2017 NJSBA Annual Meeting

Environmental Justice: Why Race and Class (Still) Matter
Co-Sponsored by the Environmental Law Section and the Diversity Committee

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1. Definitions and Principles of Environmental Justice

2. The Role of the Lawyer in Environmental Justice
   a. Representation, clients, and how we partner
   b. Law as a means, not an end

3. What is the "Justice" in Environmental Justice?

4. Telling the Story
   a. Building the case and developing a narrative
   b. Balancing litigation with grassroots strategy

5. Question & Answer

This outline prepared by Albert Huang, Senior Attorney and Director of Environmental Justice, Natural Resources Defense Council, New York, New York.
I. What is Environmental Justice?

   a. The EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."¹

   b. Robert D. Bullard identified five principles of environmental justice in his article, Environmental Justice in the 21st Century: Race Still Matters —

      1. Implementing the right "of all individuals to be protected from environmental degradation."²

      2. Adopting a "public health model of prevention as the preferred strategy."³

      3. Shifting "the burden of proof to polluters/ dischargers who do harm, discriminate, or who do not give equal protection to racial and ethnic minorities, and other 'protected' classes."⁴

      4. Allowing "disparate impact and statistical weight, as opposed to 'intent,' to infer discrimination."⁵

      5. Redressing "disproportionate impact through 'targeted' action and resources."⁶


II. The Role of the Lawyer in Environmental Justice—Law as Means, Not an End

   a. Luke W. Cole defines the role of the lawyer in his article, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law. He argues that unlike traditional environmental lawyers, environmental poverty

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³ Id. at 154.

⁴ Id

⁵ Id.

⁶ Id. at 155.
lawyers should work to address both the substantive and procedural challenges of working with low-income communities to respond to environmental hazards.

b. Who is in charge? ("Lawyers on Tap, Not on Top")

i. The Community's Role: "If we as environmental lawyers are to make environmental lawyering relevant to the people, we must follow their lead. Solutions to poor peoples' environmental problems should be found by the victims of those problems, not by environmental lawyers."7

ii. Role for Outsiders: "Most community groups in low-income areas desperately need scientific expertise and sensitive legal representation—legal representation that fits within a community-based organizing strategy and that is controlled by the community."8

c. Risks of Disempowerment and Loss

i. "The traditional law practice of serving individual clients can actually disempower people and hinder the organizing efforts necessary to wage a successful struggle."9 This may occur in four different ways:

1. "[E]ven if plaintiffs win in court, they may not be organized enough to take advantage of, or enforce, that victory."10

2. "[W]inning an easy victory may remove an important organizing tool from the community, making it more difficult to build and sustain a lasting community power base."11

3. "[T]he traditional style of lawyering, where there is no attempt to build a community group, but only to represent individual clients, may hurt 'poor people by isolating them from each other.'"12

4. "[T]o the extent that the law serves largely to legitimize the existing social structure and, especially, class relationships within that structure,' the use of the law itself may deter one's clients from thinking of or implementing more far-reaching remedies."13

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8 Id. at 651.
9 Id.
10 Id.
11 Id.
12 Id. at 651-52.
13 Id. at 652.
Most often, working within the system will continue to perpetuate the institutionalized oppression of low-income communities.

d. Practicing Environmental Justice Law

i. Environmental issues should serve as opportunities to develop broad movements to address additional social issues. Thus, the goal of environmental justice law is not simply to win a legal battle, but to empower clients.

ii. Environmental justice lawyers should adopt three key principles: (1) client empowerment; (2) group representation; and (3) law as a means, not an end.

1. Client Empowerment

   a. "Rather than solving a problem for a community, the empowerment model calls upon attorneys to help community members solve their own problems."  

   b. Involves decentralizing power away from the attorney and, instead, enabling client communities to develop the "dynamics of democratic decision making, accountability, and self-determination."

   c. Important to recognize community residents as experts and validate their experiences and knowledge.  

2. Group Representation

   a. Environmental justice lawyers represent groups, rather than individuals, meeting with them periodically to determine the group's legal strategy.

   b. Group representation ensures that the lawyer does not represent just one narrow, unique, or selfish individual interest.

14 Id. at 661.
15 Id at 663.
16 Id.
17 Id. at 664.
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c. Further, group representation serves as an educational tool for fostering community knowledge and receiving feedback on strategies.\(^\text{18}\)

3. Law As a Means, Not an End

a. Environmental justice lawyers must use strategies beyond litigation to address environmental issues faced by low-income communities of color.

b. "Because environmental problems are political problems—some government official is allowing one actor to pollute the neighborhood of another—non-legal tactics often offer the best approach."\(^\text{19}\) In some situations, there might not be a legal solution, or the legal approach may disempower the community.

c. Litigation fails to capture the human rage, pain, and sorrow of the affected communities.\(^\text{20}\) Likewise, litigation takes the power away from the community to control the issue.\(^\text{21}\)

d. "While much of our focus as lawyers is on the outcome of the struggle—the product—some of the most important neighborhood changes happen through the process of the struggle itself: creation of a sense of community, education (and self-education) of residents, development of leaders, empowerment of participants, and recognition of common problems."\(^\text{22}\)

III. What Kind of Justice Are We Seeking? (Or, What is the "Justice" in Environmental Justice?)

a. Environmental justice may involve corrective, procedural, distributive, and/or social justice.

i. Corrective justice "involves fairness in the way punishments for lawbreaking are assigned and damages inflicted on individuals and

\(^{18}\) Id.

\(^{19}\)/d at 667.

\(^{20}\) Id.

\(^{21}\) id

\(^{22}\) Id. at 668.
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This involves the "duty to repair the losses for which one is responsible." 24

ii. Procedural justice "involves justice as a function of the manner in which a decision is made, and it requires a focus on the fairness of the decisionmaking process, rather than on its outcome." 25

iii. Distributive justice "is achieved through a lowering of risks, not a shifting or equalizing of existing risks." 26

iv. Social justice focuses on locating environmental issues within the context of larger racial, social, and economic justice problems and "helps illustrate the influence of politics, race, and class on an area's quality of life." 27 Accordingly, this "broader social perspective contrasts with traditional environmentalism and its narrower focus on wilderness preservation and the technological aspects of environmental regulation." 28

IV. How Do We Address Procedural Justice?

a. Executive Order No. 12898 — Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

i. To address the increasing attention on environment injustices, in 1994, President Clinton issued Executive Order 12898, which ordered all federal agencies to "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." 29

ii. The order also called upon the EPA to create an interagency working group on environmental justice—the Federal Working Group on

24 Id.
25 Id. at 10688.
26 M. at 10684.
27 M. at 10699.
28 Id.
29 Exec. Order No 12898, § 1-101, 3 C.F.R. 859 (1995), reprinted as amended in U.S.C. § 4321 (1995). Likewise, "[e]ach Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin." Id. at § 2-2.
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Environmental Justice ("Working Group"), comprising of various Department heads. The Working Group was tasked to:

1. Guide Federal agencies on criteria to identify disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.
2. Guide Federal agencies to develop an environmental justice strategy pursuant to § 1-103.
3. Assist coordinating research among various agencies pursuant to § 3-301(a).
4. Assist coordinating data collection.
5. Examine existing data and studies on environmental justice.
6. Hold public meetings pursuant to § 5-502.
7. Develop interagency model projects on environmental justice.

iii. Further, each Federal agency must develop a strategy to address environmental injustice, which should include a list of programs, policies, planning, and public participation processes, enforcement, and/or rulemakings related to human health or the environment. These should be revised to include, at a minimum, various environmental justice goals. The strategy should also include a timetable for such revisions and

30 Id. at § 1-102. Departments a part of the Working Group include the Department of Defense, Department of Health and Human Services, Department of Housing and Urban Development, Department of Labor, Department of Agriculture, Department of Transportation, Department of Justice, Department of Interior, Department of Commerce, Department of Energy, Environmental Protection Agency, Office of Management and Budget, Office of Science and Technology Policy, Office of the Deputy Assistant to the President for Environmental Policy, Office of the Assistant to the President for Domestic Policy, National Economic Council, Council of Economic Advisors, and other Government officials the President may designate. Id.
31 Id.
32 Section 3-301(a) outlines the requirements for research on human health and environmental research and analysis, such as the inclusion of "diverse segments of the population in epidemiological and clinical studies." The section also states that agencies must "provide minority populations and low-income populations the opportunity to comment on the development and design of research strategies undertaken pursuant to this order." Id. at § 3-301(c). Federal agencies are tasked to collect data relating to race, national origin, income level. Id. at § 3-302.
33 Some of the goals include "promot[ing] enforcement of all health and environmental statues in areas with minority populations and low-income populations;" "ensur[ing] greater public participation;" "improve[ing] research and data collection relating to the health of the environment of minority populations and low-income populations;" and "identify[ing] differential patterns of consumption of natural resources among minority populations and low-income populations." Id. at § 1-103.
consideration of the different economic and social implications of the revisions.\textsuperscript{34}

iv. Federal agencies should also "collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence."\textsuperscript{35} Risks associated with these consumption patterns should be communicated to the public.\textsuperscript{36}

v. Federal agencies must increase public participation and access by.\textsuperscript{37}

1. Considering public recommendations in the adoption of environmental justice principles.

2. Translating crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations.

3. Ensuring that public documents, notices, and hearings relating to human health or the environment are accessible to the public.

4. Holding public meetings and prepare summary of the comments and recommendations discussed at the public meetings.

vi. Section 6-606 stipulates that all Federal agency responsibilities are equally applicable to Native American programs and should coordinate steps to address Federally-recognized Indian tribes in consultation with tribal leaders.

vii. Finally, the order does not create an enforceable right or law. According to § 6-609, the order "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."\textsuperscript{39} Further, the order does not create any right to judicial review.\textsuperscript{39}

\textsuperscript{34} Id.

