge the placement of waste treatment plants and similar facilities in predominantly minority neighborhoods. This article reviews those implications, as well as possible responses to the Court’s decision. Before doing so, we want to urge anyone facing an attack based on Sandoval or trying to overcome its impact to contact TLPJ for assistance. We are briefing these issues and are eager to help.

**The Sandoval Decision**

*Sandoval* was a class action lawsuit contending that the State of Alabama violated Title VI’s disparate impact regulations by requiring applicants for a driver’s license to take the written examination in English. Specifically, the suit alleged that Alabama’s policy unjustifiably excluded non-English speakers from receiving a driver’s license, discriminating against them based on their national origin. Prior to adopting an English-only amendment to the state constitution in 1990, Alabama had administered the test in 14 languages. Alabama is one of 24 states that have enacted laws designating English as the official state language. But even those states—indeed all states except Alabama—administer driver’s license exams in multiple languages.

After the bench trial, the U.S. District Court for the Middle District of Alabama ruled in the plaintiffs’ favor. The U.S. Court of Appeals for the Eleventh Circuit affirmed, agreeing that there is an implied private right of action to enforce Title VI’s disparate impact regulations.

But, in an opinion by Justice Scalia, the Supreme Court ruled that private lawsuits alleging disparate impact discrimination under the regulations are not authorized under Title VI. According to the Court, the ability of plaintiffs to go to court to enforce Title VI and its regulations extends no further than the scope of the statute’s prohibitions. Title VI itself has been interpreted to prohibit
only intentional discrimination. Because the regulations that prohibit disparate impact discrimination go beyond the statute’s prohibition against intentional discrimination, plaintiffs cannot directly enforce the regulations without a congressional mandate to do so.

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress," Justice Scalia wrote. To determine Congress’s intent, the Court examined only the text and structure of Title VI refusing to consider other indicia of intent, such as the expectations that the enacting Congress had formed about implied private rights of action in light of then-contemporary legal decisions. The Court then concluded that Congress did not intend to create a private right of action under Title VI to enforce the discriminatory impact regulations.

In a dissenting opinion joined by Justices Souter, Ginsburg and Breyer, Justice Stevens stated that it "makes no sense" to differentiate for purposes of private Title VI lawsuits between intentional discrimination and discriminatory impact. There is but one private action to enforce Title VI, and we already know that such an action exists, he wrote. Justice Stevens called the majority’s decision “unfounded in our precedent and hostile to decades of settled expectations,” and further criticized the majority for reaching out to take the case in the first place, in the absence of any conflict among the lower federal courts on the issue.

**Future Civil Rights Enforcement**

The *Sandoval* decision’s implications for future civil rights enforcement are serious and far-reaching, but it is also important to understand both what actions are not affected by the decision and what options remain for enforcing Title VI’s disparate impact regulations.

To begin with, the Court’s ruling in *Sandoval* does not prevent federal agencies from bringing their own enforcement actions, which may include cutting off federal grants to programs that employ policies or practices that have an unjustified disparate impact on minorities. As a practical matter, however, this fact offers little solace to victims of discrimination because federal resources for enforcing Title VI and its regulations have always been limited. Indeed, the United States (during the Clinton administration) filed a brief in support of the plaintiffs in *Sandoval*, stating that "private enforcement provides a necessary supplement to government enforcement" of Title VI and its implementing regulations.

The *Sandoval* ruling also will not limit cases in which a discriminatory intent can be alleged and shown. For example, there has been some speculation that the *Sandoval* decision will have a negative impact on the enforcement of Title IX of the Education Amendments of 1972. Title IX was modeled on Title VI and prohibits sex discrimination in education programs that receive federal funds. *TLPI* has successfully brought several suits under Title IX to obtain equal opportunities for women in athletics. *Sandoval* will not affect these kinds of cases. This is because the Title IX athletics cases - like most Title IX suits, including those alleging sexual harassment - involve intentional discrimination. In other words, they involve conduct that is explicitly based on gender. The Supreme Court has long recognized a private right of action for intentional discrimination under Title IX, and the *Sandoval* majority confirmed this interpretation of Title IX.

Unlike most Title IX cases, most Title VI cases involve allegations of discriminatory impact. Suits for intentional discrimination on the basis of race or ethnicity are rare these days, in large part because few federally funded programs are overtly discriminatory and, as a result, intentional race and national origin discrimination have become increasingly difficult to prove.

Although *Sandoval* has extinguished the right of private parties to sue for disparate impact discrimination under Title VI regulations, there are two principal alternative theories of recovery that plaintiffs should consider: (1) filing suit under 42 U.S.C. §1983 to enforce Title VI’s disparate impact regulations and (2) filing suit in state courts alleging violations of state anti-discrimination laws (which will, of course, differ in each state).

**Section 1983 Claims**

The *Sandoval* decision clearly bars disparate impact suits under Title VI regulations against private organizations that receive federal funds (such as virtually all private colleges and universities). The opinion, however, leaves open the question of whether Title VI’s disparate impact regulations may be enforced against public recipients of federal funds under 42 U.S.C. §1983.

In his dissenting opinion, Justice Stevens stated that the plaintiffs in *Sandoval* might be able to pursue their case under §1983, a civil rights statute that permits suits against any person acting under color of state law who violates "rights, privileges or immunities secured by the Constitution and laws" of the United States. In cases involving disparate impact discrimination by "state actors," plaintiffs should therefore consider filing suit under §1983.

