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## **Civil Rights in Transportation Projects**

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### **THE PROBLEM AND ITS SOLUTION**

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

### **APPLICATIONS**

Federal, state, and local agencies, in locating (siting) highway projects and improving levels of service, are guided by a variety of laws and regulations that may constrain or limit possible locations. This is particularly important where the project siting may involve relocating residents or businesses from preexisting neighborhoods

or commercial areas. Some of these laws also require sitings that assure nondiscriminatory provision of services, benefits, and facilities to all locations or neighborhoods in a particular service community.

This digest addresses the civil rights issues that arise when public transportation officials plan highways and related projects that allegedly affect minorities or ethnic groups in a discriminatory way, in violation of Title VI of the Civil Rights Act of 1964. An important element of this discussion is whether transportation officials can be sued individually for alleged violations, and whether alleged violations can be pursued by private lawsuits.

This report should be useful to administrators, attorneys, planners, engineers, and all other persons who might have an interest in this topic.

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## CIVIL RIGHTS IN TRANSPORTATION PROJECTS

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### I. INTRODUCTION

This paper addresses the civil rights issues that arise when public transportation officials plan highways and related projects that are alleged to affect minority or ethnic groups on a discriminatory basis. These projects implicate a number of federal laws, regulations, and policies that impose an assortment of administrative and legal obligations on both regulators and those they regulate. The leading law is Title VI of the Civil Rights Act of 1964. Section 601 of the Act, codified at 42 U.S.C. § 2000d, 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.”<sup>1</sup> To facilitate the enforcement of this provision, Section 602 of the Act states, in pertinent part, that

[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity...is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.<sup>2</sup>

While a number of federal agencies have promulgated regulations and policies in response to this congressional directive, they have done so in a manner not expressly provided for by Title VI. The Supreme Court has interpreted Section 601 as proscribing only “intentional” discrimination.<sup>3</sup> Nevertheless, as Justice Marshall has noted, “every Cabinet department and about forty federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact.”<sup>4</sup> The United States Department of Transportation’s (DOT) regulations are representative of how the federal executive branch departments and agencies have acted in this manner. Although Title VI condemns “discrimination” in federally-funded programs, the Federal DOT’s regulations provide that participants in such programs

may not, directly or through contractual or other arrangements, utilize criteria or methods of administration

*which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.*<sup>5</sup>

Similarly, those regulations also provide that,

[i]n determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.<sup>6</sup>

These regulations, as do many other federal regulations, laws, and policies, directly affect a broad array of decisions that public transportation officials make in determining how and where highways, roads, pedestrian walkways, and other transportation-related systems and facilities are constructed. The first part of this paper will address the manner in which this overlapping regulatory regime requires these officials to minimize the discriminatory effects of highway sitings and other transportation projects. This will include a discussion of not simply Title VI but also other laws and regulations with civil rights implications. Presidential Executive Order No. 12898, for example, states that, “[t]o the greatest extent practicable and permitted by law, ...each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations....”<sup>7</sup> The DOT has since promulgated an Order that generally sets forth

<sup>5</sup> 49 C.F.R. § 21.5(b)(2) (emphasis added). The Supreme Court in *Grove City College v. Bell*, 465 U.S. 555 (1984), gave a relatively restrictive reading to the sweep of the federal financial aid provisions, and held that the receipt of federal funds by an educational institution’s subunit did not subject the entire institution to the nondiscriminatory demands of the statute. Title VI has since been amended in a manner so that the “program or activity” that receives federal funds, and thus that falls within the statute’s reach, includes “all of the operations” of the department, agency, “or other instrumentality of a State or of a local government” that receives financial assistance. *See* 42 U.S.C. § 2000d-4a.

<sup>6</sup> 49 C.F.R. § 21.5(b)(3) (emphasis added).

<sup>7</sup> 59 Fed. Reg. 7629 (Feb. 16, 1994).

<sup>1</sup> 42 U.S.C. § 2000d.

<sup>2</sup> *Id.*, § 2000d-1.

<sup>3</sup> *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

<sup>4</sup> *Guardians Ass’n v. Civil Service Comm’n of the City of New York*, 463 U.S. 582, 619 (1983) (Marshall, J., dissenting). *See also id.* at 619 n.7 (citing agencies).

the process that it will use “to incorporate environmental justice principles (as embodied in the Executive Order) into existing programs, policies, and activities.”<sup>8</sup> That action has been followed by a similar Order issued by the Federal Highway Administration (FHWA) in December of 1998,<sup>9</sup> and a policy guidance published a year and a half later by FHWA and the Federal Transportation Administration that underscores the need for transportation officials to consider environmental justice concerns at the earliest stages of the planning process.<sup>10</sup>

In addition to discussing the civil rights implications of these and other laws and regulations, this paper will address whether transportation officials can be sued for alleged violations of these disparate impact provisions. The Supreme Court recently held that no private right of action exists to enforce the disparate impact regulations and policies.<sup>11</sup> In light of that decision, serious questions exist as to whether a whole category of claims can be pursued in any forum, judicial or administrative, and whether transportation officials can be held liable monetarily for purportedly running afoul of these provisions. In addressing these questions, however, the reader should not be mistaken or misled: “The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design,”<sup>12</sup> and likewise have an obligation to comply with duly promulgated federal regulations and policies. This part of the paper is meant only to assess the current state of the law in light of the most recent interpretation given it by the Supreme Court. The disparate impact policies are woven throughout the transportation planning and development process and will lead to the termination or denial of federal funds if they are not followed.

## II. DISCUSSION OF PERTINENT ENVIRONMENTAL JUSTICE DISPARATE IMPACT PROVISIONS

### A. Title VI

A number of laws, regulations, and policies form the core of what is popularly known as the environmental justice movement. The leading environmental justice law is Title VI of the Civil Rights Act of 1964. In addition to prohibiting discrimination in any federally-funded program or activity and authorizing federal

agencies to promulgate rules and regulations to enforce that prohibition, Title VI specifies the method for ensuring compliance with its mandate. Compliance with such rules and regulations may be effected by “any” means “authorized by law,”<sup>13</sup> including “the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply....”<sup>14</sup> This type of enforcement mechanism is subject to several limitations.

First, the Act limits the termination or refusal both “to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made” and “to the particular program, or part thereof, in which such noncompliance has been so found.”<sup>15</sup> Second, the Act also provides that no formal action shall be taken until the recipient or applicant has been advised of the failure to comply with the Act and the determination has been made that “compliance cannot be secured by voluntary means.”<sup>16</sup> Third, before any funding termination or grant refusal may become effective, “the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action.”<sup>17</sup> Fourth, “[n]o such action shall become effective until thirty days have elapsed after the filing of such report.”<sup>18</sup>

To effectuate Title VI, the Federal DOT has promulgated regulations containing provisions that prohibit discrimination in general and several types of discrimination in particular, including two key disparate impact provisions. The first provides as follows:

A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of person to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons to be afforded an opportunity to participate in any such program; may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.<sup>19</sup>

<sup>8</sup> 62 Fed. Reg. 18377 (Apr. 15, 1997).

<sup>9</sup> See December 2, 1998, Order entitled, “FHWA Actions To Address Environmental Justice In Minority Populations And Low-Income Populations.” This Order is accessible in pdf format at <http://www.fhwa.dot.gov/environment/guidebook/chapters/v2ch16.htm>.

<sup>10</sup> Policy Guidance Concerning Application of Title VI of the Civil Rights Act of 1964 to Metropolitan and Statewide Planning, 65 Fed. Reg. 31803 (May 19, 2000).

<sup>11</sup> *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

<sup>12</sup> *Alden v. Maine*, 527 U.S. 706, 755 (1999).

<sup>13</sup> 42 U.S.C. § 2000d-1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 49 C.F.R. § 21.5(b)(2). As set forth in 49 C.F.R. § 21.23(b), “[f]acility’ includes all or any party of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.”

The second provision directly implicates transportation siting decisions by stating that:

In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.<sup>20</sup>

These provisions apply to a number of specifically-enumerated activities set forth in an appendix to the Department's regulations.<sup>21</sup> In a separate appendix, the

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<sup>20</sup> 49 C.F.R. § 21.5(b)(3). 49 C.F.R. § 21.5(d) similarly states that [a] recipient may not make a selection of a site or location of a facility if the purpose of that selection, or its effect when made, is to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this rule applies, on the grounds of race, color, or national origin; or if the purpose is to, or its effect when made will, substantially impair the accomplishments of the objectives of this part.

<sup>21</sup> Appendix A to the Department's regulations, entitled "Activities to which this part applies," identifies the following categories:

(1) Use of grants made in connection with Federal-aid highway systems (23 U.S.C. § 101 et seq.); (2) Use of grants made in connection with the Highway Safety Act of 1966 (23 U.S.C. § 401 et seq.); (3) Use of grants made in connection with the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. §§ 1391–1409, 1421–1425); (4) Lease of real property and the grant of permits, licenses, easements and rights-of-way covering real property under control of the Coast Guard (14 U.S.C. § 93 (n) and (o)); (5) Utilization of Coast Guard personnel and facilities by any State, territory, possession, or political subdivision thereof (14 U.S.C. § 141(a)); (6) Use of Coast Guard personnel for duty in connection with maritime instruction and training by the States, territories, and Puerto Rico (14 U.S.C. § 148); (7) Use of obsolete and other Coast Guard material by the sea scout service of the Boy Scouts of America, any incorporated unit of the Coast Guard auxiliary, and any public body or private organization not organized for profit (14 U.S.C. § 641(a)); (8) U.S. Coast Guard Auxiliary Program (14 U.S.C. §§ 821–832); (9) Use of grants for the support of basic scientific research by nonprofit institutions of higher education and nonprofit organizations whose primary purpose is to conduct scientific research (42 U.S.C. § 1891); (10) Use of grants made in connection with the Federal-aid Airport Program (§§ 1-15 and 17-20 of the Federal Airport Act, 49 U.S.C. §§ 1101–1114, 1116–1120); (11) Use of U.S. land acquired for public airports under: a. Section 16 of the Federal Airport Act, 49 U.S.C. § 1115; and b. Surplus Property Act (§ 13(g) of the Surplus Property Act of 1944, 50 U.S.C. App. § 1622(g), and § 3 of the Act of Oct. 1, 1949, 50 U.S.C. App. § 1622b); (12) Activities carried out in connection with the Aviation Education Program of the Federal Aviation Administration under §§ 305, 311, and 313(a) of the Federal Aviation Act of 1958, as amended (49 U.S.C. §§ 1346, 1352, and 1354(a)); (13) Use of grants and loans made in connection with the Urban Mass Transportation Capital Facilities Grant and Loan Program—Urban Mass Transportation Act of 1964, as amended (49 U.S.C. § 1602); (14) Use of grants made in connection with the Urban Mass Transportation Research and Demonstration Grant Program—Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1605); (15) Use of grants made in connection with the Urban Mass Transportation Technical Studies Grant Program—Urban Mass Transportation Act of 1964, as amended (49 U.S.C. § 1607a); (16)

regulations provide specific examples, "without being exhaustive," that "illustrate the application of the non-discrimination provisions of this part on projects receiving Federal financial assistance under the programs of certain Department of Transportation operating administrations."<sup>22</sup> Identifying FHWA as one of those administrations, the appendix states, among the seven examples it lists, that:

(ii) The State may not discriminate against eligible persons in making relocation payments and in providing relocation advisory assistance where relocation is necessitated by highway right-of-way acquisitions....