\textsuperscript{35} This section also requires Federal agencies to "publish guidance reflecting the scientific information available concerning methods for evaluating the human health risks associated with the consumption of pollutant-bearing fish or wildlife," which should be considered in developing agency policies and rules. Id. at § 4-401.

\textsuperscript{36} Id.

\textsuperscript{37} Id. at § 5-5.

\textsuperscript{38} Id. at § 6-909.

\textsuperscript{39} Id.
b. National Environmental Policy Act (NEPA)

i. As part of the Memorandum for Executive Order 12898, the President declared that "[e]ach Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act of 1969."40

ii. The Council on Environmental Quality (CEQ) issued guidance to address environmental justice under NEPA.41 In particular, CEQ recommends the following principles that agencies should consider:

1. The "composition of the affected area, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action, and if so whether there may be disproportionately high and adverse human health or environmental effects."42

2. "[R]elevant public health data and industry data concerning the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards, to the extent such information is reasonably available."43

3. "[R]ecognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action."44

4. "[D]evelop effective public participation strategies" and "acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and should incorporate active outreach to affect groups."45

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42 Id. at 9.
43 Id.
44 Id.
45 Id.
5. "[A]ssure meaningful community representation in the process" and be "aware that community participation must occur as early as possible to be meaningful."\(^{46}\)

6. "[Sleek tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally-recognized tribes, and any treaty rights."\(^{47}\)

iii. Additional Considerations:

1. "The Executive Order does not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law."\(^{48}\)

2. "Under NEPA, the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory. Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population."\(^{49}\)

iv. Environmental justice should be considered in the following phases of the NEPA process:

1. Scoping

   a. "[A]gencies should determine whether an area potentially affected by a proposed agency action may include low-income populations, minority populations, or Indian tribes, and seek input accordingly."\(^{50}\)

   b. If the scoping process is used to develop an EIS or EA, agencies should include low income populations, minority

\(^{46}\text{id.}\)
\(^{47}\text{id.}\)
\(^{48}\text{Id. at 10.}\)
\(^{49}\text{id.}\)
\(^{50}\text{Id. at 10-11.}\)
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populations, or Indian tribes in the process as early as possible.\textsuperscript{51}

c. If any of such populations exist, agencies should develop a strategy for public involvement in determining the scope of the NEPA analysis.\textsuperscript{52}

2. Public Participation: agencies must use diligent efforts to include the public throughout the NEPA process, especially those among low-income populations, minority populations, or tribal populations.\textsuperscript{53}

3. Determining the Affected Environment: latencies should recognize that the impacts within minority populations, low-income populations, or Indian tribes may be different from impacts on the general population due to a community's distinct cultural practices.\textsuperscript{54}

4. Analysis

a. "When a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe has been identified, agencies should analyze how environmental and health effects are distributed within the affected community."\textsuperscript{55} This data should be analyzed in light of quantitative and qualitative data from the public participation process.

b. If there is a potential environmental justice issue, the agency should provide a statement in the EIS or EA with sufficient information for the public to understand the assertion.

5. Alternatives

a. Agencies should encourage potentially affected populations to develop and comment on alternatives early in the process.\textsuperscript{56}

\textsuperscript{51} Id. at it
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 13.
\textsuperscript{54} Id. at 14.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 15.
b. If the agency identifies a disproportionately high and adverse human health or environmental effect on low-income populations, minority populations, or Indian tribes, the distribution and magnitude of the disproportionate impacts must be considered in determining alternatives.  

6. Record of Decision

a. "Disproportionately high and adverse human health or environmental effects on a low-income population, minority population, or Indian tribe should be among those factors explicitly discussed in the ROD, and should also be addressed in any discussion of whether all practicable means to avoid or minimize environmental and other interrelated effects were adopted."  

b. Agencies should provide translation for EIS and ROD where practicable and appropriate.  

7. Mitigation: "[m]itigation measures include steps to avoid, mitigate, minimize, rectify, reduce, or eliminate the impact associated with a proposed agency action." These measures should reflect the needs and preferences of affected low-income populations, minority populations, or Indian tribes.  


i. CEQA does not explicitly mention "environmental justice" or "fair treatment." The CEQA principles, however, help provide guidelines to local governments to further environmental justice. For example:  

1. Section 21001(b) declares that agencies must "[l]ake all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise."  

57 Id.  
58 Id. at 16.  
59 Id.  
60 id  
61 CAL. PUB. RES. CODE § 21001(b) (West 2015).
2. Section 21000(g) declares that "[i]t is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian."\(^\text{62}\)

3. Further, § 21001(g), states that it is the policy of the state to "[r]equire governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment."\(^\text{63}\)

ii. Feasible Alternatives

1. Section 21002 states that "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects."\(^\text{64}\)

iii. Significant Effect on the Environment Includes Humans

1. Accordingly, "[a]n agency is required to find that a 'project may have a 'significant effect on the environment' if, among other things, 'the environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly. "\(^\text{65}\)

V. How Do We Address Distributive Justice?

b. Title VI of the Civil Rights Act 1964

i. As part of the Memorandum for Executive Order 122898, the President declared that "[i]n accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the

\(^\text{62}\) CAL. PUB. RES. CODE § 21000 (West 2015).

\(^\text{63}\) CAL. PUB. RES. CODE § 21001 (West 2015).

\(^\text{64}\) CAL. PUB. RES. CODE § 21002 (West 2015).

\(^\text{65}\) Kamala D. Harris, *Environmental Justice at the Local and Regional Level: Legal Background*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE 1, 2 (July 12, 2010)
environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin."

**ii. Section 601** declares that "[I* person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C.A. §2000d (1964)

**iii. Section 602** states that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, 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."

**iv. No Private Right of Action for Disparate Impact**

1. **Alexander v. Sandoval, 532 U.S. 275 (2001).** Held there is no private right of action to enforce disparate-impact regulations promulgated under §602 of Title VI.\(^66\) The court concluded that it is "beyond dispute—and no party disagrees—that §601 prohibits only intentional discrimination."\(^67\) Accordingly, there was lack of Congressional intent for a private right of action to enforce regulations that go beyond the statute, i.e., disparate impact regulations.\(^68\)

**v. No enforceable private right of action pursuant to 42 U.S.C. §1983.**

1. **South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 274 F.3d 771 (3d Cir. 2001).** Held that EPA regulations did not create right enforceable through §1983.\(^69\) The court concluded that "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


\(^{67}\) **M.** at 280.

\(^{68}\) **M.** at 290-93.

\(^{69}\) South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 274 F.3d 771 (3d Cir. 2001).
regulations on the point may be valid, they nevertheless do not create rights enforceable under section 1983.\textsuperscript{70}

2. \textbf{Gonzaga Univ. Doe, 536 U.S. 273 (2002).} Held that the Family Educational Rights and Privacy Act (FERPA) does not create personal rights to enforce under §1983.\textsuperscript{71} The court concluded "if Congress wishes to create new rights enforceable under §1983, it must do so in clear and unambiguous terms—with less and no more than what is required for Congress to create new rights enforceable under an implied private right of action. FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions."\textsuperscript{72}

3. \textbf{Save Our Valley v. Sound Transit, 335 F.3d 932, (9th Cir. 2003).} Held that the Department of Transportation's disparate impact regulation (promulgated pursuant to Title VI of the Civil Rights Act of 1964) did not create an individual federal right that could be enforced through §1983.\textsuperscript{73} Accordingly, "[t]he disparate-impact regulation cannot create a new right; it can only 'effectuate' a right already created by §601. And §601 does not create the right that [plaintiff] seeks to enforce, the right to be free from racially discriminatory effects."\textsuperscript{74}

b. \textbf{CAL. GOV'T CODE § 11135 (West 2012) discrimination in state-funded programs and activities.}

i. "No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University."\textsuperscript{75}

\textsuperscript{70} Id. at 791.
\textsuperscript{71} Gonzaga Univ. Doe, 536 U.S. 273 (2002).
\textsuperscript{72}/d. at 290.
\textsuperscript{73} Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003).
\textsuperscript{74} Id. at 944.
\textsuperscript{75} CAL. GOVT CODE § 11135 (West 2012).
ii. If the state agency determines "a contractor, grantee, or local agency has violated the provisions of this article, the state agency that administers the program or activity involved shall take action to curtail state funding in whole or in part to such contractor, grantee, or local agency.\footnote{CAL. GOVT CODE § 11137 (West 2015).}


i. "It is a discriminatory practice for a recipient, in carrying out any program or activity directly, or through contractual, licensing or other arrangements, on the basis of ethnic group identification, religion, age, sex, color, or a physical or mental disability: (i) to utilize criteria or methods of administration that: (1) have the purpose or effect of subjecting a person to discrimination on the basis of ethnic group identification, religion, age, sex, color, or a physical mental disability."

d. CAL. GOVT CODE § 11139 (West 2012) provides a private right of action to bring claims of disparate-impact discrimination.
Girandola v. Allentown

Superior Court of New Jersey, Appellate Division

December 3, 1985, Argued; March 6, 1986, Decided

No. A-557-84T7

Plaintiffs appealed an order of the Superior Court of New Jersey, Monmouth County, which denied plaintiffs' motion for an award of counsel fees in an action against defendants, borough and township, for a writ of mandamus and for relief under the New Jersey Environmental Rights Act, N.J. Stat. Ann. § 2A:35A-1 et seq., to enjoin the use of property in defendant township for defendant borough's deposit of spoils from its dredging of a lake. The litigation was resolved by an order of settlement and dismissal which recited that it was submitted to the court for approval because, pursuant to N.J. Stat. Ann. § 2A:35A-10(c), the action could not be dismissed without the express consent of the trial court. Plaintiffs thereafter filed a motion for an award of counsel fees. The trial court denied the motion, and plaintiffs appealed. The court vacated the order and remanded because the order was unaccompanied by any reasons, findings, or conclusions. The court found that plaintiffs' allegations facially qualified the action as brought "under" the Act so as to permit an award of counsel fees, but that an evaluation of the actual conduct of the litigation and results obtained was required for a determination of whether the action was brought "under" the Act and whether plaintiff was the "prevailing party."

