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May Private Individuals Sue a State That Establishes English-Only Policies?

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Case at a Glance

Title VI of the Civil Rights Act of 1964 prohibits any recipient of federal funds from discriminating on the basis of race, color, or national origin in any federally funded program. In this case, the Supreme Court is asked to determine whether individuals may bring a private action under Title VI against the director of the Alabama Department of Public Safety under the theory of "disparate impact" because the department requires driver's license applicants to take their examinations in English.

May Private Individuals Sue a State That Establishes English-Only Policies?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 176–180.

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Editor's Note: The respondent's brief in this case was not available by *PREVIEW*'s deadline.

Issue

When Congress enacted Section 602 of Title VI of the Civil Rights Act of 1964, did it intend to authorize individuals to bring a private action against states under disparate impact regulations promulgated by federal agencies pursuant to Title VI?

Facts

Alabama has historically administered its driver's license examination in a number of foreign languages. From the 1970s to 1991, the Alabama Department of Public Safety ("Department") administered the examination in at least 14 foreign languages, including Spanish, Korean, Farsi, Cambodian, German, Laotian, Greek, Arabic, French, Japanese, Polish, Thai, and Vietnamese. On July 13, 1990, an English-only amendment to the Alabama Constitution (Amendment 509) was ratified. That amendment provided that English is the official language of the state of Alabama.

About one year later, the Department adopted an English-only policy, requiring that all portions of the driver's license examination process, including the written examination, be administered in English only. The policy officially forbade the use of interpreters, translation dictionaries, and other interpretive aids. The Department's official policy still provides special accommodations for illiterate, hearing-impaired, deaf, and disabled applicants. The Department also permits non-English speaking drivers from other states and foreign countries to exchange valid out-of-state licenses for an Alabama license without taking the written examination.

After the new policy was implemented, the Alabama Attorney General issued an opinion concluding that Amendment 509 requires

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all applicants for driver's licenses to take the examination in English. The opinion acknowledged that the English-only policy "might be a violation of Title VI of the Civil Rights Act of 1964," but that considerations of safety and integrity of the licensing process would support a requirement that the driver's license examinations be given in English.

In December 1996, Martha Sandoval filed a class action suit in the U.S. District Court for the Middle District of Alabama against the Department and its director on behalf of herself and others similarly situated. She claimed that the English-only policy constituted discrimination on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d to 2000d-4) and its implementing regulations, as well as the equal protection clause of the Fourteenth Amendment to the United States Constitution.

After a trial without a jury, the district court entered a permanent injunction prohibiting the Department's enforcement of the policy and ordered the Department to make reasonable accommodations for non-English speakers who applied for a driver's license. 7 F.Supp.2d 1234 (M.D.Ala. 1996). The district court found that the policy was adopted as a pretext for discrimination and that the Department had intentionally discriminated on the basis of national origin.

The Department appealed the judgment to the U.S. Court of Appeals for the Eleventh Circuit. The Department argued that the lawsuit was barred by the Eleventh Amendment, that Section 602 of Title VI does not contain an implied private cause of action and that an English-language policy cannot constitute unlawful national original discrimination as a matter of law.

Affirming the district court, the Eleventh Circuit held that there is an implied private cause of action under Title VI of the Civil Rights Act of 1964 to enforce federal regulations prohibiting disparate-impact discrimination against statutorily protected groups. 211 F.3d 133 (11th Cir. 2000). Noting that Sandoval had brought a disparate-impact case, the court explained that she must prove by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI. Once a *prima facie* showing is made, the court said, the Department must prove that a substantial justification exists for the challenged practice. The court stated that if the Department meets this burden, Sandoval may still prevail by demonstrating that a comparably effective alternative practice exists that would result in less disproportionality, or that the Department's proffered justification is a pretext for discrimination.

The Eleventh Circuit concluded that the Department's policy of administering its driver's license examination only in English had a disparate impact on the basis of national origin in violation of Title VI. The court reasoned that the policy adversely affected non-English-speaking residents in the form of lost opportunities, social services, and other quality of life pursuits, noting that the vast majority of residents who could not obtain a license were from a country other than the United States. The Eleventh Circuit pointed out that the Department made special examination accommodations for other statutorily protected groups such as hearing-impaired, illiterate, and disabled residents.

In holding that Title VI creates a private implied cause of action against states to enforce the disparate impact regulations promulgated under Section 602, the Eleventh Circuit relied on the Supreme Court's decisions in *Lau v. Nichols,* 518 U.S. 187 (1996) and *Guardians Ass'n v. Civil Service Comm'n,* 63 U.S. 582 (1983). According to the Eleventh Circuit, the Supreme Court's decisions in *Lau, Guardians,* and *Alexander,* although not squarely addressing the issue, logically supported an implied private cause of action under Section 602.

The Department asked the U.S. Supreme Court to review the Eleventh Circuit's decision. The Supreme Court granted the Department's petition for a writ of certiorari. 121 S.Ct. 28 (2000).