....

(v) Neither the State, any other persons subject to this part, nor its contractors and subcontractors may discriminate in their employment practices in connection with highway construction projects or other projects assisted by the Federal Highway Administration.

(vi) The State shall not locate or design a highway in such a manner as to require, on the basis of race, color, or national origin, the relocation of any persons.

(vii) The State shall not locate, design, or construct a highway in such a manner as to deny reasonable access to, and use thereof, to any persons on the basis of race, color, or national origin.<sup>23</sup>

The appendix also identifies the Urban Mass Transportation Administration as another operating administration, and states in pertinent part that:

(iii) No person or group of persons shall be discriminated against with regard to the routing, scheduling, or quality of service of transportation service furnished as a part of the project on the basis of race, color, or national origin. Frequency of service, age and quality of vehicles assigned to routes, quality of stations serving different routes, and location of routes may not be determined on the basis of race, color, or national origin.

(iv) The location of projects requiring land acquisition and the displacement of persons from their residences and businesses may not be determined on the basis of race, color, or national origin.<sup>24</sup>

As these regulations make clear, the disparate impact policies that they embody directly affect federally-funded transportation projects in a variety of ways, ranging from the actual effect that a highway siting has on minority residents living within the affected community, to the discriminatory impact that employment practices have on contractors, subcontractors, and other individuals whose livelihoods have a connection with a highway construction job or other related transportation projects receiving federal funds.

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Use of grants made in connection with the Urban Mass Transportation Managerial Training Grant Program—Urban Mass Transportation Act of 1964, as amended (49 U.S.C. § 1607b); (17) Use of grants made in connection with Urban Mass Transportation Grants for Research and Training Programs in Institutions of Higher Learning—Urban Mass Transportation Act of 1964, as amended (49 U.S.C. § 1607c); and (18) Use of grants made in connection with the High Speed Ground Transportation Act, as amended (49 U.S.C. §§ 631–642).

<sup>22</sup> 49 C.F.R. Part 21, Appendix C.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## B. President Executive Order 12898 and Related DOT Orders

These projects are also affected by several other disparate impact regulatory mechanisms. Executive Order 12898 was issued in 1994 and directs each federal agency, “[t]o the greatest extent practicable and permitted by law,”<sup>25</sup> to identify and address any and all disproportionately high health or environmental effects of its programs, policies, and activities on minority populations.<sup>26</sup> The Executive Order states explicitly that it “is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.”<sup>27</sup> The Executive Order also states that it “shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.”<sup>28</sup> Nevertheless, it mandates that “each Federal agency shall develop an agency-wide environmental strategy...that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”<sup>29</sup>

In compliance with Executive Order 12898, and in furtherance of its own regulatory authority, the DOT promulgated an order in April of 1997 stating that it would enforce the “policy of DOT to promote the principles of environmental justice (as embodied in the Executive Order)” by “fully considering environmental justice principles throughout planning and decision-making processes in the development of programs, policies, and activities....”<sup>30</sup> Stating that “[c]ompliance with Executive Order 12898 is an ongoing DOT responsibility,”<sup>31</sup> the Department’s Order declares that it “will continuously monitor its programs, policies, and activities

<sup>25</sup> 59 Fed. Reg. 7629 (Feb. 16, 1994).

<sup>26</sup> *Id.*

<sup>27</sup> 59 Fed. Reg. 7632-33.

<sup>28</sup> 59 Fed. Reg. 7633.

<sup>29</sup> 59 Fed. Reg. 7630.

<sup>30</sup> 62 Fed. Reg. 18377, 18379 (Apr. 15, 1997). Prior to announcing this policy, the Department’s Secretary delegated broad authority to the Department’s Director of the Office of Civil Rights

to conduct all stages of the formal internal discrimination complaint process (including the acceptance or rejection of complaints); to provide policy guidance to the operating administrations and Secretarial officers concerning the implementation and enforcement of all civil rights laws, regulations and executive orders for which the Department is responsible; to otherwise perform activities to ensure compliance with external civil rights programs; and to review and evaluate the operating administrations’ enforcement of these authorities.

49 C.F.R. § 1.70. The authority cited for this regulation includes Title VI and Executive Order No. 12898. 49 C.F.R. 1.70(b), (o).

<sup>31</sup> 62 Fed. Reg. 18379.

to ensure that disproportionately high and adverse effects on minority populations and low-income populations are avoided, minimized or mitigated in a manner consistent with this Order and Executive Order 12898.”<sup>32</sup> Programs, policies, or activities that have such an effect “will only be carried out if further mitigation measures or alternatives that would avoid or reduce the disproportionately high and adverse effect are not practicable.”<sup>33</sup> The Order continues that “[i]n determining whether a mitigation measure or an alternative is ‘practicable,’ the social, economic (including costs) and environmental effects of avoiding or mitigating the adverse effects will be taken into account.”<sup>34</sup> FHWA issued a similar Order on December 2, 1998.<sup>35</sup>

## C. DOT/FHWA/FTA Policy Guidance Concerning the Application of Title VI to Metropolitan and Statewide Planning Decisions

As shown by relatively recent events, the sweep of Title VI, the President’s Executive Order, and the DOT and FHWA Orders extends far. To provide further clarification on Title VI and these Orders, the FHWA and Federal Transit Administration in May of 2000 promulgated a policy guidance memorandum it issued the preceding year to Federal Regional and Division Administrators on the subject of implementing Title VI requirements in the area of metropolitan and Statewide planning.<sup>36</sup> Federal funding for transportation projects in an urban area requires, among other things, that the projects be selected from “the approved transportation improvement program by the metropolitan planning organization designated for the area in consultation with the State and any affected public transit operator.”<sup>37</sup> In developing that program, “the metropolitan planning organization, in cooperation with the State and any affected public transit operator, shall provide citizens, affected public agencies, ...and other interested parties with a reasonable opportunity to comment on the proposed program.”<sup>38</sup> Among other requirements, the metropolitan planning process shall provide for consideration of projects and strategies that will “protect and enhance the environment” and “improve quality of life.”<sup>39</sup> The transportation planning process must be certified to be in compliance with these and all “other applicable requirements of Federal law” to be

<sup>32</sup> *Id.*

<sup>33</sup> 62 Fed. Reg. 18380.

<sup>34</sup> *Id.*

<sup>35</sup> See <http://www.fhwa.dot.gov/environment/guidebook/chapters/v2ch16.htm>.

<sup>36</sup> Policy Guidance Concerning Application of Title VI of the Civil Rights Act of 1964 to Metropolitan and Statewide Planning, 65 Fed. Reg. 31803 (May 19, 2000).

<sup>37</sup> 23 U.S.C. § 134(i)(4)(A).

<sup>38</sup> *Id.*, § 134(h)(1)(B). A similar transportation planning process exists at the Statewide level. See 23 U.S.C. § 135.

<sup>39</sup> 23 U.S.C. § 134(f)(1)(D).

eligible for federal funds.<sup>40</sup> If the planning process is not certified, the DOT “may withhold up to 20 percent of the apportioned funds attributable to the transportation management area.”<sup>41</sup>

The May 2000 Policy Guidance emphasizes the need for government officials in the planning certification review process to be sensitive to the policies embraced by what the Guidance refers to as the “Environmental Justice Orders.”<sup>42</sup> “While Title VI and EJ [environmental justice] concerns have most often been raised during project development, it is important to recognize that the law also applies equally to the processes and products of planning.”<sup>43</sup> The Guidance thus proposes that federal administrators should ask questions of their state and local counterparts “to substantiate metropolitan planning organization (MPO) self-certification of Title VI compliance.”<sup>44</sup> The Guidance also proposes “a series of actions that could be taken to support Title VI compliance and EJ goals, improve planning performance, and minimize the potential for subsequent corrective action and complaint.”<sup>45</sup>

As illustrative examples of the kinds of questions federal administrators should ask, the Guidance suggests that they inquire:

What strategies and efforts has the planning process developed for ensuring, demonstrating, and substantiating compliance with Title VI?...

Has the planning process developed a demographic profile of the metropolitan planning area or State that includes identification of the locations of socio-economic groups, including low-income and minority populations as covered by Executive Order on Environmental Justice and Title VI provisions?...

Does the public involvement process have an identified strategy for engaging minority and low-income populations in transportation decision making? What strategies, if any, have been implemented to reduce participation barriers for such populations? Has their effectiveness been evaluated?<sup>46</sup>

The Policy Guidance also emphasizes the need for federal administrators to review with State and local transportation officials “how Title VI is addressed as part of their public involvement and plan development processes” and “the extent to which MPOs and States have made proactive efforts to engage these [minority and low-income] groups through their public involvement programs.”<sup>47</sup> In the absence of any “documented process” for “assessing the distributional effects of the transportation investments in the region, the planning certification report should include a corrective action

directing the development of a process for accomplishing this end.”<sup>48</sup>

In sum, the Policy Guidance provides the detail of the obligations envisioned more generally by both existing<sup>49</sup> and proposed regulations.<sup>50</sup>

In critiquing their own proactive efforts, State and local transportation officials also need to be aware of their obligations under another policy guidance that the Department of Transportation published in January of 2001, entitled *DOT Guidance to Recipients on Special Language Services to Limited English Proficient (LEP) Beneficiaries*.<sup>51</sup> The guidance, which became effective immediately, states that, “because in some circumstances lack of awareness of the existence of a particular program may effectively deny LEP individuals meaningful access, it is important to continually survey/access the needs of eligible service populations to determine whether critical outreach materials should

<sup>48</sup> *Id.*

<sup>49</sup> See 23 C.F.R. § 450.316(b). See also Jan. 19, 1977, DOT Order 1000.12, p. I-5 ¶ 4.b.(2)(a)

(Where the program or activity for which Federal financial assistance is sought involves nonelected boards, advisory councils, or committees which are an integral part of planning or implementing the program or activity, the Title VI program shall require appropriate action to insure that such boards, councils or committees reasonably reflect the racial/ethnic composition of the community affected by the program or activity.);

*id.* at I-5 ¶ 4.b.(2)(b)

(Where the program or activity requires public hearings, the Title VI program shall require appropriate action to ensure that notice of such hearings reaches all segments of the affected community.... The Title VI program shall also require that direct contact shall be made with racial/ethnic community organizations and/or leaders in communities affected by the program or activity. The participation of such persons and organizations in the decision-making process shall be solicited.)

<sup>50</sup> 65 Fed. Reg. 33922 (May 25, 2000). Among other things, regulations proposed by the FHWA and the Federal Transit Administration would make explicit that “[t]ransportation plan development and plans shall be consistent with Title VI,” and that this consistency shall be demonstrated by requiring planners to assess “[a]ny disproportionately high and adverse environmental impacts, including interrelated social and economic impacts, affecting these [low-income and minority] populations, consistent with the provisions of Executive Order 12898 as implemented through U.S. DOT Order 5610.2 and FHWA Order 6640.23.” 65 Fed. Reg. 33952, 33953.

<sup>51</sup> 66 Fed. Reg. 6733 (Jan. 22, 2001). Several months prior to the issuance of this policy guidance, the Department of Justice issued a similar but less detailed policy guidance entitled “Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency.” 65 Fed. Reg. 50123 (Aug. 16, 2000). Stating that “[t]his document provides a general framework by which agencies can determine when LEP assistance is required in their federally assisted programs and activities and what the nature of that assistance should be,” the Department of Justice stated that “[w]e expect agencies to implement this document by issuing guidance documents specific to their own recipients.” 65 Fed. Reg. 50125.