Outcome

The court vacated the order denying plaintiffs' motion for an award of counsel fees and remanded, holding that an evaluation of the actual conduct of the litigation and results obtained was required for a determination of counsel fees, and that the order was unaccompanied by any reasons, findings, or conclusions.

LexisNexis® Headnotes

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview


Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

Whether an action should be characterized as brought "under" the New Jersey Environmental Rights Act, *N.J. Stat. Ann. § 2A:35A-1 et seq.*, so as to permit an award of counsel fees pursuant to *N.J. Stat. Ann. § 2A:35A-10*, requires consideration not only of the pleadings but of the conduct of the litigation and its resolution. Only by a careful evaluation of the contentions actually pursued, the "design" of the statute, regulation, or ordinance allegedly violated, and the relief obtained can a determination be made whether the action was brought "under" the Act within the meaning of § 2A:35A-10.

Whether plaintiffs were "prevailing" parties requires an evaluation of the pleadings, the actual conduct of the litigation, and the results obtained.

An award of counsel fees under the New Jersey Environmental Rights Act, *N.J. Stat. Ann. § 2A:35A-10*, requires a finding that the case is "appropriate" for such an award. A litigant who establishes that he has met the standards to qualify as a "prevailing party" in an action brought "under" the Act has made a prima facie showing that the case is "appropriate" for a fee award. Once such a showing is made, the litigant should ordinarily recover an attorney's fee as allowed by § 2A:35A-10 unless special circumstances would render such an award unjust.

Counsel: Robert A. Goodsell argued the cause for appellants (Irwin, Post & Rosen, P.A., attorneys; Margaret H. MacNeil, on the brief).

David H. Coates argued the cause for respondent Borough of Allentown (Turp, Coates, Essl & Driggers, P.C., attorneys; Donald S. Driggers, on the brief).

Sanford D. Brown argued the cause for respondent Upper Freehold Township (Dawes & Brown, P.A., attorneys; Sanford D. Brown and John I. Dawes, on the brief).

Judges: Michels, Gaulkin and Deighan. The opinion of the court was delivered by Gaulkin, J.A.D.

Opinion by: GAULKIN

Plaintiffs brought this action "in lieu of prerogative writ, for a writ of mandamus and for relief under the Environmental Rights Act, *N.J.S.A. 2A:35A-1 et seq.*, to enjoin the use of certain property in Upper Freehold Township for the Borough of Allentown's deposit of spoils from its dredging of Allentown Lake. The litigation was resolved by an order of settlement and dismissal which recited that it was submitted to the court for approval because "[p]ursuant to § 10 of the New Jersey Environmental Rights Act, *N.J.S.A. 2A:35A-10(c)*, the within action may not be dismissed without the express consent of the Court in which the action was filed." Plaintiffs thereafter moved for the award of counsel fees "to be apportioned by the Court among the defendants, Allentown, Upper Freehold Township, Upper Freehold Township Planning Board, and Virginia Garbarine and Louis F. Dierking." The motion was denied; the order was unaccompanied by any reasons, findings or conclusions. Plaintiffs appeal from the denial of the motion.

The Environmental Rights Act (the Act), *N.J.S.A. 2A:35A-1 et seq.*, provides in *N.J.S.A. 2A:35A-10(a)* for the award of counsel fees:

In any action under [the Act] the court may in appropriate cases award to the prevailing party
reasonable counsel and expert witness fees, but not exceeding a total of $5,000.00.

Unfortunately, the motion judge has given us no hint whatsoever why he denied plaintiffs' application. We do not know whether he regarded the action as not brought "under" the Act, whether he found plaintiffs not to be "the prevailing party" under the settlement agreement, [***3] whether he considered the counsel fees to be unreasonable or whether he otherwise found the case not "appropriate" for a fee award. The judge's failure to make findings and conclusions is not only in disregard of oft-stated admonitions (see, e.g., McCann v. Bliss, 65 N.J. 301, 304, n. 2 (1974); Castro v. Helmsley Spear, Inc., 150 N.J. Super. 160, 162 (App.Div.1977)), but does the parties a substantial [*441]disservice, for we are left unable to resolve the meritorious issues which they project.

HN[4] The Act authorizes "any person" to maintain an action "to enforce, or to restrain the violation of, any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment." N.J.S.A. 2A:35A-4a. Here plaintiffs alleged that the deposit of dredge spoils would constitute "violations of the Upper Freehold Township land use ordinances and other applicable ordinances," that the relevant provisions of those ordinances "are designed to prevent or minimize pollution, impairment or destruction of the environment as defined by N.J.S.A. 2A:35A-1, et seq.," that the dredging operation lacked the necessary prior [***4] approval of the Planning Board and the Board of Adjustment of Upper Freehold, that Allentown was in violation of an order of the Department of [***6] Environmental Protection to take corrective action on Allentown Dam pursuant to the Safe Dam Act (N.J.S.A. 58:4-11 et seq.), a "statute intended and designed to minimize the pollution, impairment or destruction of the environment," and that the dredging project conflicted with the order of the Department of Environmental Protection as well as recommendations of the Army Corps of Engineers. Those allegations facially qualify the action as brought "under" the Act so as to permit an award of counsel fees pursuant to N.J.S.A. 2A:35A-10. But HN[3] whether the action should be so characterized requires consideration not only of the pleadings but of the conduct of the litigation and its resolution. Only by a careful evaluation of the contentions actually pursued, the "design" of the "statute, regulation or ordinance" allegedly violated and the relief obtained can a determination be made whether the action was brought "under" the Act within the meaning of N.J.S.A. 2A:35A-10.

HN[5] Whether plaintiffs were "prevailing" parties requires [***5] a similar evaluation of the pleadings, the actual conduct of the litigation and the results obtained. Plaintiffs certainly can be [*442] regarded as "prevailing" even though the case was disposed of by settlement rather than judgment. Cf. Maher v. Gagne, 448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653, 661 (1980). The settlement included, at least in part, injunctive relief, which is the relief accorded to a "prevailing party" under the Act. See Birchwood Lakes Colony Club v. Medford Lakes, 179 N.J. Super. 409, 413-14 (App.Div.1981), mod. and aff'd 90 N.J. 582 (1982). But also to be considered are whether the litigation was a necessary and important factor in obtaining the relief, whether the relief obtained by settlement was substantial and a significant portion of the goals of the suit and whether the settlement had a reasonable basis in law. See, e.g., Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir.1978); Kahan v. Rosenstiel, 424 F.2d 161 (3rd Cir.), cert. den. 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970); Bonnes v. Long, 599 F.2d 1316 (4th Cir.1979), cert. den. 455 U.S. 961, 102 S.Ct. [***6] 1476, 71 L.Ed.2d 681 (1982). The order of settlement here included a number of provisions which may be viewed simply as procedures to monitor the progress of municipal undertakings as to which the litigation may have had no necessary or important role. But the order also requires certain substantive action from at least some of the defendants, including, most significantly, restoration and regrading of the spoils site. Whether the relief provided by the order of settlement represents substantial success on a significant issue in litigation, whether the litigation was a necessary and important factor in obtaining that relief and whether the settlement had a reasonable basis in law are all matters which must be addressed in determining whether a counsel fee is allowable. Cf. Westfield Centre Service, Inc. v. Cities Serv. Oil Co., 172 N.J. Super. 196, 203 (App.Div.1980), aff'd 86 N.J. 453 (1981).

HN[6] An award of counsel fees under N.J.S.A. 2A:35A-10 also requires a finding that the case is "appropriate" for such an award. A litigant who establishes that he has met the standards we have described to qualify as a "prevailing party" in an action brought "under" the [***7] Act has made a prima facie showing [*443] that the case is "appropriate" for a fee award; once such a showing is made, the litigant should ordinarily recover an attorney's fee as allowed by statute unless special circumstances would render such an

The present posture of the case permits us to state only the most general principles which govern the award of counsel fees under N.J.S.A. 2A:35A-10. Application of those principles to the facts of the case is appropriately left in the first instance to the trial court which shepherded the case to its disposition. That court is in the best position to make some of the nice judgments which are required.

Accordingly, we vacate the August 27, 1984 order denying plaintiffs' motion for an award of counsel fees and remand the matter to the Law Division for further proceedings consistent with this opinion. We do not retain jurisdiction.

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Bradley v. Kovelesky
Superior Court of New Jersey, Appellate Division
January 13, 2016, Submitted; August 15, 2016, Decided
DOCKET NO. A-0423-14T4

Report
2016 N.J. Super. Unpub. LEXIS 1898 *


Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2955-12.

Core Terms
remediate, notice, defenses, discovery, amend, nuisance, limitations period, contamination, time-barred, trespass, laches, statute of limitations, common law claim, continuous, original complaint, summary judgment, trial court, environmental, plaintiffs’, violations, hazardous, issues

Counsel: Law Office of Howard Davis, P.C., attorneys for appellants (Mr. Davis, of counsel; Anne Ronan and Justin M. Davidson, on the briefs).

Dilworth Paxson LLP, attorneys for respondents Joseph Kovelesky and Kove Construction Company (Joseph A. Clark, of counsel and on the brief).

Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys for respondent Tommaso Iadevaia & Sons Contracting Company, Inc. (Jacob S. Grouser, of counsel and on the brief).

Judges: Before Judges Ostrer, Haas and Manahan.

Opinion

PER CURIAM

Plaintiffs Ann Bradley and Katherine Rudnick, as co-executors of the Estate of Lawrence Carton, appeal from the summary judgment dismissal of their complaint seeking various forms of relief under environmental statutes and the common law for pollution of a property purchased by the late Lawrence Carton. We affirm in part, and reverse in part.