Case Analysis

Section 601 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) prohibits any recipient of federal financial assistance from discriminating on the basis of race, color, or national origin in any federally funded program. The Supreme Court has recognized an implied private cause of action to enforce Section 601. See *Alexander v. Choate,* 469 U.S. 287, 293-94 (1985); *Guardians Ass'n v. Civil Service Comm'n,* 63 U.S. 582, 607 n.27 (1983).

Section 602 of Title VI authorizes federal agencies to promulgate rules and regulations effectuating Title VI. The section contains three essential parts. The first part delegates to federal agencies rule-making authority to effectuate Section 601. The second part provides agency guidelines for obtaining compliance with Section 601 and states that compliance may be effected by termination of funding or by any other

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means authorized by law. The third part establishes a procedural rule for determining noncompliance, including notice to the state agency, a requirement that the federal agency first seek voluntary compliance and a reporting mechanism for alerting Congress that a federal agency is considering termination of federal funding. There is no express provision in either Section 601 or Section 602 for an independent private-party enforcement action.

While Section 601 requires a plaintiff to establish the funding recipient's discriminatory intent, regulations promulgated by the U.S. Department of Justice and the U.S. Department of Transportation prohibit funding recipients from taking any action that results in a disparate impact or produces discriminatory effects on the basis of race, color, or national origin. The U.S. Department of Transportation has promulgated such regulations. The parties concede that the Alabama Department of Public Safety is subject to these regulations and that the U.S. Department of Transportation and the U.S. Department of Justice may enforce these regulations through proceedings to terminate federal funding or to discontinue financial assistance.

The parties disagree whether *an individual* may enforce these agency regulations without express statutory authorization. Sandoval relies on decisions in the Eleventh Circuit and in seven other circuits that found an implied right of private action in Section 602 cases. Sandoval also contends that Supreme Court cases, while not directly addressing the point, have indicated that there is a right to a private action for violation of regulations promulgated under Section 602.

On the other hand, Alexander argues that the Supreme Court in *United States v. Fordice* overruled the other Supreme Court cases relied on by Sandoval. According to the Department, in order to create a private cause of action against states in the context of legislation such as Title VI, Congress's intent must be "unambiguously" expressed in the language of the statute. It is the Department's position that Title VI does not meet this "clear statement" requirement.

The Department stresses that Section 601 covers only intentional discrimination and not disparate impact claims. It asserts that Section 601 does not authorize private individuals, as opposed to the federal government, to enforce compliance with the section's requirements. With respect to Section 602, the Department argues that it does not create any rights at all but merely delegates rule-making authority to federal agencies to effectuate the anti-discrimination provisions of Section 601. It is the Department's position that this "unremarkable grant of authority" does not authorize federal agencies to make impermissible by regulation what Congress has made permissible by statute.

According to the Department, the Supreme Court's Title VI decisions do not support a contrary analysis. The Department explains that in *Lau,* the Supreme Court assumed that Section 601 barred disparate-effect as well as intentional-discrimination claims. Since then, the Department says that the Court has made clear that Section 601 proscribes only what the Fourteenth Amendment proscribes—a standard that does not cover disparate impact claims.

The Department claims that Section 602 does not establish a different standard of care from Section 601 but merely allows federal agencies to "effectuate" Section 601 by promulgating regulations. According to the Department, Section 601 does not authorize federal agencies to create rules barring disparate effects arising from generally applicable state programs that occur "merely in spite of," rather than "because of," an individual's national origin. The Department asserts that an effort to bar disparate effects arising from Title VI would not effectuate the objectives of Title VI but would rewrite them. The Department points out that, in other statutory settings, such as the Americans with Disabilities Act, when Congress has intended to apply a disparate-impact standard, it has specifically created disparate impact standards.

It is the Department's position that Section 602 does not offer the slightest indication that Congress intended private parties to carry out the enforcement of the regulations. The Department argues that all efforts to bring states into compliance with Section 601 must follow a detailed procedure established by Section 602. The Department contends that Congress did not contemplate that, in addition to a suspension of funding after a "hearing" or some other procedure implemented by the pertinent federal agency, there would also be private enforcement actions premised exclusively on agency regulations. The Department stresses that Section 602 provides that no enforcement action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

Pointing out that the issue is whether there is an implied private right of action under Section 602,

the Department states that it is not necessary for the Supreme Court to invalidate the disparate-impact regulations in order to reject Sandoval's claim. The Department acknowledges that the regulations might be enforced by executive branch agencies following the extensive procedural protections Congress enacted for enforcement of Title VI.

Under the spending clause of the U.S. Constitution (Art. I, § 8), Congress has the authority to attach conditions on the receipt of federal funds. *South Dakota v. Dole,* 483 U.S. 203 (1987). Because Congress may attach conditions on the receipt of federal funds, it may use this authority to induce states to establish programs that it could not otherwise compel them to enact. Generally, the states are given the choice of complying with the conditions set forth in the legislation or forgoing the benefits of federal funding.