<sup>40</sup> *Id.*, § 134(i)(5)(B)(i).

<sup>41</sup> *Id.*, § 134(i)(5)(C)(i).

<sup>42</sup> 65 Fed. Reg. 31803 (May 19, 2000).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 65 Fed. Reg. 31804.

<sup>47</sup> *Id.*

be translated into other languages.<sup>52</sup> On the subject of transportation planning, the DOT Guidance states that “[r]ecipients’ transportation plans should identify how the needs of LEP persons will be met where a significant number of persons can reasonably be expected to need transportation services.”<sup>53</sup> In this regard, transportation plans involving highway projects are substantively no different than plans involving bus transportation routes. Plans pertaining to the former need to take into account the effect that a proposed highway siting project has not only on low-income and minority populations, but also on populations whose members are limited in English proficiency. This means, for example, that consideration should be given to the impact that ramp closures have on communities or businesses inhabited by non-English speaking individuals.

The Department’s LEP policy guidance is thus another example of the depth to which disparate impact policies affect highway transportation project planning and development. It serves to underscore the extent to which state and local officials are expected to act, when planning and carrying out highway and other transportation projects, to ensure compliance with the environmental justice principles set forth in the President’s Executive Order and the regulatory provisions discussed above.

#### D. Other Environmental Justice Laws and Regulations

While the above provisions impose significant obligations on government officials in terms of the need to address the disparate impact that transportation planning and projects may have on minority groups, transportation officials also need to be aware of other civil rights-related laws and regulations that are implicated by planning and project decisions. The Department of Transportation is obligated “to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest....”<sup>54</sup> Federal regulations achieve these goals by requiring state highway agencies to make “State assurances”<sup>55</sup> of being in compliance with Title VI when federal assistance is sought

with respect to proposed highway projects, and by subjecting those agencies to procedures designed to ensure compliance when “a recipient fails or refuses to voluntarily comply with requirements within the time frame allotted.”<sup>56</sup>

Compliance is also accomplished by requiring state highway agencies to engage in a number of other “State actions,”<sup>57</sup> including establishing and staffing a civil rights unit that is “responsible for initiating and monitoring Title VI activities and preparing required reports;”<sup>58</sup> developing procedures “for prompt processing and disposition” of “complaints received directly by the State and not by FHWA;”<sup>59</sup> developing programs to “[c]onduct Title VI reviews of cities, counties, consultant contractors, suppliers, universities, colleges, planning agencies, and other recipients of Federal-aid highway funds;”<sup>60</sup> and taking other actions designed to ensure compliance with Title VI and “related statutes.”<sup>61</sup>

The Uniform Relocation Assistance and Real Property Acquisition Policies Act is one of those statutes. That Act “establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance,”<sup>62</sup> and is designed to “assure that the unique circumstances of any displaced person are taken into account and that persons in essentially similar circumstances are accorded equal treatment under this chapter.”<sup>63</sup> Congress made manifest its concern for the civil rights implications of the actions covered by this legislation in providing that the Act’s policies and procedures “will be administered in a manner which is consistent with...title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.].”<sup>64</sup> The President has designated the Department of Transportation as the lead agency for implementing this law.<sup>65</sup> Department regulations require each State agency “under which Federal financial assistance will be made available for a project which results in real property acquisition or displacement that is subject to the Uniform Act”<sup>66</sup> to “provide appropriate assurances”<sup>67</sup> that it will comply not only with the Act, but also with “other applicable Federal laws and implementing regulations,” including Title VI.<sup>68</sup>

<sup>52</sup> 66 Fed. Reg. 6741. The Department recognized the importance of addressing the needs of non-English speaking individuals long before issuing this guidance. See Jan. 19, 1977, DOT Order 1000.12, p. I-5, ¶ 4.b.(2)(c)

(Where a significant number or proportion of the affected community needs information in a language other than English in order to be effectively informed of or to participate in the public hearings [required by any federally funded program or activity], the recipient shall publish and announce notices of public hearings in the other languages and shall take any other reasonable steps, including the furnishing of an interpreter, considering the scope of the program and the size and concentration of the non-English speaking population.)

<sup>53</sup> 66 Fed. Reg. 6742.

<sup>54</sup> 23 U.S.C. § 109(h).

<sup>55</sup> 23 C.F.R. § 200.9(a).

<sup>56</sup> *Id.*, § 200.11(e).

<sup>57</sup> *Id.*, § 200.9(b).

<sup>58</sup> *Id.*, § 200.9(b)(1).

<sup>59</sup> *Id.*, § 200.9(b)(3).

<sup>60</sup> *Id.*, § 200.9(b)(7).

<sup>61</sup> *Id.*, § 200.9(b)(9). See also 23 C.F.R. § 200.5(p)(4).

<sup>62</sup> 42 U.S.C. § 4621(b).

<sup>63</sup> *Id.*, § 4621(c)(2).

<sup>64</sup> *Id.*, § 4621(c)(4) (brackets in original).

<sup>65</sup> See 50 Fed. Reg. 8953 (March 5, 1985).

<sup>66</sup> 49 C.F.R. § 24.4(a)(1).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*, § 24.8(b).

Thus, as these statutory and regulatory provisions illustrate, public transportation siting decisions implicate Title VI civil rights issues in a variety of different ways. While all of these provisions involve the DOT, the Environmental Protection Agency (EPA) is another federal agency whose authority will virtually always be implicated by such a siting decision. Existing EPA regulations impose the same panoply of restrictions, procedures, and administrative sanctions that are triggered with respect to a decision by a recipient of EPA assistance to “choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination...on the grounds of race, color, or national origin or sex.”<sup>69</sup> In addition, as set forth in an Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits that the EPA issued in 1998, while Title VI “is inapplicable to EPA actions, including EPA’s issuance of permits, Section 2-2 of Executive Order 12,898 is designed to ensure that Federal actions substantially affecting human health or the environment do not have discriminatory effects on race, color, or national origin.”<sup>70</sup> EPA has thus stated its commitment “to a policy of nondiscrimination in its own permitting programs,”<sup>71</sup> and has established an elaborate framework for processing complaints alleging discriminatory intent or effect in the context of environmental permitting decisions.<sup>72</sup>

The EPA subsequently issued in June of 2000 its “Draft Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance).”<sup>73</sup> The Draft Guidance “is directed at the processing of discriminatory effects allegations.”<sup>74</sup> Both the 1998 Interim Guidance and the June 2000 Draft Guidance state explicitly that they are not intended “to create any rights or obligations enforceable by any party in litigation with the United States.”<sup>75</sup> Nevertheless, both make clear that projects requiring EPA permits will also be subject to the scrutiny of yet another agency in determining whether those projects have a discriminatory impact on minority and other protected groups.

## E. Administrative Enforcement Procedures

The disparate impact regulations generally identify two different ways in which the disparate impact poli-

<sup>69</sup> 40 C.F.R. § 7.35(c).

<sup>70</sup> Feb. 5, 1998, Interim Guidance, located at <http://www.epa.gov/ocrp/1/polguid.htm>, at 1. The Interim Guidance is in PDF format and is accessible through the EPA’s Web site.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 3-11.

<sup>73</sup> 65 Fed. Reg. 39650 (June 27, 2000).

<sup>74</sup> *Id.* at 39668.

<sup>75</sup> *Id.* at 39656; Feb. 5, 1998, Interim Guidance, at 11.

cies are enforced. First, federal financial assistance may be refused if an applicant “fails or refuses to furnish an assurance required under [49 C.F.R.] § 21.7 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section....”<sup>76</sup> The “assurance” required by § 21.7 is a condition to the approval and extension of any such assistance, and is “an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. Every program of Federal financial assistance shall require the submission of such an assurance.”<sup>77</sup> The assurance shall be in a form specified by the Secretary, and “shall include provisions which give the United States a right to seek its judicial enforcement.”<sup>78</sup>

To effectuate this regulatory command, the Secretary of Transportation on August 24, 1971, issued DOT Order 1050.2, which sets forth the standard Title VI assurances that the Department of Transportation requires and includes in several appendices specific clauses that are to be included in all contracts, permits, deeds, leases, and similar agreements involving federal financial assistance that are subject to Title VI and the Department’s regulations. The Department ensures that these assurances are not just hollow promises by requiring each application for federal financial assistance to include a section entitled “Title VI Assessment” that contains “information sufficient to permit an initial determination by DOT of whether the applicant will probably fully comply with the Title VI requirements.”<sup>79</sup> The Title VI assessment is to include:

A statistical breakdown by race, color and national origin of: 1. The population eligible or likely to be served or affected by the project; 2. The projected users or beneficiaries of the project; 3. The owners of property to be taken, and persons or businesses to be relocated or adversely affected, as a result of the project; and 4. The present or proposed membership of any planning or advisory board which is an integral part of the program or project.<sup>80</sup>

<sup>76</sup> 49 C.F.R. § 21.13(b).

<sup>77</sup> *Id.*, § 21.7(a)(1). While this section states that it applies to every application for financial assistance to carry out a program, “except a program to which paragraph (b) of this section applies,” *id.*, the latter provides that

[e]very application by a State or a State agency to carry out a program involving Federal financial assistance to which this part applies...shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application: (1) Contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this part, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the Secretary to give reasonable guarantee that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this part.

*Id.*, § 21.7(b).

<sup>78</sup> *Id.*, § 21.7(a)(1).

<sup>79</sup> Jan. 19, 1977, DOT Order 1000.12, p. IV-1, ¶ 2.a.

<sup>80</sup> *Id.*, pp. IV-1–IV-2 ¶ 2.a, (1)(a).

The Title VI assessment shall also contain detailed information concerning minority contractor participation;<sup>81</sup> employment (when either “a primary objective of the assistance is to provide employment” or “discriminatory employment practices could cause discrimination with respect to beneficiaries”);<sup>82</sup> and “[t]he proposed location, and alternative locations, of any facilities to be constructed or used in connection with the project, together with data concerning the composition by race, color and national origin of the populations of the areas surrounding such facilities.”<sup>83</sup>

The funding agency is required to review and approve the Title VI assessment, and may conduct an onsite compliance review if the circumstances warrant such action.<sup>84</sup> Semi-annual compliance reports are also required.<sup>85</sup> Thus, applicants for financial assistance are required to provide meaningful assurances that they are complying with the disparate impact regulations and policies, and risk the federal government’s refusal to provide funding for their projects if they fail to provide such assurances.