I.

We discern the following facts from the record, extending all favorable inferences to plaintiffs as the non-movants. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995).

This appeal pertains to an 8.3-acre property in Middletown Township that Carton purchased on January 18, 2006. Sometime thereafter, he began building [*2] a residence on the property.1 Work stopped after the Department of Environmental Protection (DEP) issued violation notices in September 2006, alleging solid waste and land use violations. Carton retained environmental consultants, who reported in February 2007 that soil and groundwater contained excess concentrations of benzo(a)pyrene, arsenic, and other contaminants. The consultants opined the pollution was “probably due to the promiscuous dumping of asphalt material . . . .”

1 Plaintiffs’ attorney certified that Carton intended to use the house himself, but the attorney lacked personal knowledge for that assertion. See R. 1:6-6.
Carton died on June 1, 2007. In 2009, the estate hired another consultant to perform additional soil sampling and remediation activities. In around June 2010, the consultant began to excavate and dispose contaminated soil. Remediation activities continued into 2012.

On July 11, 2012, Bradley and Rudnick, Carton's wife and daughter, in their role as co-executors of Carton's estate, sued the property's prior owners: Kove Construction Company, Inc. (Kove), which owned the property from 1973 to 1999; GTL Investments, L.P. (GTL), which owned it next; and JJR Realty Capital Group, LLC (JJR), the last owner before Carton. Plaintiffs also named Kove's president and sole shareholder, Joseph Kovelesky.3

Plaintiffs alleged that defendants caused the contamination on the property. Counts one and two sought contribution toward remediation costs and an order compelling defendants to remediate. Count one was a claim for contribution under the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11; Count two asserted violations of the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1.3 (BCSRA), the Site Remediation Reform Act, N.J.S.A. 58:10C-28 (SRRA), and the Spill Act. The remaining four counts asserted claims of strict liability, negligence, trespass, and nuisance, for which plaintiffs sought compensatory damages, contribution and indemnification, declaratory relief, abatement of the nuisance, and attorney fees and costs.

In their October 2012 answer, Kove and Kovelesky (collectively, "Kove") denied that they discharged hazardous substances on the property. Kove also filed a third-party complaint against Tommaso Iadevaia & Sons Contracting Company Inc. (Iadevaia), which alleged that Iadevaia polluted the property in 1971 while constructing a public sanitary sewer improvement. Iadevaia filed a counter-claim against Kove. Both Kove and Iadevaia asserted affirmative defenses of statute of limitations, laches, and unclean hands. Plaintiffs never filed a direct claim against Iadevaia.

On February 6, 2014, Kove filed a motion for summary judgment. Kove argued that the Spill Act contribution claim and common law claims were time-barred under N.J.S.A. 2A:14-1, which establishes a six-year limitations period. Kove contended that the claims accrued in 2004 when Carton, as the Middletown planning board attorney, became aware of environmental issues on the property. Kove cited a development application proceeding from 2004, in which the planning board expressed concern about fill material on the property. Kove also asserted plaintiffs lacked a private right of action for the statutory relief sought under count two, and had failed to serve on DEP a notice of claim in accordance with the Environmental Rights Act (ERA), N.J.S.A. 2A:35A-1 to-14. Iadevaia supported Kove's motion.

On February 14, 2014, plaintiffs served a thirty-day notice of intent to commence an ERA action on DEP. On March 12, 2014, plaintiffs filed a motion to amend the complaint to add an ERA claim against Kove, premised on the Spill Act, BCSRA, and SRRA violations asserted in count two of the original complaint.

Plaintiffs also filed opposition to Kove's summary judgment motion, arguing that the Spill Act contribution claim was not subject to a statute of limitations defense. They also contended the common law claims were not time-barred, arguing that, under the discovery rule, Carton did not discover a basis for the claims until February 2007. Plaintiffs also argued that summary judgment was premature because discovery was incomplete. The discovery end date was September 30, 2014. The record indicates that, although plaintiffs had served deposition notices and discovery requests on defendants, no discovery occurred. The discovery requests are not in the record.

In its June 6, 2014 oral decision, the trial court found that the Spill Act contribution claim and common law claims were time-barred. Relying on our decision in Morristown Associates v. Grant Oil Co., 432 N.J. Super. 287, 106 A.3d 1176 (2015) (Morristown I), rev'd [6], 220 N.J. 360, 106 A.3d 1176 (2015) (Morristown II), the court held that the Spill Act contribution claim was subject to the same six-year statute of limitations under N.J.S.A. 2A:14-1 that governed the common law claims. The court held the limitations period began to run more than six years before the complaint was filed, because Carton became aware of environmental problems on the property in 2004.

The court characterized count two as an ERA claim, and

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2 Although the record does not disclose the current status of Carton's estate, we presume the estate is still open, inasmuch as the property remains in Carton's name, according to public records. See N.J.R.E. 202(b); N.J.R.E. 201.

3 The complaint against GTL and JJR was eventually dismissed for failure to prosecute.

Brittany DeBord
dismissed the court because plaintiffs failed to serve notice on DEP before filing the original complaint. The court also denied the motion to amend the complaint, reasoning that plaintiffs could not cure the failure to serve advance notice on DEP by filing an amended complaint. The court thereafter denied reconsideration of the order denying the motion to amend.

II.

Plaintiffs raise four issues on appeal. The first pertains to the timeliness of their Spill Act contribution claim. After the June 6, 2014 summary judgment decision, the Supreme Court rendered its decision in *Morristown II*, [*supra*], vindicating plaintiffs' position that this claim is not subject to a statute of limitations defense. 220 N.J. at 364 ("Based on the plain language of the Spill Act, reinforced by its legislative history, we hold that N.J.S.A. 2A:14-1's six-year [*7] statute of limitations is not applicable to Spill Act contribution claims."). Faced with the Court's clear declaration, defendants now argue that dismissal was nonetheless appropriate based on principles of laches and unclean hands.

The remaining three issues presented are whether the common law claims are time-barred; whether the statutory claims in count two were properly dismissed; and whether the court erred in denying plaintiffs' motion to amend to add an ERA claim.


III.

A.

Starting with the Spill Act contribution claim, *Morristown II* forecloses defendants' argument that this claim is subject to equitable defenses. Defendants' position is at odds with the Court's holding that the enumerated defenses in N.J.S.A. 58:10-23.11g(d) are exclusive:

> [W]hile the contribution provision does not explicitly state that no statute of limitations applies, it does state that "[a] contribution defendant shall have only the defenses [*8] to liability available to parties pursuant to [N.J.S.A. 58:10-23.11g(d)]." N.J.S.A. 58:10-23.11f(a)(2)(a) (emphasis added). The language of the statute expressly restricting the defenses available under the Spill Act provides significant support for a conclusion that no statute of limitations applies. The Spill Act's incorporation of the defenses enumerated in N.J.S.A. 58:10-23.11g(d) limits defendants to the following defenses: 'an act or omission caused solely by war, sabotage, or God, or a combination thereof.' That list does not include a statute of limitations defense. [*Id. at 381.*]

Just as the exclusive list of defenses precludes a statute of limitations defense, it precludes equitable defenses of laches or unclean hands. "The 'only defenses' available to contribution claims were to be the ones to which the Legislature specifically referred." *Id. at 382*; see also *id. at 384* (noting the "specific legislative intent to eliminate other otherwise available defenses"). Further, the Court's concern that fact-sensitive discovery rule disputes would complicate resolution of Spill Act claims also militates against allowing a laches defense. *See id. at 384*. A prerequisite [*9] to applying laches is the plaintiff's awareness of his or her rights to assert a claim. *See Donnelly v. Ritzendollar*, 14 N.J. 96, 108, 101 A.2d 1 (1953) ("a person cannot be deprived of his remedy in equity on the ground of laches, unless it appears that he had knowledge of his rights.") (quoting *Scheel v. Jacobson*, 112 N.J. Eq. 265, 269, 164 A. 270 (E. & A. 1933)). Thus, as with the statute of limitations, application of laches requires an inquiry into when the plaintiff discovered the facts supporting a cause of action.

Defendants' remaining arguments in support of the dismissal of the Spill Act contribution claim lack sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E).*

B.

Turning to the common law claims, plaintiffs argue that under the discovery rule, the limitations period did not

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4 The Spill Act contains several other defenses to liability, N.J.S.A. 58:10-23.11g(d)(2)-(5), which the *Morristown II* Court did not discuss and are not at issue here.
begin to run until Carton became aware of the contamination in February 2007. Applying \textit{N.J.S.A. 2A:14-1}'s six-year statute of limitations, they contend their July 2012 complaint was timely. They argue that the documentary evidence pertaining to the 2004 planning board action at most shows that Carton was aware of improper filling of wetlands, but not contamination by hazardous chemicals. Plaintiffs also contend summary judgment was premature, as they had not completed discovery.