Section 1983 suits to enforce the Title VI regulations are likely to fare better in some federal courts of appeals than others, as the courts are split on whether federal regulations are "laws" of the United States within the meaning of §1983. For example, the Sixth Circuit has expressly held that regulations are independently enforceable "laws" within the meaning of §1983. Several other circuits, including the Second, Third and Ninth, appear to agree with the Sixth Circuit. In contrast, the Fourth and Eleventh Circuits have ruled that regulations may not form an independent basis for §1983 actions. The Supreme Court, in *Maine v. Thiboutot*, has held that the term "laws" in §1983 includes federal statutes, but it has never squarely addressed the issue of whether the term also includes federal regulations. The federal appeals courts that have interpreted laws to include regulations have, however, relied on language in a 1987 Supreme Court decision, *Wright v. City of Roanoke Redevelopment & Housing Authority*, to support their position.

Separate and apart from the question of whether regulations are laws for §1983 purposes, plaintiffs would also have to prove that Title VI’s disparate impact regulations create enforceable
"rights, privileges or immunities" within the meaning of §1983. There is substantial precedent to support the argument that the regulations meet the "enforceable rights" test, but defendants are likely to argue that Congress has impliedly foreclosed a §1983 remedy for enforcing the Title VI regulations by creating a comprehensive enforcement scheme under Title VI itself. Circuits are split on the issue of whether Title VI's enforcement scheme is sufficiently comprehensive to preclude a §1983 claim. For example, the Third Circuit has ruled that Title VI's enforcement scheme does not foreclose a §1983 remedy for violations of the disparate impact regulations. The Seventh Circuit, however, has reached the opposite conclusion, rejecting a §1983 claim to enforce Title VI's disparate impact regulations.

In any event, §1983 suits may only be brought for injunctive relief against state officials; states, their departments and agencies, and state officials sued in their official capacity for damages are not considered a persons within the meaning of §1983. Some state officials may try to defend against §1983 claims by arguing that they are immune from suit under the U.S. Constitution's Eleventh Amendment. But Eleventh Amendment sovereign immunity generally does not apply to suits seeking prospective injunctive relief against state officials, under the Young doctrine articulated by the Supreme Court.

Since the Court's decision in Sandoval, there has already been an important decision recognizing the availability of §1983 suits to enforce Title VI's disparate impact regulations. On May 10, 2001, the U.S. District Court for the District of New Jersey held in South Camden Citizens in Action v. New Jersey Dept of Environmental Protection that Title VI's disparate impact regulations may be enforced against state officials under §1983. Following the guidance provided in Justice Steven's Sandoval dissent, the district court upheld a preliminary injunction under §1983 that had been issued before Sandoval under Title VI's disparate impact regulations. Prior to Sandoval, the Court had ruled that New Jersey officials violated the Title VI regulations by granting Clean Air Act permits for a cement plant in a low-income, minority neighborhood. Residents of the predominantly African-American and Hispanic neighborhood had alleged that the state's permitting policy would adversely impact them, pointing to an already disproportionately high rate of asthma and other respiratory ailments.

State Law Claims

In the wake of Sandoval, plaintiffs should also consider asserting their disparate impact claims under state public accommodations or other anti-discrimination statutes. There are, of course, certain limitations imposed by resorting to state law. To begin with, there is no uniformity in state anti-discrimination statutes, some state courts are more friendly to civil rights claims than others. For political reasons, moreover, some state court judges may be reluctant to issue a ruling against state officials. All these factors should be carefully weighed in deciding whether to pursue a disparate impact claim under state law.

Conclusion

Section 83 claims, at least in some jurisdictions, appear to be the only remaining option for private suits to enforce Title VI's disparate impact regulations. Such lawsuits would be limited to discriminatory conduct by state officials and would not reach private recipients of federal funds but at least there may still be recourse against state-sanctioned conduct that has an unjustified discriminatory impact on minorities. Congress is, of course, free to overturn Sandoval as it has done with several other Supreme Court decisions that narrowed the scope of civil rights laws because the decision involved statutory rather than constitutional interpretation. But this seems unlikely to occur any time in the near future, given the current political climate. That being so, lawyers representing victims of disparate impact discrimination should carefully investigate potential causes of action under §1983, research all potentially applicable state laws, and, if further help is needed, consider contacting TLPI.

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ENDNOTES

2 Id. at 1523.
4 121 S. Ct. at 1519.
5 Id. at 1521.
6 Id. at 1533.
7 Id.
8 Id. at 1524, 1536.
9 20 U.S.C. 1681 et seq.
10 121 S. Ct. at 1527.
11 Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994).
12 The Third Circuit upheld a 1983 claim to enforce Title VI's disparate impact regulations in Powell v. Ridge, 189 F.3d 387, 399-403 (3d Cir.), cert. denied, 528 U.S. 1046 (1999); see Buckley v. City of Redding, 66 F.3d 188 (9th Cir. 1995) (framing issue as whether underlying statute conferred right enforceable under §1983, but applying analysis to regulations and finding regulations imposed enforceable, binding obligation on defendant); see also King v. Town of Hempstead,
161 F.3d 112 (2d Cir. 1998) (assuming regulations can provide independent basis for a 1983 suit, but without deciding issue).

13 Harris v. James, 127 F.3d 993, 1007-12 (11th Cir. 1997); Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987).

14 Maine v. Thiboutot, 448 U.S. 1, 6-8 (1980).


16 Powell, 189 F.3d at 401-03.

17 Alexander v. Chicago Park D., 773 F.2d 850, 856 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986).


20 On June 15, 2001, the U.S. Court of Appeals for the Third Circuit lifted the injunction issued by the district court in South Camden Citizens in Action, allowing the cement plant to open while the case is on appeal and suggesting that the 1983 claim may fail. The appeals court put the case on a fast track and scheduled oral argument the week of July 30 to consider whether to reinstate the injunction.