The second way in which the disparate impact policies are enforced is when a complaint alleging a violation of the policies is filed with the funding agency. The DOT’s regulations provide that “[a]ny person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Secretary a written complaint.”<sup>86</sup> The regulations also state that the Department “will make a prompt investigation” whenever such a complaint is filed.<sup>87</sup> Applicants and recipients thus risk that the Department will take further action if, following such an investigation, it concludes that a transportation project receiving federal funding has or will have a racially disparate impact. The Department’s regulations require that a complaint alleging discrimination be filed with the Secretary “180 days after the date of the alleged discrimination, unless the time for filing is extended by the Secretary.”<sup>88</sup> When the Secretary’s investigation demonstrates that no action is warranted, the Secretary will inform the complainant and the subject of the complaint.<sup>89</sup> Conversely, when the Secretary’s investigation shows a failure to comply with the Department’s regulations, “the Secretary will so inform the recipient and the matter will be

resolved by informal means whenever possible.”<sup>90</sup> In the event such a resolution cannot be reached, compliance “may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law.”<sup>91</sup>

Section 21.13 of the Department’s regulations identifies the procedures that apply when the Department seeks to terminate financial assistance or to refuse to grant or to continue such assistance. These procedures apply both when an applicant fails or refuses to comply with the assurance provisions set forth in 49 C.F.R. § 21.7, and when a matter cannot be resolved by informal means following an investigation demonstrating a failure to comply with the disparate impact regulations, as set forth in 49 C.F.R. § 21.11.<sup>92</sup> As with the restrictions set forth in Title VI that were discussed earlier, an order suspending, terminating, or refusing to grant or continue financial assistance does not become effective until the following conditions have been met:

- (1) The Secretary has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means;
- (2) There has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part;
- (3) The action has been approved by the Secretary pursuant to § 21.17(e),<sup>93</sup> and
- (4) The expiration of 30 days after the Secretary has filed with the committee of the House and committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action.<sup>94</sup>

The hearing that must precede any adverse action taken against an applicant or recipient of federal funds shall take place either before the Secretary or a hearing examiner,<sup>95</sup> is to be conducted in conformity with the procedures set forth in the Federal Administrative Pro-

<sup>90</sup> *Id.*, § 21.11(d).

<sup>91</sup> *Id.*, § 21.13(a). As one commentator points out, “a complainant has no right to participate in the agency’s investigation, although the agency in its discretion may allow the complainant to comment on particular issues that arise.” Bradford C. Mank, *Using § 1983 To Enforce Title VI’s Section 602 Regulations*, 49 U. KAN. L. REV. 321, 371 (2001). If the agency refuses to conduct an investigation, the complainant may bring “suit under the Administrative Procedure Act to compel the agency to investigate and cut off funds.” *Cannon v. University of Chicago*, 441 U.S. 677, 706 n.41 (1979) (citing *Adams v. Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973)).

<sup>92</sup> 49 C.F.R. § 21.13(a), (b).

<sup>93</sup> Section 21.17(e) provides that

[a]ny final decision by an official of the Department, other than the Secretary personally, which provides for the suspension or termination of, or the refusal to grant or to continue Federal financial assistance, or the imposition of any other sanction available under this part or the Act, shall promptly be transmitted to the Secretary personally, who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.

<sup>94</sup> 49 C.F.R. § 21.13(c).

<sup>95</sup> *Id.*, § 21.15(b).

<sup>81</sup> *Id.*, p. IV-2.a.(1)(c).

<sup>82</sup> *Id.*, p. IV-2.a.(1)(b); p. I-5, ¶ 4.b.(1). The Department assumes that, for any program providing financial assistance for construction, a primary purpose is to provide employment. See *id.*, p. III-1, ¶ 2.a.(1). See also Appendix B to 49 C.F.R. pt. 21.

<sup>83</sup> DOT Order 1000.12, p. IV-2 ¶ 2.a.(1)(d).

<sup>84</sup> *Id.*, pp. IV-3–IV-7 ¶¶ 2.b.-3.

<sup>85</sup> *Id.*, p. IV-7 ¶ 4.

<sup>86</sup> 49 C.F.R. § 21.11(b). See generally Jan. 19, 1977, DOT Order 1000.12, pp. V-1–V-10.

<sup>87</sup> 49 C.F.R. § 21.11(c).

<sup>88</sup> *Id.*, § 21.11(b).

<sup>89</sup> *Id.*, § 21.11(d)(2).

cedure Act,<sup>96</sup> shall result in a written decision setting forth findings of fact and conclusions of law,<sup>97</sup> shall be approved by the Secretary if it is rendered by a hearing examiner,<sup>98</sup> and is subject to judicial review.<sup>99</sup>

Despite the relatively unambiguous nature of these procedures, they do not always lead to prompt agency action on funding requests. While no formal refusal to grant funding is permitted unless the requirements set forth above are met, the federal government, on occasion, has deferred taking action on a funding request or otherwise delayed the process.<sup>100</sup> The result, if prolonged, is a de facto denial of funding. The case law is sparse on the subject, but at least one court in these circumstances has denied the federal government's motion to dismiss on exhaustion grounds a suit filed in federal court challenging such a deferral of payment of federal funds.<sup>101</sup> As a practical matter, however, it would seem a far more prudent and efficient use of time and resources to resolve through means other than litigation any funding stalemate that may exist.

### III. SCOPE OF LIABILITY IMPOSED BY ENVIRONMENTAL JUSTICE DISPARATE IMPACT PROVISIONS

#### A. *Alexander v. Sandoval*

The luxury of making such a choice does not always exist, unfortunately, especially when the aggrieved party is not a state or local transportation agency but rather an individual who claims the agency's transportation project has violated or threatens to infringe his or her rights under Title VI. While the Supreme Court

<sup>96</sup> *Id.*, § 21.15(d).

<sup>97</sup> *Id.*, § 21.17(d).

<sup>98</sup> *Id.*, § 21.17(e).

<sup>99</sup> *Id.*, § 21.19.

<sup>100</sup> Department of Justice regulations state that heads of agencies with Title VI responsibilities may defer action on an application for federal financial assistance when the requisite assurance has not been filed or is facially inadequate, or when it appears that a facially adequate assurance is in "some material respect untrue" or "not being honored." 28 C.F.R. § 50.3.

<sup>101</sup> See *Lee County School District No. 1 v. Gardner*, 263 F. Supp. 26 (D.S.C. 1967). *But see Taylor v. Cohen*, 405 F.2d 277, 280 (4th Cir. 1968) (en banc) ("Final action is the decision to terminate or continue financial assistance. Until this decision is made, judicial intervention is not sanctioned by statute."). See also *Dermott Special School District of Chicot County v. Gardner*, 278 F. Supp. 687, 691 (E.D. Ark. 1968)

(If the administrative remedy afforded is inadequate or involves undue delay, then exhaustion of that remedy is not required as a prerequisite to maintaining an action in court. In the instant case the administrative proceedings drag on for over a year notwithstanding Plaintiff's efforts to expedite them. Without reciting in detail the unilateral delays in the administrative proceedings that resulted from Defendants' actions, as sustained by the evidence and the record, the Court is of the opinion that the administrative remedies made available to the Plaintiff School District were sufficiently inadequate; the doctrine of exhaustion is therefore not applicable in this case.)

(citation omitted).

has on several occasions addressed the scope of Title VI's reach over the last 20 years,<sup>102</sup> it did not decide until 2001 the question whether there exists under Title VI a private right to enforce the disparate impact regulations promulgated under that statute, with the result that a fair amount of commentary addressing that question has filled law libraries across the country.<sup>103</sup>

Several terms ago, the Court granted certiorari to address the issue in a case challenging a decision to issue a permit for a hazardous waste facility, but subsequently dismissed the case as moot after the permit was revoked.<sup>104</sup> No mootness question presented itself in *Alexander v. Sandoval*.<sup>105</sup> In that case, the plaintiff claimed that Alabama's English-only driver's license examination violated, among other regulations, the Federal DOT's regulations discussed earlier prohibiting recipients of federal assistance from utilizing "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin...."<sup>106</sup> In addressing that claim, the Court declared that it was not addressing whether the regulations were "authorized by § 602 [of Title VI], or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin."<sup>107</sup> Rather, the Court agreed to review "only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation."<sup>108</sup> The Court answered that question in the negative and held that there is no such cause of action.

Before setting forth its analysis, the Court emphasized three points "as given."<sup>109</sup> "First, private individuals may sue to enforce § 601 of Title VI and obtain both

<sup>102</sup> See *Alexander v. Choate*, 469 U.S. 287 (1985); *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

<sup>103</sup> See, e.g., J. Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631 (2000); T. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155 (2000); B. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787 (1999); G. Carrasco, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENVTL. L. J. 321 (1998).

<sup>104</sup> *Chester Residents Concerned for Quality Living v. Seif*, 524 U.S. 915, vacated as moot, 524 U.S. 974 (1998).

<sup>105</sup> 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

<sup>106</sup> 532 U.S. at 278 (quoting regulations). The other regulations challenged were those of the United States Department of Justice. Both sets of regulations were identical with respect to their disparate impact provisions.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 279.

injunctive relief and damages.”<sup>110</sup> “Second, it is similarly beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination.”<sup>111</sup> The third point was one that the Court stated elsewhere at the outset of its opinion and that, as stated later in this paper, has ramifications far beyond the case before it: “we must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.”<sup>112</sup> Having addressed these three points, the Court proceeded to hold that no private right of action exists to enforce the disparate impact regulations.

The Court began its analysis by stating that “[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.”<sup>113</sup> After making that observation, the Court asserted “[i]t is clear now 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 these regulations.”<sup>114</sup> Declaring that such a right “must come, if at all, from the independent force of § 602,”<sup>115</sup> the Court held, after noting for the third time that “we assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations,”<sup>116</sup> that this section does not confer a private right to enforce the regulations.

After stating that Congress, as opposed to executive branch agencies, must create private rights of action to enforce federal law, the Court asserted that, “[f]ar from displaying congressional intent to create new rights, § 602 limits agencies to ‘effectuat[ing]’ rights already

created by § 601.”<sup>117</sup> A statute that focuses on the person regulated instead of on the individuals to be protected does not imply an intent to confer rights on any particular classes of persons, and in this case “the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI’s protection” because “it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating.”<sup>118</sup> Moreover, while “this authorizing portion of § 602 reveals no congressional intent to create a private right of action,”<sup>119</sup> the Court observed “[n]or do the methods that § 602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy.”<sup>120</sup> Stating that, “if anything they suggest the opposite,”<sup>121</sup> the Court pointed out that Section 602 authorizes agencies to enforce their regulations by terminating funding or “any other means authorized by law;”<sup>122</sup> that no enforcement action may 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;”<sup>123</sup> that every agency enforcement action is subject to judicial review;<sup>124</sup> that the head of the funding agency must “file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and grounds for such action;”<sup>125</sup> and that no termination of funding takes effect “until thirty days have elapsed after the filing of such report.”<sup>126</sup>

Stating that these statutory restrictions “tend to contradict a congressional intent to create privately enforceable rights through § 602 itself,”<sup>127</sup> the Court declared it unnecessary to discuss its cases in which it recognized that “some remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights.”<sup>128</sup> That analysis was not needed because “[t]he question whether § 602’s remedial scheme can overbear other evidence of congressional intent is simply not presented, since we have found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602.”<sup>129</sup> The Court accordingly held that a private

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<sup>110</sup> *Id.* The typical defendant in such a suit is the recipient of federal funds alleged to have violated federal law. *See supra* note 101. On occasion, the federal funding agency has been sued, such as when the agency was alleged to have “consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty” to enforce Title VI, *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc); or the agency purportedly used improper procedures in approving funding programs, *see Shannon v. United States Dep’t of Housing and Urban Dev.*, 436 F.2d 809, 817, 820 (3d Cir. 1970); or the agency allegedly “failed to make the required investigations and determinations” under Title VI. *Hardy v. Leonard*, 377 F. Supp. 831, 840 (N.D. Cal. 1974). These cases are the exception, as Title VI is “aimed at protecting individual rights without subjecting the Government to suits.” *Canon v. University of Chicago*, 441 U.S. at 715.