We need not reach these issues, however, as plaintiffs’ strict\(^{[*10]}\) liability, negligence, and trespass claims are time-barred for a different reason.\(^{[*5]}\) Plaintiffs asserted these claims on behalf of Carton’s estate. Consequently, the claims are survival actions, which are governed by the two-year limitations period contained in \textit{N.J.S.A. 2A:15-3.}

\textit{N.J.S.A. 2A:15-3} provides: “Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living.” The statute preserves the right of action a deceased would have had for damages to his person or property. \textit{See Aronberg v. Tolbert, 207 N.J. 587, 593, 25 A.3d 1121 (2011).} It abrogates the common-law prohibition of claims brought on behalf of deceased parties for injuries to, among other things, the deceased’s real property. \textit{Canino v. New York News, Inc., 96 N.J. 189, 191-95, 475 A.2d 528 (1984); Soden v. Trenton & Mercer Cty. Traction Corp., 101 N.J.L. 393, 395-96, 127 A. 558 (E. & A. 1925).} The word “trespass” in \textit{N.J.S.A. 2A:15-3} is broadly construed to include all torts generally. \textit{Canino, supra, 96 N.J. at 194-95.}

A survival action under \textit{N.J.S.A. 2A:15-3} must be brought within two years of the decedent’s death. The statute was amended in 2010 to incorporate the two-year limitations period that governs\(^{[*11]}\) wrongful death actions under \textit{N.J.S.A. 2A:31-3. See L. 2009, c. 266, §1.} The amended statute provides: “Every action brought under this chapter shall be commenced within two years after the death of the decedent, and not thereafter,” except in certain cases where the decedent was a victim of homicide. \textit{N.J.S.A. 2A:15-3.}\(^{[*5]}\) The amendment applies to “any action pending or filed on or after the effective date” of January 17, 2010. \textit{L. 2009, c. 266, § 2.}

Accordingly, plaintiffs were required to file their complaint by June 2009, two years after Carton’s death, “and not thereafter.” Even if we were to assume that the limitations period was tolled until the executors’ discovery of the basis for a cause of action, that occurred in 2009, more than two years before the May 2012 filing. In sum, the strict liability, negligence and trespass claims are time-barred under \textit{N.J.S.A. 2A:15-3.}

We reach a different\(^{[*12]}\) result with respect to the nuisance claim, which alleges a continuing failure to remediate the contamination. In essence, plaintiffs allege a continuing nuisance, which is a continuing tort. \textit{See Russo Farms v. Vineland Bd. of Educ., 144 N.J. 84, 102-03, 675 A.2d 1077 (1996) (discussing distinction between continuing and permanent nuisance).} Therefore, the cause of action continually accrues, triggering a new limitations period each day the nuisance is not abated. \textit{Id. at 99, 104.} Accordingly, the nuisance claim is not time-barred.

C.

Finally, we consider together the dismissal of the claim for various forms of statutory relief in count two, and the denial of the motion to amend to add an ERA claim.

We affirm the dismissal of count two, to the extent it relies on \textit{BCSRA} and \textit{SRRA}. Count two sought an order declaring Kove liable under the Spill Act as a “discharger or person in any way responsible for a hazardous substance” and requiring Kove to remediate and fund the remediation pursuant to BCSRA, SRRA, and DEP regulations. Plaintiffs provide no authority for a private right of action under BCSRA and SRRA, and we are aware of none. To the extent count two relies on the Spill Act, it is duplicative of count one; we have already held that the Spill Act contribution claim was not subject\(^{[*13]}\) to dismissal.

We reverse the denial of plaintiffs’ motion to amend to

\(^{[*5]}\)\textit{See State v. Heisler, 422 N.J. Super. 399, 416, 29 A.3d 320 (App. Div. 2011) (stating an appellate court is “free to affirm the trial court’s decision on grounds different from those relied upon by the trial court”).}

\(^{[*10]}\)\textit{We recognize that the Legislature’s apparent intent in adding the two-year time bar to \textit{N.J.S.A. 2A:15-3} was to toll the statute for personal injury actions in cases of homicide. Senate Judiciary Committee, \textit{Statement to Senate Bill No. 2763} (May 18, 2009). Nonetheless, we are bound by the plain language of the statute, which imposes a two-year period on “[e]very action.” \textit{See In Re Kollman, 210 N.J. 557, 568, 46 A.3d 1247 (2012).}
add an ERA claim. The ERA grants private persons standing to sue for violations of environmental statutes:

Any person may commence a civil action in a court of competent jurisdiction against any other person **alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment.** The action may be for injunctive or other equitable relief to compel compliance with a statute, regulation or ordinance, or to assess civil penalties for the violation as provided by law. The action may be commenced upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future.

[N.J.S.A. 2A:35A-4(a)](emphasis added.)


As a prerequisite to suit, a plaintiff must serve written notice of his or her intent to assert a claim under the ERA on DEP and other public officials. N.J.S.A. 2A:35A-11. The notice must be served "at least 30 days prior to" commencing the action. *Ibid.* This requirement enables DEP to determine its approach to the litigation, including whether it will join the litigation, whether its expertise would assist the court, and whether the litigation risks undermining "broad state interests." *Howell, supra,* 207 N.J. Super. at 95.

The trial court read [N.J.S.A. 2A:35A-11](to require plaintiffs to serve notice before filing the original complaint, reasoning that count two was actually an ERA claim. We disagree. A plaintiff is required to give notice of any "action . . . commenced pursuant to this act." N.J.S.A. 2A:35A-11. The notice requirement was not triggered until plaintiffs asserted a claim "pursuant to this act," which was when they filed their motion to amend on March 12, 2014. The original complaint made no mention of the ERA, and thus was not an "action . . . commenced pursuant to [ERA]." Nothing in the ERA states that an ERA claim may only be asserted in the original complaint. Because plaintiffs served notice on DEP on February 14, 2014, they satisfied the thirty-day notice requirement.

The decision whether to grant leave to amend a complaint rests within the trial court's discretion. *Kernan v. One Wash. Park Urban Renewal Assocs.,* 154 N.J. 437, 457, 713 A.2d 411 (1998) (citing R. 4:9-1). Although leave "shall be freely given in the interest of justice," R. 4:9-1, the court may deny leave if the amendment would unduly delay the litigation or cause undue prejudice to a party. *Kernan, supra,* 154 N.J. at 457 (internal citations omitted). Here, there is no indication in the record that the amendment would cause delay or prejudice.

A court may also deny leave if the amendment would be "futile," meaning the proposed claim "is not sustainable as a matter of law." Prime Accounting Dep't v. Twp. of Carney's Point, 212 N.J. 493, 511, 58 A.3d 690 (2013) (internal quotation marks and citations omitted). The trial court found the proposed ERA claim was futile because it alleged only past environmental violations. We disagree. Plaintiffs alleged that Kove has a continuing duty to remediate under BCSRA, see N.J.S.A. 58:10B-1.3(a) (stating that discharger of or "person in any way responsible for a hazardous substance" “shall remediate the discharge of a hazardous substance.”) They alleged that Kove has not and currently is not conducting remediation, and thus is in continuous violation of BCSRA. Plaintiffs further alleged that if Kove's failure to remediate continues in the future, it will remain in [*16] violation of BCSRA. Accordingly, plaintiffs alleged a continuous or intermittent environmental violation, which is likely to "recur in the future." N.J.S.A. 2A:35A-4(a). 7

In sum, we affirm the dismissal of the strict liability, negligence, and trespass claims, and of the BCSRA and SRRA claims in count two. We reverse the dismissal of the nuisance and Spill Act contribution claims and the denial of the motion to amend to add an ERA claim.

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7 We reject Kove's argument that it cannot be in continuous violation of environmental laws because it no longer owns the property. If Kove is a discharger or "person in any way responsible," it has an ongoing obligation to remediate pursuant to N.J.S.A. 58:10B-1.3(a).
Affirmed in part. Reversed in part. We do not retain jurisdiction.

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Interfaith Cmty. Org., Inc. v. PPG Indus.

United States District Court for the District of New Jersey

July 12, 2010, Decided; July 12, 2010, Filed

Civil Action No. 09-0480 (GEB)

INTERFAITH COMMUNITY ORGANIZATION, INC., GRACO COMMUNITY ORGANIZATION, and NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiffs, v. PPG INDUSTRIES, INC., Defendant.


Case Summary

Procedural Posture

Defendant facility operator filed a motion for reconsideration of the court's prior order denying its motion for summary judgment or, alternatively, for leave to file an interlocutory appeal under 28 U.S.C.S. § 1292(b). Plaintiff organization brought an imminent and substantial endangerment citizen suit against defendant alleging that defendant contributed to chromium waste from 1954 to 1964 at its facility at a site in the State of New Jersey.

Overview

The site and other areas contaminated by chromium waste were the subject of litigation in New Jersey state court after the New Jersey Department of Environmental Protection (DEP) sought remediation under state law. Ultimately, in early 2009, defendant and the DEP agreed to terms on a Consent Judgment that resolved the litigation between those entities. The district court judge determined that abstention pursuant to the Burford and primary jurisdiction doctrines were not warranted in the case. In support of its motion for reconsideration, defendant argued that new evidence was available with regard to the Consent Judgment being implemented and the contamination at the site being addressed. The court held that the largely ministerial details advanced by defendant regarding the Consent Judgment did not justify reconsideration and that the jurisdiction issues raised by defendant had already been decided upon. The court found that an interlocutory appeal was not warranted since there was not substantial grounds for difference of opinion as to the legal standard for abstention and mere disagreement with the district court's ruling did not constitute a substantial ground.

Outcome

The court denied defendant's motion for reconsideration and for a discretionary interlocutory appeal.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > Newly Discovered Evidence

**HN1** In the District of New Jersey, motions for reconsideration are governed by Fed. R. Civ. P. 59(e) and D.N.J., Civ. R. 7.1. The Third Circuit has made clear that motions for reconsideration should only be granted in three situations: (1) when an intervening change in controlling law has occurred; (2) when new evidence becomes available; or (3) when reconsideration is necessary to correct a clear error of law, or to prevent manifest injustice. If none of these three bases for reconsideration is established, the parties should not be permitted to reargue previous
ruleds made in the case. Further, because reconsideration of a judgment after its entry is an extraordinary remedy, requests pursuant to these rules are to be granted sparingly.

Further, because reconsideration of a judgment after its entry is an extraordinary remedy, requests pursuant to these rules are to be granted sparingly.

HN2 To permit reconsideration when new evidence becomes available, the moving party must present new evidence that would alter the disposition of the case. Additionally, the moving party has the burden of demonstrating the evidence was unavailable or unknown at the time of the original hearing.