In *Cort v. Ash,* 422 U.S. 66 (1975), the Supreme Court held that a statute that does not explicitly provide a private right of action may nevertheless employ such a remedy in certain circumstances. To create a private cause of action against states in the context of spending clause legislation, the Supreme Court has held that Congress' intent must be unambiguously expressed in the language of the statute. *See, e.g., South Dakota v. Dole,* 483 U.S. 203 (1987); *Pennhurst State School & Hosp. v. Halderman,* 451 U.S. 1 (1981).

The Eleventh Circuit has recognized an implied private cause of action to enforce disparate-impact regulations under Section 602 Title VI in three other cases in addition to the Sandoval case. *See Burton v. City of Belle Glade,* 178 F.3d 1175 (11th Cir. 1999); *Elston v. Talladega County Bd. of Educ.,* 997 F.2d 1394 (11th Cir. 1993); *Georgia State Conference of Branches of NAACP v. Georgia,* 775 F.2d 1403 (11th Cir. 1985). Seven other circuits have suggested that an implied private cause of action may exist under Section 602. *Latinos Unidos De Chelsea v. Secretary of Housing & Development,* 799 F.2d 744, 785 n.20 (1st Cir. 1986); *New York Urban League, Inc. v. New York,* 71 F.3d 1031 (2d Cir.1995); *Castenada by Castenada v. Pickard,* 781 F.2d 456, 465 n.11 (5th Cir. 1986); *David K. v. Lane,* 839 F.2d 1265 (7th Cir.1988); *Buchanan v. City of Bolivar,* 99 F.3d 1352 (6th Cir. 1996); *Larry P. by Lucille P. v. Riles,* 793 F.2d 969 (9th Cir. 1984); *Villanueva v. Carere,* 85 F.3d 481 (10th Cir. 1996). However, of these circuits, only the Third Circuit has addressed the issue in detail.

The Supreme Court has not yet squarely addressed the question of whether a private action may be used to enforce Title VI. In *Lau v. Nichols,* 518 U.S. 187 (1996), the Court held that HEW regulations, promulgated pursuant to Section 602 and establishing a disparate-impact standard, were valid interpretations of Title VI. However, later Supreme Court decisions have cast doubt on the continued validity of Lau and indicate that Title VI must be held to proscribe only those racial classifications that would violate the equal protection clause. *See, e.g., United States v. Fordice,* 505 U.S. 717 (1992); *Guardians Ass'n v. Civil Service Comm'n,* 63 U.S. 582 (1983); *Univ. of California Regents v. Bakke,* 438 U.S. 265 (1978). Further, the Supreme Court has held that the equal protection clause bans only intentional discrimination and not disparate-impact discrimination. *Washington v. Davis,* 426 U.S. 229 (1976). *Guardians Ass'n v. Civil Service Comm'n,* 63 U.S. 582 (1983), was a decision with six separate opinions. The lower court had rejected the plaintiffs' claim that the New York City police department's entry-level written examination had a discriminatory impact on them, and they filed suit on that basis under Title VI and its implementing regulations. The Second Circuit rejected the claim on the theory that Title VI required proof of discriminatory intent. Five justices affirmed the decision in separate opinions and on a variety of grounds. Justices White and Rehnquist expressed the view that there was only a limited cause of action to enforce Title VI regulations, reasoning that relief in private disparate impact actions should be limited to declaratory and injunctive relief. Justice Powell and Chief Justice Burger concurred in the judgment, concluding that no private right of action to enforce the regulations could be implied. Justice O'Connor concurred in the judgment on the ground that an administrative agency could not create a disparate-impact cause of action under Title VI.

Other Supreme Court cases interpreting Section 504 of the Rehabilitation Act and Title IX have implied private rights of action. *See, e.g., Alexander v. Choate,* 469 U.S. 287 (1985) (Section 504); *Cannon v. Univ. Chicago,* 441 U.S. 677 (1979) (Title IX). However, none of these cases involved implied private rights of action premised on agency regulations.

SIGNIFICANCE

This case presents the Supreme Court with the opportunity to directly address the issue of whether a private cause of action for disparate impact can be implied from administrative regulations promulgated pursuant to Title VI. The

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issue of the legality of English-only laws and policies is not directly before the Supreme Court.

The significance of the issue can be measured by the large number of *amicus* briefs in this case. A decision affirming the Eleventh Circuit's holding will make it easier for individuals to obtain relief for race, color, or national origin discrimination under Title VI because it would, among other things, eliminate the often difficult burden of proving discriminatory intent. Such a decision would allow private litigants to recover monetary damages from governmental agencies in addition to exposing these agencies to the risk of losing their federal funding.

The Eleventh Circuit's decision may have an impact on other federal laws and regulations in addition to Title VI cases. According to one amicus, unless reversed, the Eleventh Circuit's decision will have a profoundly adverse impact on other programs, such as those established by the federal environmental statutes and administered primarily by state regulatory agencies, as well as on such activities as college admissions, intercollegiate athletics, and public school funding.

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Amicus Briefs (as of Dec. 11)

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Washington Legal Foundation, Allied Educational Foundation, Manufacturers Alliance, and U.S. Representatives Robert Aderholt, Spencer Bachus, Sonny Callahan, Terry Everett, and Bob Riley (Richard A. Samp (202) 588-0302)

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