<sup>111</sup> 532 U.S. at 280.

<sup>112</sup> *Id.* at 281.

<sup>113</sup> *Id.* at 283.

<sup>114</sup> *Id.* at 285.

<sup>115</sup> *Id.* at 286.

<sup>116</sup> *Id.*

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<sup>117</sup> *Id.* at 289 (quoting 42 U.S.C. § 2000d-1).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> 42 U.S.C. § 2000d-1.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*, § 2000d-2.

<sup>125</sup> *Id.*, § 2000d-1.

<sup>126</sup> *Id.*

<sup>127</sup> 532 U.S. at 290.

<sup>128</sup> *Id.* at 290 (citing *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1, 19–20 (1980)).

<sup>129</sup> 532 U.S. at 291.

right of action does not exist to enforce disparate impact regulations promulgated under Title VI.

## B. The Continuing Validity of Disparate Impact Policies

It is difficult to overstate the significance of the Court's decision in *Alexander v. Sandoval*. As pointed out earlier, every executive Cabinet department and approximately 40 federal agencies have promulgated disparate impact regulations, citing Title VI as their authority.<sup>130</sup> Virtually all of the other federal laws, regulations, and policies discussed above that are aimed at achieving environmental justice also intend to provide the same rights as does Title VI.<sup>131</sup> Moreover, as Justice Stevens stated in his dissenting opinion in that case, “[j]ust about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations.”<sup>132</sup> The impact of the Court's decision, therefore, is sweeping.

Nevertheless, Justice Stevens's dissent raises an issue that, as subsequent events have already demonstrated, ensures that cases still will be brought seeking virtually the same relief that has been sought in cases such as *Alexander v. Sandoval*. Justice Stevens asserted that, “to the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport.”<sup>133</sup> In his view, “[l]itigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief.”<sup>134</sup> At least one federal district court has since held that § 1983 permits a cause of action to be brought alleging a violation of Title VI's disparate impact regulations.<sup>135</sup>

<sup>130</sup> See *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. at 619 and n.7 (Marshall, J., dissenting) (listing agencies).

<sup>131</sup> See, e.g., 42 U.S.C. § 4621(c)(4).

<sup>132</sup> *Alexander v. Sandoval*, 532 U.S. 275, at 295 (Steven, J., dissenting) (citing decisions from every federal circuit court of appeals).

<sup>133</sup> 532 U.S. at 299 (Stevens, J., dissenting). Section 1983 states in full:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

<sup>134</sup> *Id.*

<sup>135</sup> Commentators have also shared the view that “EJ advocates may well be advised to follow Stevens' approach in con-

structing future Title VI disparate impact claims” and to “simply cross-cite 42 U.S.C. § 1983.” Kevin J. Klesh, *Urban Sprawl: Can The 'Transportation Equity' Movement and Federal Transportation Policy Help Break Down Barriers to Regional Solutions?*, 7 ENVTL. L. 649, 665, 666 (2001).

Stating that the Federal EPA's disparate impact regulations promulgated under Title VI can be enforced pursuant to § 1983, the United States District Court for the District of New Jersey in *South Camden Citizens in Action v. New Jersey Dep't of Environmental Protection*,<sup>136</sup> vacated air pollution permits issued by the New Jersey Department of Environmental Protection to a cement processing company and entered a preliminary injunction prohibiting the cement company from operating a proposed facility on the ground that New Jersey did not consider the potentially adverse disparate impact of its permitting decision. Three months later, the United States District Court for the Eastern District of Michigan in *Lucero v. Detroit Public Schools*<sup>137</sup> cited the court's decision in *South Camden Citizens in Action* and held that a § 1983 action can be brought challenging a decision to build an elementary school on a site containing chemically contaminated soil. Although the *Lucero* court appeared to agree with the *South Camden* District Court's conclusion that disparate impact regulations are enforceable in a § 1983 action, the court in *Lucero* actually held that “Title VI creates a federal right of action pursuant to 42 U.S.C. § 1983 where Plaintiffs, who are African American and Hispanic, were the intended beneficiaries.”<sup>138</sup> There is nothing ambiguous about the other court's decision, which squarely held that “Plaintiffs may enforce the disparate impact regulations promulgated by the EPA pursuant to § 602 of Title VI under 42 U.S.C. § 1983.”<sup>139</sup>

As subsequent events have shown, the preliminary injunction that the district court entered in *South Camden Citizens in Action* was short lived. The United States Court of Appeals for the Third Circuit stayed the injunction just 5 weeks later, and ultimately rendered a decision in December of 2001 reversing the district court's grant of preliminary injunctive relief.<sup>140</sup> The rationale that the Third Circuit used, and other reasons discussed below, make debatable whether a § 1983 suit

structuring future Title VI disparate impact claims” and to “simply cross-cite 42 U.S.C. § 1983.” Kevin J. Klesh, *Urban Sprawl: Can The 'Transportation Equity' Movement and Federal Transportation Policy Help Break Down Barriers to Regional Solutions?*, 7 ENVTL. L. 649, 665, 666 (2001).

<sup>136</sup> 145 F. Supp. 2d 505 (D. N.J.), *reversed*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 536 U.S. 939 (2002).

<sup>137</sup> 160 F. Supp. 2d 767 (E.D. Mich. 2001).

<sup>138</sup> *Id.* at 784. The Third Circuit in *South Camden Citizens in Action* interprets *Lucero* differently. Noting that the Sixth Circuit in *Loschiavo v. City of Dearborn*, 33 F.3d 548 (1994), *cert. denied*, 513 U.S. 1150 (1995), previously held that the regulation at issue in that case created a right enforceable under § 1983, the court in *South Camden Citizens*, 274 F.3d at 787 n.10, stated that “when the issue was raised in a district court within the Sixth Circuit the court followed *Loschiavo*. See *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 781–85 (E.D. Mich. 2001).” For the reasons stated above, this observation appears to be incorrect.

<sup>139</sup> *South Camden Citizens in Action*, 145 F. Supp. 2d at 549.

<sup>140</sup> 274 F.3d 771 (3d Cir. 2001).

alleging a violation of disparate impact regulations will survive judicial scrutiny.

### C. The Viability of Using § 1983 as a Means of Enforcing Disparate Impact Policies

As the courts in *South Camden Citizens in Action* and *Lucero* recognized, the question of whether a private right of action exists under a statute is not the same as the question as to whether a remedy exists under § 1983.<sup>141</sup> Section 1983 of 42 U.S.C., which is part of the Civil Rights Act of 1871, does not itself create any substantive rights, but provides a civil remedy for the deprivation of federal statutory or constitutional rights. To successfully achieve redress, the claimant must show that “the conduct complained of was engaged in under color of state law and that such conduct subjected the plaintiff to a deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States.”<sup>142</sup> If rights protected by the statute are violated by state action,<sup>143</sup> redress may be had by an action at law, a suit in equity, or other proper proceeding.<sup>144</sup> “There is virtually no limit on the types of causes of action allowable under the Act.”<sup>145</sup>

The claimant, to be successful, must show that the complained of action occurred “under color of state law,” which may be shown by statute, ordinance, regulation, or “official policy.”<sup>146</sup> Generally, private action will not provide the basis for a claim under 42 U.S.C. § 1983, although it may if state involvement is shown.<sup>147</sup>

The Supreme Court has taken a different approach (to that taken in *Alexander v. Sandoval*) in determining whether relief is available under § 1983. To seek such relief, “a plaintiff must assert the violation of a federal

right, not merely a violation of federal law.”<sup>148</sup> In determining whether a statutory provision gives rise to a federal right, the Court has looked at three factors:

First, Congress must have intended that the provision in question benefit the plaintiff... Second, the plaintiff must demonstrate that the right assertedly protected by statute is not so ‘vague and amorphous’ that its enforcement would strain judicial incompetence.... Third, the statute must unambiguously impose a binding obligation on the States.<sup>149</sup>

Rather than focus on any one of these factors in reversing the district court’s preliminary injunction in *South Camden Citizens in Action*, the Third Circuit considered them collectively in reaching the conclusion that “a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute.”<sup>150</sup>

As the Third Circuit observed, “[i]n considering whether a regulation in itself can establish a right enforceable under section 1983, we initially point out that a majority of the Supreme Court never has stated expressly that a valid regulation can create such a right.”<sup>151</sup> Rather, while Justice Stevens on behalf of himself and two other Justices in *Guardians Ass’n v. Civil Service Comm’n*<sup>152</sup> stated that “the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law,”<sup>153</sup> Justice O’Connor, on behalf of four Justices in *Wright v. City of Roanoke Redevelopment and Housing Authority*,<sup>154</sup> stated that the question “whether administrative regulations alone could create such a right” is “a troubling issue,”<sup>155</sup> as was the “view that, once it has been found that a statute creates some enforceable right, any regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.”<sup>156</sup>

The issue was not presented in *Wright*, however, because, as the Third Circuit recognized in *South Camden Citizens in Action*, “the regulation at issue in *Wright* merely defined the specific right that Congress already had conferred through the statute.”<sup>157</sup> Observing that the Fourth and Eleventh Circuits have concluded that a regulation alone may not create a right enforceable

<sup>141</sup> 42 U.S.C. 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

<sup>142</sup> 14A C.J.S., Civil Rights, § 228.

<sup>143</sup> This applies to territories or the District of Columbia governments; see language of 42 U.S.C. 1983, as amended.

<sup>144</sup> See, for example, *Monroe v. Pape*, 365 U.S. 167 (1961); *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, at 11 (1971): “Once a right and a violation have been shown, the scope of...a court’s equitable powers...is broad....”

<sup>145</sup> 14A C.J.S. Civil Rights, § 228, citing *Rossiter v. Benoit*, 162 Cal. Rptr. 65, 88 Cal. 3d 706 (1979), in which a claimant sued for mental distress for an arrest for public drunkenness.

<sup>146</sup> See, for example, *Owen v. City of Independence*, 445 U.S. 622 (1980).

<sup>147</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

<sup>148</sup> *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis in original).

<sup>149</sup> *Id.* (quoting *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 431–32 (1987)).

<sup>150</sup> 274 F.3d at 790.

<sup>151</sup> *Id.* at 781.

<sup>152</sup> 463 U.S. 582 (1983).

<sup>153</sup> *Id.* at 638 (Stevens, J., dissenting).

<sup>154</sup> 479 U.S. 418 (1987).

<sup>155</sup> *Id.* at 437 (O’Connor, J., dissenting) (emphasis in original).

<sup>156</sup> *Id.* at 438 (emphasis in original).

<sup>157</sup> 274 F.3d at 783.

under § 1983,<sup>158</sup> the Third Circuit rejected the contrary view of the Sixth Circuit in *Loschiavo v. City of Dearborn*,<sup>159</sup> and held that “the EPA’s disparate impact regulations cannot create a federal right enforceable through section 1983.”<sup>160</sup> Quoting the “critical point” made in *Alexander v. Sandoval* “that ‘[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not,’”<sup>161</sup> the Third Circuit held that, “particularly in light of *Sandoval*, Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination and that while the EPA’s regulations on the point may be valid, they nevertheless do not create rights enforceable under section 1983.”<sup>162</sup>

While the Third Circuit did not engage in a micro-analysis of each of the three factors that the Supreme Court has held must exist to establish an enforceable right under § 1983,<sup>163</sup> the district court in *South Camden Citizens in Action* did engage in a factor-by-factor discussion in reaching the conclusion that such a right does exist.