HN3 The district court may grant certification under 28 U.S.C.S. § 1292(b) provided that the issue the defendants raise for reconsideration: (1) involves a controlling question of law upon which there is; (2) substantial grounds for difference of opinion as to its correctness; and (3) if appealed immediately, may materially advance the ultimate termination of the litigation. Any appeal under § 1292(b) represents a deviation from the ordinary policy of avoiding piecemeal appellate review of trial court decisions which do not terminate the litigation. Mere disagreement with the district court’s ruling does not constitute a substantial ground for difference of opinion within the meaning of § 1292(b). The difference of opinion must be a genuine doubt as to the correct legal standard.

Opinion

This matter comes before the Court upon the motion of Defendant PPG Industries, Inc. (“PPG”) for reconsideration of the March 26, 2010 order entered by the Hon. Joseph A. Greenaway, Jr., U.S.C.J., that denied PPG’s motion for summary judgment. 1 (Doc. No. 43.) PPG’s present motion is opposed by Plaintiffs Interfaith Community Org., Graco Community Org., and Natural Resources Defense Council, Inc. (collectively “Plaintiffs”). The Court has considered the parties’ submissions and decided this matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons [**2] stated below, the Court will deny PPG’s motion for reconsideration.

I. Background


1 When PPG’s underlying summary judgment motion was filed, Judge Greenaway presided over this case as a United States District Judge. Before PPG’s motion for summary judgment motion was decided, however, Judge Greenaway was elevated to the United States Court of Appeals for the Third Circuit. For purposes of deciding PPG’s summary judgment motion, Judge Greenaway sat on the District Court by designation. After PPG’s summary judgment motion was decided, the case was reassigned to the undersigned.

For PPG INDUSTRIES, INC., Defendant: JOSEPH F. LAGROTTERIA, LEAD ATTORNEY, KAROL CORBIN WALKER, LECLAIRRYAN ONE RIVERFRONT PLAZA, NEWARK, NJ.

Judges: GARRETT E. BROWN, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: GARRETT E. BROWN, JR.
operated at 880 Garfield Avenue, Jersey City, New Jersey ("Garfield Site"). (JAG Mem. Op. 2; Doc. No. 41) The Garfield Site and other areas contaminated by chromium waste were the subject of litigation in New Jersey state court after the New Jersey Department of Environmental Protection ("DEP") sought remediation [*3] of the chromium waste under the New Jersey Spill Compensation and Control Act ("Spill Act"). (Id.) Ultimately, in early 2009, PPG and the DEP agreed to terms on a Consent Judgment that resolved the litigation between those entities. 2 (Id.)

On February 3, 2009, at approximately the same time PPG and the DEP agreed to the Consent Judgment, Plaintiffs filed the complaint that gave rise to this case. An amended complaint followed on June 24, 2009. Shortly thereafter, on July 7, 2009, PPG filed its underlying motion for summary judgment, or alternatively, for abstention or a stay of this case. On March 26, 2010, Judge Greenaway (the "Court") denied PPG's motion. In the accompanying opinion, the Court addressed the spectrum of issues raised by PPG and ruled against PPG. Of import here, the Court ruled that circumstances which might warrant abstention under various doctrines are not present in this case. PPG's instant motion seeks reconsideration of the Court's determination that abstention pursuant to the Burford and primary jurisdiction doctrines are not warranted. Alternatively, [*4] PPG seeks leave to file an interlocutory appeal.

II. DISCUSSION

PPG's motion for reconsideration asserts that there is new evidence available that might have altered the Court's March 26 decision not to abstain pursuant to either the Burford or primary jurisdiction doctrines. (Def.'s Br. 4; Doc. No. 43.) In general, PPG laments that it "did not focus the Court's attention enough on the factual and legal significance of the [DEP] enforcement [*317] action under the [NJSA] and other applicable environmental laws in the earlier and ongoing New Jersey Superior Court case." 3 (Def.'s Br. 1; Doc. No. 43.) In particular, PPG advances evidence that purportedly demonstrates the Consent Judgment is being implemented and contamination of the Garfield Avenue site is being addressed. (Id. at 5.)

If PPG's forgoing arguments [*5] for reconsideration fail, PPG asks the Court to modify the March 26 decision to provide for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Def.'s Br. 13; Doc. No. 43.) In support of this request, PPG asserts that abstention under the Burford and primary jurisdiction doctrines are controlling questions of law, upon which there is a substantial ground for difference of opinion, and that an immediate appeal could materially advance the ultimate termination of the litigation. (Id.)

In opposition to PPG's motion for reconsideration, Plaintiffs argue that the evidence PPG advances is immaterial and is not new. (Pls.' Opp. Br. 3; Doc. No. 45.) Additionally, Plaintiffs argue that there is no clear error of law or manifest injustice that renders reconsideration of the March 26 decision appropriate, and that an interlocutory appeal should not be allowed. (Id. at 5.)

A. Standard of Review

In the District of New Jersey, motions for reconsideration are governed by FED. R. CIV. P. 59(e) and L. CIV. R. 7.1. The Third Circuit has made clear that motions for reconsideration should only be granted in three situations: (1) when an intervening change in controlling law has occurred; (2) when new evidence [*6] becomes available; or (3) when reconsideration is necessary to correct a clear error of law, or to prevent manifest injustice. N. River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995). If none of these three bases for reconsideration is established, "the parties should not be permitted to reargue previous rulings made in the case." Oritani Sav. & Loan Ass'n. v. Fidelity & Deposit Co., 744 F. Supp. 1311, 1314 (D.N.J. 1990). Further, "[b]ecause reconsideration of a judgment after its entry is an extraordinary remedy, requests pursuant to these rules are to be granted 'sparingly.'" NL Indus. v. Commercial Union Ins. Co., 935 F. Supp. 513, 516 (D.N.J. 1996), quoting Maldonado v. Lucca, 636 F. Supp. 621, 630 (D.N.J. 1986).

B. APPLICATION

1. Whether Material New Evidence is Available

2 Further detail on the background of this matter is available in Judge Greenaway's March 26, 2010 Opinion.

3 The Court notes that this phraseology, which is repeated at several points throughout PPG's moving brief, appears to signal a collateral attack on the March 26 decision. Local Civil Rule 7.1, of course, does not contemplate simple re-litigation of issues already decided. Given the Court's ultimate denial of this motion on other grounds, however, the Court shall not discuss this issue further.
PPG moves for reconsideration on the grounds that additional material facts are now available that were not when PPG filed its motion for summary judgment. To permit reconsideration when new evidence becomes available, the moving party must present new evidence that would alter the disposition of the case. Church & Dwight Co. v. Abbott Labs., 545 F. Supp. 2d 447, 450 (D.N.J. 2008). Additionally, the moving party has the burden of demonstrating the evidence was unavailable or unknown at the time of the original hearing. Desantis v. Alder Shipping Co., No. 06-1807 (NLH), 2009 U.S. Dist. LEXIS 13535, at *3 (D.N.J. Feb 20, 2009) (citing Levinson v. Regal Ware, Inc., No. 89-1298, 1989 U.S. Dist. LEXIS 18373, 1989 WL 205724, at *3 (D.N.J. Dec. 1, 1989).

PPG contends the evidence it advances indicates that Burford abstention should apply. PPG argues this "new" evidence demonstrates the Consent Judgment is being implemented and contamination addressed, and therefore that a complex state regulatory scheme exists. (Def.'s Br. 5; Doc. No. 43.) The Court finds that the evidence submitted by PPG does not alter the disposition of this case, and therefore reconsideration is not warranted. In his March 26 opinion, Judge Greenaway declined to abstain under Burford because, among other reasons, "New Jersey's ability to create a coherent environmental policy would not be disrupted by this Court's exercise of jurisdiction." (Op. 20-21; Doc. No. 41.) Judge Greenaway supported his finding by noting "the mere fact that a state agency has taken some action on the waste at issue here does not make ["8] this Court's subsequent involvement a disruptive intrusion into the state's capacity to create a coherent policy." (Id. at 21.) Furthermore, Judge Greenaway found that there is "no regulatory process at issue" that justifies abstention. (Id. at 23.) The evidence advanced by PPG simply does not alter Judge Greenaway's findings. Plainly, Judge Greenaway was aware of the nature and history of PPG's agreement with the DEP at the time of the March 26 opinion and did not find the Consent Judgment reason to abstain. (Id. 2-3.) The largely ministerial details advanced by PPG regarding the Consent Judgment do not justify reconsideration of Judge Greenaway's March 26, 2010 decision.

2. Whether the Court Focused on Key Matters Justifying Abstention

In its motion for reconsideration, PPG also argues the Court did not focus on key matters justifying abstention under Burford or the primary jurisdiction doctrine. PPG argues: (1) abstention is proper under Burford because Plaintiffs had timely and adequate state court review available; and (2) the Court should reconsider PPG's primary jurisdiction argument and find that the Court should abstain from exercising jurisdiction.

With regard to the first argument, the Court found Plaintiffs do not have a timely and adequate state court review available to them because state courts lack jurisdiction over the RCRA and that the RCRA is not the functional equivalent to the Spill Act. (Op. at 20.) Although PPG again argues these laws are functionally equivalent, this issue was previously briefed and has been decided by Judge Greenaway. PPG's disagreement with Judge Greenaway's conclusion on that issue is not a valid ground for reconsideration.

Next, PPG argues that Maine People's Alliance v. Holtrachem Mfg. Co., No. 00-69-B-C, 2001 U.S. Dist. LEXIS 21039, 2001 WL 1602046 "8 (D. Me. Dec. 14, 2001), which the Court cited in the March 26 opinion, is factually inapposite and actually supports primary jurisdiction abstention. (Def.'s Br. 12; Doc. No. 43.) The Court does not find this argument compelling. Judge Greenaway quoted dicta from Maine People's Alliance to support his analysis of a factor determining if primary jurisdiction abstention applies. (Op. 26.) The Court did not claim that case was factually analogous. Thus, PPG has simply pointed out an irrelevant distinction between the cases that is not controlling and does not warrant reconsideration of this matter.