In concluding that “the specific language of the EPA’s implementing regulations clearly reveals an intent to benefit individuals such as the Plaintiffs,”<sup>164</sup> the district court in *South Camden Citizens in Action* asserted that the disparate impact regulations at issue in that case “explicitly state: ‘no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin.’”<sup>165</sup> The problem with this analysis is that it focuses on the wrong regulatory provision. The regulatory language that the district court quoted is based on the language found in Section 601 of Title VI, which the Supreme Court in *Alexander v. Sandoval* acknowledged gives rise to a private right of action.<sup>166</sup> The disparate impact regulations do not focus at all on potential beneficiaries but rather, as the district court in *South Camden* stated, are aimed “specifically” at

“recipients of federal funds.”<sup>167</sup> The court nevertheless found that in light of the remaining regulatory language that forbids recipients from “using criteria or methods of administering [their] program[s] which have the effect of subjecting *individuals* to discrimination because of their race, color, national origin, or sex,”<sup>168</sup> “[t]he EPA’s regulations, promulgated at the express instruction of Congress in § 602, are ‘undoubtedly intended to benefit individuals such as the plaintiffs.’”<sup>169</sup>

This conclusion is difficult to reconcile with the Supreme Court’s statement in *Alexander v. Sandoval* that Section 602 does not focus on the person to be benefited but rather “is twice removed from the individuals who will ultimately benefit from Title VI’s protection.”<sup>170</sup> As the *Sandoval* Court observed, “[f]ar from displaying congressional intent to create new rights, § 602 limits agencies to ‘effectuat[ing]’ rights already created by § 601.”<sup>171</sup> These observations, coupled with the Supreme Court’s finding that there is “no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602,”<sup>172</sup> present an obstacle to satisfying the first factor discussed above—that Congress intended the provision in question to benefit the plaintiff.

The Supreme Court’s decision at the end of its 2002 Term in *Gonzaga University v. Doe*<sup>173</sup> suggests that this obstacle may well be insurmountable. That case involved the question of whether a student could bring a § 1983 action for damages against a university under certain provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA).<sup>174</sup> The Court held such an action could not be brought “because the relevant provisions of FERPA create no personal rights to enforce 42 U.S.C. § 1983.”<sup>175</sup>

The Court acknowledged that “whether a statutory violation may be enforced through § 1983 ‘is a different inquiry than that involved in determining whether a private right of action can be implied under a particular statute.’”<sup>176</sup> “But the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute ‘confer[s] rights on a particular class of person.’”<sup>177</sup> Stating that “[a] court’s role in dis-

<sup>158</sup> See *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987); *Harris v. James*, 127 F.3d 993, 1009–110 (11th Cir. 1997).

<sup>159</sup> 33 F.3d 548, 551 (6th Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995).

<sup>160</sup> *South Camden Citizens in Action*, 274 F.3d at 788.

<sup>161</sup> *Id.* at 788 (quoting 121 S. Ct. at 1522).

<sup>162</sup> *South Camden Citizens in Action*, 274 F.3d at 790–91. See also *Ceaser v. Pataki*, \_\_\_ F. Supp. 2d \_\_\_, 2002 WL 472271, \*3 (S.D. N.Y. 2002) (“The regulation at issue in this case does not create federal rights for the purposes of § 1983 because it is too far removed from what Congress proscribed in section 601 of Title VI.”); *Bonnie L. v. Bush*, 180 F. Supp. 2d 1321, 1343–44 (S.D. Fla. 2001) (same).

<sup>163</sup> See *Blessing v. Freestone*, 520 U.S. at 340–41.

<sup>164</sup> *South Camden Citizens in Action*, 145 F. Supp. 2d at 536.

<sup>165</sup> *Id.* (Quoting 40 C.F.R. § 7.30) (emphasis and brackets added by the Court).

<sup>166</sup> See 121 S. Ct. at 1516.

<sup>167</sup> 145 F. Supp. 2d at 537.

<sup>168</sup> *Id.* (Quoting 40 C.F.R. § 7.35(b)) (emphasis and brackets added by the Court).

<sup>169</sup> 145 F. Supp. 2d at 537 (quoting *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 341 (S.D. N.Y. 1999)).

<sup>170</sup> 532 U.S. at 289.

<sup>171</sup> *Id.* (Brackets added by the Court).

<sup>172</sup> *Id.* at 1522.

<sup>173</sup> 536 U.S. 273 (2002).

<sup>174</sup> 20 U.S.C. § 1232(g).

<sup>175</sup> *Gonzaga Univ. v. Doe*, 536 U.S. at 276.

<sup>176</sup> *Id.* at 283 (Quoting *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 508 n.9 (1990)).

<sup>177</sup> *Id.* (Quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)).

cerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context.<sup>178</sup> the Court asserted that “where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.”<sup>179</sup> The Court thus concluded that “if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied right of action.”<sup>180</sup>

This language, as well as the Court’s reference to *Alexander v. Sandoval* in underscoring the need for “the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights,”<sup>181</sup> seem to be a fairly strong indication of how the Court would resolve the question whether disparate impact regulations could be enforced in a § 1983 action.

The enforceability of disparate impact regulations in a § 1983 action or any other kind of proceeding is also constrained by another aspect of the Court’s decision in *Alexander v. Sandoval*. Pointing out that “[b]oth the Government and the respondents argue that the regulations contain rights-creating language and so must be privately enforceable,”<sup>182</sup> the Court stated that this argument “skips an analytical step. Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”<sup>183</sup> The Court agreed that, “when a statute has provided for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable.”<sup>184</sup> The Court nevertheless stated that “it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer’s apprentice but not the sorcerer himself.”<sup>185</sup>

These statements, when considered with the Court’s determination that the disparate impact regulations at issue there “forbid conduct that § 601 permits,”<sup>186</sup> suggest it is not likely that the Court would conclude that Congress could “have intended that the provision in question benefit the plaintiff.”<sup>187</sup> The rationale that the Court used to reach its contrary conclusion would thus

seem to rule out the possibility that a majority of the Justices would agree with Justice Stevens’ suggestion that their decision is “something of a sport” that a litigant could sidestep merely by invoking § 1983 as the mechanism for pursuing a Title VI claim.<sup>188</sup> Despite the majority’s express and repeated refusal to address whether disparate impact regulations “are authorized by § 602” and “may validly proscribe activities that...are permissible under § 601,”<sup>189</sup> and despite the Third Circuit’s statement in *South Camden Citizens in Action* that the disparate impact regulations at issue there were “assumedly valid,”<sup>190</sup> the language from *Alexander v. Sandoval* discussed above suggests that a majority of the Court would agree with Justice O’Connor’s statement in *Guardians Association* that “regulations that would proscribe conduct by the recipient having only a discriminatory effect...do not simply ‘further’ the purpose of Title VI; they go well beyond that purpose.”<sup>191</sup>

The Court has not shied away in other contexts from invalidating regulations that, in the Court’s view, went beyond their authorizing statute. For example, in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, the same five Justices comprising the majority in *Alexander v. Sandoval* held that the Food and Drug Administration did not have authority to regulate tobacco, stating that “[r]egardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”<sup>192</sup> Finding that “Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products,”<sup>193</sup> the Court held that, “[i]n light of this clear intent, the FDA’s assertion of jurisdiction is impermissible”<sup>194</sup> because it was not “grounded in a valid grant of authority from Congress.”<sup>195</sup>

Similarly, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*,<sup>196</sup> the Court held that the Army Corps of Engineers exceeded its authority in asserting regulatory authority over intrastate waters that, in the Court’s view, were not covered by the Clean Water Act. While the Corps promulgated a rule permitting it to exercise jurisdiction over such waters, “the text of the statute will not allow this.”<sup>197</sup> Most

<sup>178</sup> *Id.* at 285.

<sup>179</sup> *Id.* at 286.

<sup>180</sup> *Id.* at 290.

<sup>181</sup> *Id.* at 287 (quoting *Alexander v. Sandoval*, 532 U.S. at 288–89).

<sup>182</sup> *Alexander v. Sandoval*, 532 U.S. at 291 (emphasis in original).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 285.

<sup>187</sup> *Blessing v. Freestone*, 520 U.S. at 340.

<sup>188</sup> 532 U.S. at 299 (Stevens, J., dissenting).

<sup>189</sup> *Alexander v. Sandoval*, 532 U.S. at 279, 281.

<sup>190</sup> 274 F.3d at 790.

<sup>191</sup> *Guardians Ass’n v. Civil Service Comm’n of the City of New York*, 463 U.S. at 613 (O’Connor, J., concurring in the judgment).

<sup>192</sup> 529 U.S. 120 at 125 (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

<sup>193</sup> 529 U.S. at 126.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 161.

<sup>196</sup> 531 U.S. 159 (2001).

<sup>197</sup> *Id.* at 168.

recently, in *Ragsdale v. Wolverine Worldwide Inc.*,<sup>198</sup> the Court struck down a federal Department of Labor regulation promulgated under the Family and Medical Leave Act because “the regulation worked an end-run around important limitations of the statute’s remedial scheme.”<sup>199</sup> In light of these decisions, the Court’s language in *Alexander v. Sandoval* places the future of those disparate impact regulations in doubt.

As the Third Circuit recognized, its holding that disparate impact regulations are not enforceable in a § 1983 action has “implications” that “are enormous.”<sup>200</sup> While one commentator has stated that “the *Sandoval* decision certainly does not foreclose EJ [environmental justice] advocates from seeking administrative and legislative relief,”<sup>201</sup> it certainly puts much of that relief in question. First, this aspect of the Court’s decision makes questionable a major assumption that many have made about the continuing enforceability of disparate impact regulations in the wake of a decision such as this. As the same commentator has observed in stating this assumption, “advocates may still file administrative complaints based upon alleged disparate impacts that violate agency regulations.”<sup>202</sup> That avenue may well prove unsuccessful, however, if the Court were to address the validity of such regulations. Noting that five Justices in *Guardians* made statements in separate opinions that disparate impact regulations are valid, the majority in *Alexander v. Sandoval* opined that “[t]hese statements are in considerable tension with the rule of *Bakke*[<sup>203</sup>] and *Guardians* that § 601 forbids only intentional discrimination.”<sup>204</sup> Absent a change in the composition of the Court, it is likely that a majority would conclude that the regulations are not valid. Such a ruling would eliminate a whole avenue of administrative relief that is currently available.

Second, other aspects of the Court’s decision in *Alexander v. Sandoval* suggest that additional obstacles may remain even if Congress were to step in and amend Title VI so that it clearly authorizes disparate impact regulations. The Court observed that a “claim of exclusivity for the express remedial scheme” may rule out a private cause of action even for “statutes that admittedly create substantive private rights.”<sup>205</sup> While the Court several Terms earlier observed that “[o]nly twice have we found a remedial scheme sufficiently

comprehensive to supplant § 1983,”<sup>206</sup> it actually reached a similar result in *Seminole Tribe of Florida v. Florida*,<sup>207</sup> in which it held that no § 1983 relief was available, under what is known as the *Ex parte Young* doctrine, “where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right....”<sup>208</sup> Addressing the “intricate procedures” and “modest set of sanctions” that Congress established in the Indian Gaming Regulatory Act,<sup>209</sup> the Court stated “the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under” that Act.<sup>210</sup>

Thus, while one commentator argues that “a plaintiff may file a Title VI suit without having to first exhaust her administrative remedies” because “Title VI’s administrative scheme provides limited remedies for individuals,”<sup>211</sup> another commentator counter argues, “[t]he fact that Congress included in section 602 so detailed an enforcement scheme strongly suggests that it did not intend to permit, in the alternative, private lawsuits to enforce section 602.”<sup>212</sup> Stated differently, it is the very limited nature of those remedies that provides a basis for arguing that this is all that Congress intended. In any event, while it remains to be seen how the Supreme Court would resolve this issue in the event Congress were to amend Title VI and authorize disparate impact regulations, transportation officials should be aware that the question is not settled and needs to be considered if they find themselves in the future on the receiving end of a § 1983 suit alleging a regulatory violation.<sup>213</sup>

<sup>206</sup> *Blessing v. Freestone*, 520 U.S. at 347 (citing *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981); *Smith v. Robinson*, 468 U.S. 992 (1984)).

<sup>207</sup> 517 U.S. 44 (1996).

<sup>208</sup> 517 U.S. at 74. For a more full discussion of the *Ex parte Young* doctrine, see ANDREW H. BAIDA, *THE STATES’ IMMUNITY FROM SUIT IN FEDERAL AND STATE COURT*, at 16–18 (National Cooperative Highway Research Program Legal Research Digest No. 45, 2000).

<sup>209</sup> 517 U.S. at 75.

<sup>210</sup> *Id.* at 75–76.

<sup>211</sup> Bradford C. Mank, *Using § 1983 to Enforce Title VI’s Section 602 Regulations*, 49 U. KAN. L. REV. 321, 371 (2001).

<sup>212</sup> Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1246 (2000).

<sup>213</sup> The regulatory violation referred to is a violation of a disparate impact regulation. As stated earlier in this paper, statutes other than Title VI, such as the Uniform Relocation Assistance and Real Property Acquisition Policies Act, express the intent that the Act’s policies and procedures are to be administered “in a manner which is consistent” with Title VI, see 42 U.S.C. § 4621(c)(4), and so the ideas set forth in the preceding discussion apply equally to regulations promulgated pursuant to such legislation. Transportation siting decisions will also implicate non-civil rights related legislation. While

<sup>198</sup> 535 U.S. 81, 122 S. Ct. 1155 (2002).

<sup>199</sup> *Id.* 122 S.Ct at 1162.

<sup>200</sup> *South Camden Citizens in Action*, 274 F.3d at 790.

<sup>201</sup> Kevin J. Klesh, *Urban Sprawl: Can the ‘Transportation Equity’ Movement and Federal Transportation Policy Help Break Down Barriers to Regional Solutions?*, 7 ENVTL. L. 649, 666 (2001).

<sup>202</sup> *Id.*

<sup>203</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>204</sup> 532 U.S. at 281.

<sup>205</sup> *Id.* at 290.

In summary, while private suits may be brought under Title VI and § 1983 for intentional discrimination, the Supreme Court has eliminated Title VI and its implementing regulations as the means by which private redress may be sought for government action alleged to have a disparate impact on minority groups. Section 1983 remains an option for private parties seeking relief from such action, but the future viability of those suits is questionable, given the current composition of the Supreme Court. Administrative complaints represent yet another avenue for aggrieved parties to pursue, although the remedies available in that forum are quite limited when compared with the remedies that are ordinarily available in a judicial action, and it is far from clear whether disparate impact regulations could even survive if their validity were challenged in an administrative proceeding. Congressional action appears to be the brightest solution to the issues that arise when a government project is claimed to have a discriminatorily disparate impact on minorities.

#### IV. STANDING

Several additional issues should also be considered if an action is brought claiming that a transportation project siting decision violates the disparate impact regulations and policies of the DOT, a DOT modal administration, the EPA, or any of the many other departments and agencies that have such regulations and policies. The Supreme Court has held that, regardless of the context, a plaintiff must satisfy three requirements to establish standing under Article III of the Constitution. “First, he must demonstrate ‘injury in fact’—a harm that is both ‘concrete’ and ‘actual or imminent, not conjectural or hypothetical.’”<sup>214</sup> “Second, he must establish causation—a ‘fairly...trace[able]’ connection between the alleged injury in fact and the al-

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those issues are beyond the scope of this paper, courts have recognized that such legislation does not provide a private right of action. *See, e.g.,* Jersey Heights Neighborhood Ass’n v. Glendenning, 174 F.3d 180, 186 (4th Cir. 1999) (stating that neither the Federal-aid Highway Act nor the National Environmental Policy Act “provides a private right of action”); Buckingham Township v. Wykle, 157 F. Supp. 2d 457, 465 (E.D. Pa. 2001) (reaching same conclusion with respect to those Acts, the Federal-aid Highway Act amendments in the Intermodal Surface Transportation Efficiency Act, and the citizen suit provision of the Clean Air Act). *See also* Allandale Neighborhood Ass’n v. Austin Transp. Study Policy Advisory Comm., 840 F.2d 258, 264–67 (5th Cir. 1988) (no private right of action based on purported failure to give due consideration to social, economic, and environmental goals as required by 23 U.S.C. § 134 and 49 U.S.C. § 1607).

<sup>214</sup> Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

leged conduct of the defendant.”<sup>215</sup> “And third, he must demonstrate redressability—a ‘substantial likelihood’ that the requested relief will remedy the alleged injury in fact.”<sup>216</sup> The same standing requirements appear to apply in Title VI cases generally and in cases that involve challenges to highway siting decisions on disparate impact grounds.

For example, in *Powell v. Ridge*,<sup>217</sup> the Third Circuit recited these requirements in holding that children attending Philadelphia public schools had standing under Title VI and its disparate impact regulations to challenge “the practices of the Commonwealth of Pennsylvania in funding public education as having a racially discriminatory effect,”<sup>218</sup> stating that “the plaintiffs complain that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level.... We...conclude that the school children’s injury is redressable by court order.”<sup>219</sup> The court also held that several organizational plaintiffs had standing to challenge the funding practices, finding that their standing “is consistent with the long line of cases in which organizations have sued to enforce civil rights, civil liberties, environmental interests, etc.”<sup>220</sup>

Court decisions in the transportation project siting context treat standing requirements in the same manner. In *Allandale Neighborhood Ass’n v. Austin Transportation Study Policy Advisory Committee*,<sup>221</sup> the Fifth Circuit applied the three requirements set forth above in deciding whether several associations representing individuals and businesses owning property near a proposed highway had standing to challenge the propriety of a transportation plan containing the proposal. The plaintiffs contended that the defendant, “a planning group at the local level, violated federal statutes codified at 23 U.S.C. § 134 and 49 U.S.C. § 1607 chiefly by failing to give due consideration to social, economic, and environmental goals when the Committee devised and endorsed an overarching transportation plan.”<sup>222</sup> The court held that the plaintiffs had standing to bring such a challenge, stating that the “assertedly unlawful procedures produced the Austin Transportation Plan and its provision for the highway,”<sup>223</sup> that “[t]he existence of this provision for the highway has caused the

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<sup>215</sup> Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. at 771 (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41 (1976)).

<sup>216</sup> Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 771 (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. at 45).

<sup>217</sup> 189 F.3d 387 (3rd Cir.), *cert. denied*, 528 U.S. 1046 (1999).

<sup>218</sup> 189 F.3d at 391.

<sup>219</sup> *Id.* at 403.

<sup>220</sup> *Id.* at 404 (citing cases).

<sup>221</sup> 840 F.2d 258 (5th Cir. 1988).

<sup>222</sup> *Id.* at 259.

<sup>223</sup> *Id.* at 262.

market to reassess at a lower level the values of properties in neighborhoods through which the planned highway will pass,<sup>224</sup> and that the “depressed property value” is “a sufficient injury for constitutional standing purposes.”<sup>225</sup>

In holding that residents and neighborhood groups had standing to challenge on Title VI grounds the proposed construction of a highway extension and tunnel near their community, the court in *Bryant v. New Jersey Department of Transportation*<sup>226</sup> found that the plaintiffs “must satisfy not only the ‘case or controversy’ standing requirements of Article III of the Constitution, but also the requirements of statutory standing.”<sup>227</sup> That is because, as the Supreme Court has recognized, “[t]he term ‘standing’ subsumes a blend of constitutional requirements and prudential considerations.”<sup>228</sup> Those considerations require, among other things, that the plaintiff’s complaint “fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>229</sup> In analyzing whether a complaint satisfies such a requirement, the Supreme Court has held that courts “should not inquire whether there has been a congressional intent to benefit the would-be plaintiff,”<sup>230</sup> but rather that they are to “discern the interests ‘arguably...to be protected’ by the statutory provision at issue; we then inquire whether the plaintiff’s interests affected by the agency action in question are among them.”<sup>231</sup>

Stating that “Title VI has been interpreted to reflect two purposes: (1) to prevent discrimination by entities which receive federal funds; and (2) to ‘provide citizens with effective protection against discrimination,’”<sup>232</sup> the court in *Bryant v. New Jersey Department of Transportation* concluded that “[t]he interests arguably to be protected by Title VI, then, are those of persons against

whom federally funded programs discriminate.”<sup>233</sup> Having discerned those interests, the court held that the plaintiffs had standing to challenge the proposed highway extension and tunnel at issue in that case, stating that “African-American residents of Atlantic City whose homes may be destroyed as a result of a federally funded highway project allegedly located in a discriminatory manner must be within the zone of interests protected by Title VI.”<sup>234</sup>

## V. NATURE AND BURDEN OF PROOF ISSUES

As *Bryant, Allandale Neighborhood Ass’n v. Austin Transportation Study Policy Advisory Committee* and similar Title VI cases illustrate, it should not be difficult for a homeowner or neighborhood association to establish their standing in court to challenge a highway or other transportation project proposed to be placed in or near the area in which the property owner or members of the association live.<sup>235</sup> Standing to sue, however, should not be confused with success on the merits. While the court in *Allandale Neighborhood Ass’n* declined to address the plaintiffs’ additional claim that they had standing to allege “to varying degrees that the construction and operation of the six-lane highway will have deleterious social, economic, and environmental effects upon their members,”<sup>236</sup> the Second Circuit in *New York City Environmental Justice Alliance v. Giuliani*<sup>237</sup> confronted a similar contention in holding that several environmental organizations failed to submit sufficient proof to show that they were likely to succeed on the merits of their claim that New York City’s proposed sale or bulldozing of city lots containing community gardens had a disparate impact on minority groups in violation of Title VI and regulations promulgated by the EPA. The court’s analysis is instructive from both a standing and a merits perspective.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 263 (citing *Alschuler v. Department of Housing and Urban Dev.*, 686 F.2d 472, 476–77 (7th Cir. 1982); *Foster v. Center Township*, 798 F.2d 237, 243 n.10 (7th Cir. 1986); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 121 (S.D. Ohio 1984); *Citizens Committee Against Interstate Route 675 v. Lewis*, 542 F. Supp. 496, 521–25 (S.D. Ohio 1982)).

<sup>226</sup> 998 F. Supp. 438 (D. N.J. 1998).

<sup>227</sup> *Id.* at 443.

<sup>228</sup> *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982).

<sup>229</sup> *Powell v. Ridge*, 189 F.3d at 404 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. at 475 (quoting *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970))).