In sum, the Court finds there is no clear error of law present and no manifest injustice will result from this Court's declination to reconsider Judge Greenaway's prior decision on these issues. 4

3. Defendants' Alternative Request for Certification for

4 In reaching this conclusion the Court briefly acknowledges the supplemental letters submitted by the parties that address the recent opinion of Judge Joel A. Pisano, U.S.D.J., in Raritan Baykeeper, Inc. v. NL Indus., Inc., 713 F. Supp. 2d 448, 2010 U.S. Dist. LEXIS 52542, 2010 WL 2079749 (D.N.J. May 26, 2010). PPG argues that Raritan represents an intervening change in controlling law that renders reconsideration of Judge Greenaway's decision not to abstain appropriate. Plaintiffs counter that Judge Pisano's decision in Raritan cited Judge Greenaway's underlying opinion, applied the same legal standard, but simply reached a different conclusion based upon different facts. The Court agrees with Plaintiffs that Raritan does not constitute an intervening change of law and does not compel reconsideration in this case. For that reason, PPG's additional argument in favor of interlocutory appeal based upon Raritan is unavailing.

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In the alternative, PPG seeks certification for interlocutory appeal. (Def.'s Br. 13; Doc. No. 43.)

*HN3* The Court may grant certification under 28 U.S.C. § 1292(b) provided that the issue Defendants raise for reconsideration: (1) involves a controlling question of law upon which there is; (2) substantial grounds for difference of opinion as to its correctness; and (3) if appealed immediately, may materially advance the ultimate termination of the litigation. *Katz, 496 F.2d at 754.* Any appeal under 28 U.S.C. § 1292(b) represents a "deviation from the ordinary policy of avoiding 'piecemeal appellate review of trial court decisions which do not terminate the litigation.'" *Kapossy v. McGraw-Hill, Inc., 942 F. Supp. 996, 1001 (D.N.J. 1996)* (quoting *United States v. Hollywood Motor Car Co., 458 U.S. 263, 265, 102 S. Ct. 3081, 73 L. Ed. 2d 754 (1982).*

In this case, there is not a substantial grounds for difference of opinion as to the legal standard for abstention. "Mere disagreement with the district court's ruling does not constitute a 'substantial ground for difference of opinion' within the meaning of § 1292(b)." *Kapossy v. McGraw-Hill, Inc., 942 F. Supp. 996, 1001 (D.N.J. 1996).* The "difference of opinion" must be a "genuine doubt as to the correct legal standard." *Id.* PPG has not asserted [*11] that the Court applied the wrong legal standard. Instead, PPG simply disagrees with the result of the Court's application of that standard. That argument therefore fails.

Finally, PPG argues that interlocutory appeal is appropriate because Judge Greenaway declined to follow certain cases in other districts and circuit courts of appeal that are not controlling on this Court. Those arguments are not meritorious because the Court has no duty to follow non-controlling law. Because PPG has not shown there is a substantial difference of opinion as to a legal standard used by this Court to decide this case, certification for interlocutory appeal is not appropriate.

**III. CONCLUSION**

For the foregoing reasons, PPG's motion for reconsideration will be denied. (Doc. No. 43) An appropriate form of order is filed herewith.

Dated: July 12, 2010

/s/ Garrett E. Brown, Jr.
Bellocchio v. N.J. Dep't of Envtl. Prot.

United States District Court for the District of New Jersey

April 15, 2014, Decided; April 15, 2014, Filed

Civil Action No. 13-6244 (JBS/JS)

Reporters

ARThUR BELLOCCHio and CARMELITA
BELLOCCHio, Plaintiffs, v. NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
et al., Defendants.

Subsequent History: Affirmed by Bellocchio v. N.J.
Dep’t of Envtl. Prot., 2015 U.S. App. LEXIS 4909 (3d
Cir. N.J., Mar. 26, 2015)

Core Terms
Plaintiffs’, FAA, motion to dismiss, Airport, noise, Turnpike, public entity, allegations, projects, fail to state a claim, immunity, solar, neglected, residents, farm, court of appeals, Redesign, damages, decisions, argues, PHL, lack of subject matter jurisdiction, Municipal, violating, Airspace, Aviation, planning, removal, notice, Enhancement

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Bruce D. Ettman, Esq., Gage Andretta, Esq., WOLFF & SAMSON, PC, West Orange, NJ, Attorneys for Defendant New Jersey Turnpike.
David Vincent Bober, Office of the U.S. Attorney, District of New Jersey, Trenton, NJ, Attorney for Defendant Federal Aviation Administration.

Judges: HONORABLE JEROME B. SIMANDLE, Chief United States District Judge.

Opinion by: JEROME B. SIMANDLE

Opinion

[*369] SIMANDLE, Chief Judge:

I. INTRODUCTION

This matter comes before the Court on seven motions to dismiss.2 Plaintiffs, Arthur and Carmelita Bellocchio, are

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1 After briefing on Defendant Mount Laurel Municipal Utility's motion to dismiss was complete, Gerald Kaplan, Esq. was substituted as defense counsel.

2 Defendant Township of Mount Laurel filed a motion to dismiss on October 28, 2013. [Docket Item 11.] Relying on Fed. R. Civ. P. 15(a)(1)(A), Defendant filed an “amended” motion to dismiss on November 18, 2013. [Docket Item 28.] Because Rule 15(a)(1)(A) regarding amendment of pleadings is inapplicable, Plaintiffs have not filed an amended complaint, and the Court did not grant Defendant leave to file an “amended” motion, the Court will only consider Defendant
proceeding pro se and bring this action against various federal, state, and local entities for damages arising primarily from noise and air pollution associated with the New Jersey Turnpike and the Philadelphia International Airport.

[*370] Because each defendant raises unique grounds for dismissal, the Court will address each separately. The Court is not unsympathetic to Plaintiffs' complaints of noise and air pollution, nor does [*3] the Court doubt the alleged impact on their lives, but there is no legal basis on which these defendants may be held liable based on the allegations in Plaintiffs' Complaint. For the reasons discussed below, the Court will grant the FAA's motion to dismiss with prejudice and the remaining Defendants' motions to dismiss without prejudice.

II. BACKGROUND

A. Factual Background

The Court accepts the following facts alleged in Plaintiffs' 80-page Complaint as true for the purpose of the instant motions to dismiss. Plaintiffs have resided at 225 Ramblewood Parkway, Mount Laurel, New Jersey, for more than 26 years. (Compl. [Docket Item 1-2] at 55.) Their home is located approximately 300 feet from the New Jersey Turnpike ("the Turnpike") and 16 miles from the Philadelphia International Airport ("PHL"). (Id. at 59, 67.) Plaintiffs complain of noise emanating from vehicles on the Turnpike and planes arriving to and departing from PHL. Plaintiffs' Complaint contains repeated allegations that noise levels around their home have diminished their quality of life, adversely affected their health, and reduced the value of their home. Although Plaintiffs' alleged damages result from the cumulative impact [*4] of various actions by defendants, Plaintiffs' Complaint contains specific allegations as to each, which the Court interprets as follows.

1. Federal Aviation Administration

Plaintiffs allege that the Federal Aviation Administration ("FAA") violated the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA") through its role in approving projects at PHL, including the Philadelphia International Airport Runway 17-35 Improvements Project ("Runway 17-35 Project"), the New York/New Jersey/Philadelphia Airspace Redesign ("Airspace Redesign Project"), and the Philadelphia Airport Capacity Enhancement Program ("Capacity Enhancement Program"). (Id. at 66-76.) Plaintiffs also allege that the Philadelphia International Airport Noise Exposure Map failed to include their home and "there was no mention that Mt. Laurel was going to be affected by these projects." (Id. at 76-77.) Because Plaintiffs' Complaint provides little detail about these projects and because they are matters [*5] of public record, the Court has considered the FAA's environmental impact statements and records of decision related to the projects.

2. Philadelphia Airport

Plaintiffs' allegations against the Philadelphia Airport substantially overlap with those against the FAA. Plaintiffs complain of noise related to flights arriving to and departing from PHL following implementation of the Runway 17-35 Project, the Airspace Redesign Project, and the Capacity Enhancement Program. (Id. at 23-52.) Plaintiffs allege that the Philadelphia Airport neglected to comply with NEPA and failed to assess the impact the projects would have on their home. (Id. at 23.) Further, Plaintiffs allege that the Philadelphia Airport failed to assess the correct decibel levels for their area during the planning process, neglected to follow noise mitigation policies, neglected to inform Plaintiffs that they would be impacted by [*371] the projects, and neglected to perform environmental studies in their area during the planning process. (Id.)

3. New Jersey Turnpike Authority

Plaintiffs allege that the New Jersey Turnpike Authority ("NJTA") engaged in "deforestation" along the "south bound side of Gathers Drive and the north bound [*6] side along Ramblewood Parkway" in violation of the New Jersey No Net Loss Act." (Id. at 8.) "The removal of trees that were used as the natural barrier between the residents and the highway escalated the noise pollution and affected [Plaintiffs'] air quality." (Id. at 8.) Plaintiffs allege that the NJTA removed the trees without notice or opportunity to comment and without environmental studies being performed to evaluate the impact on the community. (Id. at 9.) As a result, "lights from the warehouses now shine in the windows of the homes across the highway" and "trucks and vehicles travelling this highway can be seen 24 hours a day." (Id.)