<sup>230</sup> *National Credit Union v. First National Bank & Trust Co.*, 522 U.S. 479, 489 (1998).

<sup>231</sup> *Id.* at 492 (quoting *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. at 153).

<sup>232</sup> *Bryant v. New Jersey Dep’t of Transp.*, 998 F. Supp. at 445 (citing *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 936 (3d Cir. 1997)).

<sup>233</sup> 998 F. Supp. at 445.

<sup>234</sup> *Id.*

<sup>235</sup> Standing would seem to be immaterial at the administrative level when a complaint is filed with a federal agency complaining about the disparate impact a transportation siting project may have. Regardless of the citizen’s “standing” to make such a complaint, and despite questions that exist concerning the validity of the federal government’s disparate impact regulations, the government is authorized by those regulations to conduct an investigation on the basis of such a complaint and to take action in the event it determines there is a “failure to comply.” 49 C.F.R. § 21.11(d)(1). See also DOT Order 1000.12, p. V-3, ¶ 3.d.(1)(b) (stating that the Department has jurisdiction to investigate a complaint if the complaint “alleges any of the specific actions prohibited by 49 C.F.R. 21.5 or any other action which discriminates against any person, class, or minority contractor on the basis of race, color, or national origin”); DOT Order 1000.12, p. V-3, ¶ 3.d.(1)(c) (same investigative authority with respect to a complaint that alleges discrimination in “covered employment”).

<sup>236</sup> 840 F.2d at 263.

<sup>237</sup> 214 F.3d 65 (2nd Cir. 2000).

The regulations that were allegedly violated are identical to the DOT regulation discussed earlier in this paper that prohibits a federal-aid recipient from using criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.<sup>238</sup> The court in *New York City Environmental Justice Alliance v. Giuliani* observed that “to establish a prima facie case of adverse disparate impact, they [the plaintiffs] had to allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities.”<sup>239</sup> Stating that “the plaintiffs were required in the course of attempting to establish causation to employ facts and statistics that ‘adequately capture[d]’ the impact of the City’s plans on similarly situated members of protected and non-protected groups,”<sup>240</sup> the court concluded that the plaintiffs failed factually to show that “specific actions of the defendants would cause a disparate effect on similarly situated people to the detriment of a protected group.”<sup>241</sup>

As one commentator observes, “[t]he small universe of Title VI litigation appears to indicate that, when courts determine disparity, it is appropriate to measure the racial proportionality of the allegedly affected population against the population of the defendant entity’s decision making jurisdiction.”<sup>242</sup> The EPA’s *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* sets forth a multi-step analysis for determining whether a disparate impact exists. First, while the EPA acknowledges that “adverse impacts from permitted facilities are rarely distributed in a predictable and uniform manner,”<sup>243</sup> it notes that “proximity to a facility will often be a reasonable indicator of where impacts are concentrated. Accordingly, where more precise information is not available, [EPA’s] OCR [Office of Civil Rights] will gen-

erally use proximity to a facility to identify adversely affected populations.”<sup>244</sup>

The second step that EPA takes is “to determine the racial and/or ethnic composition of the affected population for the permitted facility at issue in the complaint.”<sup>245</sup> The third step “is to identify which other permitted facilities, if any, are to be included in the analysis and to determine the racial or ethnic composition of the populations affected by those permits.”<sup>246</sup> The fourth step “is to conduct a disparate impact analysis that, at a minimum, includes comparing racial or ethnic characteristics within the affected population” and that “will also likely include comparing the racial characteristics of the affected population to the non-affected population.”<sup>247</sup> “The final phase of the analysis is to use arithmetic or statistical analyses to determine whether the disparity is significant under Title VI.”<sup>248</sup>

Thus, as the EPA recognizes in setting forth the final step it takes in evaluating a complaint, the mere existence of a disparity is not enough to establish a violation of the disparate impact regulations. Rather, as the court in *New York City Environmental Justice Alliance v. Giuliani* stated, “[i]n order to make out a prima facie case of disparate impact, plaintiffs must show ‘a significantly discriminatory impact.’”<sup>249</sup> The DOT has similarly stated that a “disproportionately high and adverse effect” is one that “is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population.”<sup>250</sup>

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 9.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 10.

<sup>248</sup> *Id.*

<sup>249</sup> 214 F.3d at 70 (quoting *Connecticut v. Teal*, 457 U.S. 440, 446 (1982)). See also *National Ass’n for Advancement of Colored People v. Medical Center, Inc.*, 657 F.2d 1322, 1332 (3rd Cir. 1981) (en banc) (expressing “serious doubts” that impacts “described as ‘de minimus,’ ‘insignificant,’ and ‘minor’ are enough to establish a prima facie case and that “some definite, measurable disparate impact is required”); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. at 127 (same). See generally *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–95 (1988).

<sup>250</sup> 62 Fed. Reg. 18377 at 18381 (Apr. 15, 1997). See also December 2, 1998, Order of the Federal Highway Administration, entitled, “FHWA Actions To Address Environmental Justice In Minority Populations and Low-Income Populations,” at 3, located at <http://www.fhwa.dot.gov/environment/guidebook/chapters/v2ch16.htm>. The Supreme Court has found that standard deviations that are “greater than two or three” give rise to an inference that the disparities are caused by racial discrimination. See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307 (1977); *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). See also *E.E.O.C. v. American Nat’l Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981) (“with standard deviations of more than three, the analysis may perhaps safely be used to exclude chance as a hypothesis, hence absolutely to confirm the legitimacy of an inference of

<sup>238</sup> *Id.* at 68 (quoting 40 C.F.R. § 7.35(b)).

<sup>239</sup> 214 F.3d at 69.

<sup>240</sup> *Id.* at 70 (quoting *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1037 (2nd Cir. 1995)) (brackets in original).

<sup>241</sup> 214 F.3d at 70.

<sup>242</sup> J. Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. at 689 (citing *Villanueva v. Carere*, 85 F.3d 481, 487 (10th Cir. 1996); *Larry P. v. Riles*, 793 F.2d 969, 983 (9th Cir. 1984)). See also *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d at 927 n.1 (noting comparison between racial composition of population affected by permit in question and racial composition of the rest of the county). *But see* *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. at 127 (focusing solely on the racial composition of the neighborhoods through which the proposed highway will travel).

<sup>243</sup> Feb. 5, 1998, *Interim Guidance* at 8.

## VI. JUSTIFYING THE DISPARATE IMPACT

Even when a plaintiff demonstrates that a proposed highway or other transportation project will have a sufficient disparate impact to establish a regulatory violation, that is not the end of the proverbial road. Transportation officials may avoid liability by “articulating legitimate nondiscriminatory reasons for the location,”<sup>251</sup> or, stated slightly differently, by demonstrating “the existence of ‘a substantial legitimate justification’ for the allegedly discriminatory practice.”<sup>252</sup> While establishing such a legitimate, nondiscriminatory objective technically shifts the burden back to the plaintiff to prove “the existence of a less discriminatory alternative method of achieving the defendants’ legitimate goals,”<sup>253</sup> courts typically have conflated the two in determining whether the defendant has committed a violation of the law.

The court in *Coalition of Concerned Citizens Against I-670 v. Damian*, for example, found that the defendants in that case avoided liability by establishing that construction of the proposed highway “would have substantially less impact upon racial minorities than would the construction of a freeway along...the major alternative location for a freeway,”<sup>254</sup> and by demonstrating that the “defendants have selected a final location for the highway so as to minimize impacts upon minority neighborhoods.”<sup>255</sup> Similarly, in *National Association for the Advancement of Colored People v. Medical Center, Inc.*, the Third Circuit affirmed the district court’s refusal to enjoin the implementation of a proposed relocation of a medical facility when the defendant came “forward with evidence showing that it has chosen the least discriminatory alternative.”<sup>256</sup> The Third Circuit labeled this a “stringent standard” that “more than adequately serves Title VI aims.”<sup>257</sup>

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discrimination based upon judicial appraisals that disparities are, to the legally trained eye, ‘gross’), *cert. denied*, 459 U.S. 923 (1982).

<sup>251</sup> *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. at 127.

<sup>252</sup> *New York City Env’tl. Justice Alliance v. Giuliani*, 214 F.3d at 72 (quoting *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (quoting *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985))).

<sup>253</sup> *New York City Environmental Justice Alliance v. Giuliani*, 214 F.3d at 72.

<sup>254</sup> 608 F. Supp. at 127.

<sup>255</sup> *Id.*

<sup>256</sup> 657 F.2d at 1337 (quoting district court decision).

<sup>257</sup> *Id.* See also, e.g., *Elston v. Talladega County Board of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993), “[S]ince the district court properly found that the land that the Board needed for expansion simply was unavailable at the Training School site, obviously plaintiffs cannot demonstrate that placing the new school at that site would have been comparably as effective as placing it at the Idalia site. Since plaintiffs have proffered no

The DOT’s position on this issue is also instructive and reflective of the view that courts have expressed. The Department has ordered its operating administrators and other responsible Department officials to “ensure that any of their respective programs, policies or activities that will have a disproportionately high and adverse effect on minority populations or low-income populations will only be carried out if further mitigation measures or alternatives that would avoid or reduce the disproportionately high and adverse effect are not practicable.”<sup>258</sup> In addition, the Department has ordered that these programs, policies, and activities will be implemented only if “(1) a substantial need for the program, policy or activity exists, based on the overall public interest,” and “(2) alternatives that would have less adverse effects on protected populations..., either (i) would have other adverse social, economic, environmental or human health impacts that are more severe, or (ii) would involve increased costs of extraordinary magnitude.”<sup>259</sup>

The Department has also stated that, notwithstanding its environmental justice procedures, “DOT’s responsibilities under Title VI and related statutes and regulations are not limited by this paragraph, nor does this paragraph limit or preclude claims by individuals or groups of people with respect to any DOT programs, policies, or activities under these authorities.”<sup>260</sup> Despite this disclaimer, the procedures are in accord with the way courts resolve disparate impact claims. In any event, the views of both the courts and the federal government’s Executive Branch agencies need to be considered by officials when they plan transportation projects.

## VII. CONCLUSION

Disparate impact policies are embodied in a host of regulations, Orders, and policy guidances that affect a broad range of decision-making in the highway siting context. These policies permeate the entire process, from general transportation planning to specific highway projects, and require transportation officials to seek out and assess the potential impacts that this process will have on minority and non-English speaking individuals, whether they are citizens in the community to be affected by the planning and development activities, or employees whose wages can be linked to federal funds.

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other alternative sites, they have not met their ultimate burden of proof; thus, the district court properly decided in defendants’ favor on the Title VI regulations challenge to the siting of the new school.”; *Lucero v. Detroit Public Schools*, 160 F. Supp. at 796 (ultimately agreeing with the defendants’ assertion that “they made a business decision to build a new, state-of-the-art neighborhood school on the best available site”).

<sup>258</sup> 62 Fed. Reg. at 18380 (Apr. 15, 1997).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

While the Supreme Court has significantly restricted the ability of citizens to use Title VI to fight transportation projects alleged to have a disparate impact on these groups, it has done so by only the slimmest of margins, and it has not directly addressed the question whether the disparate impact policies can be enforced in a § 1983 action. Regardless of whether such an action will survive *Alexander v. Sandoval*, these policies are still on the books, they are presumed to be valid, and they must be evaluated with the many other factors that are examined in the transportation project planning process.

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