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3 Citations to Plaintiffs' Complaint refer to the page number assigned by the electronic docketing system because Plaintiffs failed to include page numbers or separately number the paragraphs in their Complaint.
at 10.) Plaintiffs allege that "NJ Turnpike documents show that in 1992 the decibel levels in Ramblewood were 70 decibels when a dense forest did exist. In May 2012 and November 2012 the Burlington County Board of Health performed two unofficial sound readings in our area showing decibel levels . . . between the ranges of 68-75 under minimum conditions." (Id.) Next, Plaintiffs allege that Mount Laurel was on the "priority list in line for a wall barrier" in 1992, but the wall was never erected. (Id.) Further, Plaintiffs allege that in the spring of 2013, without an opportunity to comment or consideration of community impact, "a large sign was erected on the southbound side along Gathers Drive where the deforestation occurred," which is visible from Plaintiffs' home in the early spring, fall, and winter. (Id.) As a result of the noise and light from the Turnpike, Plaintiffs are unable to open the windows in their home and suffer from sleep deprivation, stress, tinnitus, hearing loss. (Id. at 13-14.)

4. Delaware Valley Regional Planning Commission

The Court is unable to identify any specific allegations against the Delaware Valley Regional Planning Commission ("DVRPC"). Plaintiffs' Complaint states generally that "[a]ll of these issues were address [sic] at two of the Delaware Valley Regional Planning Commissioners Monthly meetings and one aviation meeting," and "[t]he DVRPC has neglected to provide accurate information during the planning projects that would impact residents and residential communities."4

4 In their Complaint, Plaintiffs repeatedly allege:

The DVRPC has neglected to provide accurate and up to date information on their website that is used for major project [sic]. The DVRPC has neglected to provide accurate information during planning projects that would impact residents and residential communities. The DVRPC has neglected to bring together participation from the nine metropolitan areas to ensure future transportation is not affecting the environment or communities affected by transportation. Neglected to ensure environmental justice to the residents that are affected by noise and air pollution. The DVRPC has neglected to review airport projects to ensure that environment and communities are not affected by transportation. The DVRPC neglected to realize the affected [sic] this situation has on our health, our hearing, our jobs, our sleep, our quality of life and the value of our homes. The DVRPC contributed to violating our civil rights to live in peace and in a healthy environment and the freedom to move freely in and around our home as we wish to choose.

5. Mount Laurel Municipal Utilities Authority

Plaintiffs allege that in February 2010 the Mount Laurel Municipal Utilities Authority ("MUA") constructed "a solar farm at 200 1/2 Ramblewood Parkway." (Id. at 60.) Not all residents received notice of the project, although "[i]ndividual meetings were held with the residents that reside along the solar farm area." (Id. at 61.) As part of the project, "two acres of trees were removed along turnpike property, surrounding MUA property and within Turnpike property," including "19 very large trees" that "contributed to the natural tree line that protected the residents." (Id.) No environmental studies were performed prior to the tree removal. (Id.)

6. New Jersey Department of Environmental Protection

Plaintiffs allege that the New Jersey Department of Environmental Protection ("NJDEP") "reviewed the Mt. Laurel Solar Farm Project in accordance with the NJAC 7:22-10 based on planning information submitted" and approved funding for the solar project without consideration of community and environmental impact. (Id. at 63.) 94 trees "were removed for the solar farm project" and "NJ DEP Forestry was never notified of this tree removal." (Id.) Further, "[**10] the NJDEP "visited the site and confirmed that the trees planted were the incorrect size" and many that had died were not replanted until 2012. (Id. at 64.)

7. Township of Mount Laurel

Plaintiffs' allegations against the Township of Mount Laurel ("the Township") include generalized complaints of noise and air pollution from the Turnpike and PHL. Additionally, Plaintiffs state that "Mt. Laurel Township has been aware of the conditions in our area and our Township has not practiced good land use and has approved projects knowing that our area would be impacted by these project [sic]."5 (Id. at 22.) Plaintiffs

5 In their Complaint, Plaintiffs repeatedly allege:
note that a petition signed by 87 residents was submitted to address concerns regarding the Turnpike, but no update has been provided. Further, Plaintiffs allege that Ramblewood Parkway has not been repaved in over 25 years, contributing to "escalated ambient noise levels in [the] area," and Mount Laurel did not follow zoning regulations in the construction of the solar farm on Ramblewood Parkway. (Id. at 23.)

8. Damages

Plaintiffs note that they have "tried for over one and a half years to address these issues" with the NJTA and over eight months with the Philadelphia Airport and FAA. (Id. at 53.) Plaintiffs seek punitive damages of $341,000, as well as compensatory damages exceeding $300,000. Plaintiffs also request that Ms. Belloccio's salary be paid in full if she becomes unemployed due to illness.

B. Procedural Background

Plaintiffs filed a civil action in the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-2234-13, on September 12, 2013, against seven named defendants: the New Jersey Department of Environmental Protection, the New Jersey Turnpike, the Philadelphia Airport, the Federal Aviation Administration, the Township of Mount Laurel, the Mount Laurel Municipal Utility Authority, and the Delaware Valley Regional Planning Commission. The case was removed by Defendant Philadelphia Airport pursuant to 28 U.S.C. § 1441(b) on October 21, 2013. [Docket Item 1.] Defendant FAA also filed a notice of removal on November 4, 2013 pursuant to 28 U.S.C. § 1442(a)(1). Defendants then filed the seven motions to dismiss pending before the Court.

III. STANDARD OF REVIEW

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court concludes that plaintiff failed to set forth fair notice of what the claim is and the grounds upon which it rests that make such a claim plausible on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Although a court must accept as true all factual allegations in a complaint, that tenet is "inapplicable to legal conclusions," and "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "Generally, in ruling on a motion to dismiss, a district court relies [only] on the complaint, attached exhibits, and matters of public record." Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007) (citation omitted).

When evaluating a motion to dismiss under Rule 12(b)(6), "[w]here the plaintiff is a pro se litigant, the court has an obligation to construe the complaint liberally." Giles v. Kearney, 571 F.3d 318, 322 (3d Cir. 2009) (citing Haines v. Kerner, 404 U.S. 519, 520-521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)). The Court will, therefore, construe facts alleged, wherever possible, in a manner favorable to Plaintiffs, but even so, the

The Mt. Laurel Township has neglected to follow good land use. The Mt. Laurel Township has neglected to take the necessary steps to ensure that the value of the home in our area would be protected from growth around a major highway and ensuring the necessary steps are taken to protect any environmental impact on our lives, our health, our hearing, our quality of life and the value of our homes and investments. The Township has neglected to ensure our zoning regulations were followed that were put in place to protect the residents and our community. The Mt. Laurel [sic] has contributed to violating our civil rights to live in peace and in a healthy environment and the freedom to move freely in and around our home as we wish to choose.

Plaintiffs also named three fictitious defendants.

7 The FAA's notice of removal resulted in an identically captioned case in this district docketed as Civil Number 13-6714 and assigned to the undersigned. The FAA and MUA are the only defendants to enter appearances in that action. The FAA and MUA filed identical motions to dismiss in both actions. Because the Philadelphia Airport had already filed a notice of removal, the opening of a separate civil action on the Court's docket was error. Therefore, the Court will enter an order administratively terminating the action docketed as Civil Number [*113] 13-6714.

8 The Court will not consider the more than 400 pages of documents attached to Plaintiffs' Complaint because Plaintiffs have not provided specific citation [*114] to any of these documents. Therefore, the Court is unable to determine which, if any, of these documents are "integral to or explicitly relied upon in the complaint[.]" In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997) (citation omitted) (emphasis in original).
Complaint must allege sufficient facts from which a plausible claim to relief can be shown.

A motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) which is filed prior to answering the complaint is considered a "facial challenge" to the court's subject [*374] matter jurisdiction. Cardio-Med. Assocs. v. Crozer-Chester Med. Ctr., 721 F.2d 68, 75 (3d Cir. 1983). This is distinct from a factual attack on the court's subject matter jurisdiction [*15] which can only occur after the answer has been served. Mortensen v. First Federal Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). In deciding a Rule 12(b)(1) motion to dismiss which is filed prior to an answer, the court must "review only whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court." Licata v. U.S. Postal Serv., 33 F.3d 259, 260 (3d Cir. 1994).

This Court is mindful, however, that the sufficiency of this pro se pleading must be construed liberally in favor of plaintiff, even after Twombly. See Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007). Moreover, a court should not dismiss a complaint with prejudice for failure to state a claim without granting leave to amend, unless it finds bad faith, undue delay, prejudice or futility. See Grayson v. Mayview State Hosp., 293 F.3d 103, 110-111 (3d Cir. 2002); Shane v. Fauver, 213 F.3d 113, 117 (3d Cir. 2000).

IV. DISCUSSION

A. Federal Aviation Administration's Motion to Dismiss

The FAA filed a motion to dismiss pursuant to Rule 12(b)(1) and 12(b)(6). [Docket Item 38.] The FAA argues that the Court lacks subject [*16] matter jurisdiction over Plaintiffs' claims because the courts of appeal have exclusive jurisdiction to review final orders of the FAA and, even if this Court had subject matter jurisdiction, Plaintiffs' claims would be time-barred. Further, the FAA contends that Plaintiffs are not entitled to the damages they seek because there is no private right of action for monetary relief under NEPA, the FAA argues that the Court lacks subject matter jurisdiction over any takings claim Plaintiffs might assert. Plaintiffs oppose the FAA's motion, but fail to address the legal arguments therein.10

[*375] For the reasons discussed below, the Court will grant the FAA's motion to dismiss with prejudice.

Plaintiffs allege that the FAA violated NEPA in approving projects at PHL, including the Runway 17-35 Project, the Airspace Redesign Project, and the Capacity Enhancement Program.


11 49 U.S.C. § 46110(a) provides in pertinent part:

[A] person disclosing a substantial interest in an order

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Courts have interpreted 49 U.S.C. § 46110 as granting the courts of appeals exclusive jurisdiction to affirm, amend, modify, or set aside orders of the FAA. See Jones v. United States, 625 F.3d 827, 829 (5th Cir. 2010) ("Section 46110(a) of the Federal Aviation Act vests the exclusive jurisdiction over challenges to FAA orders in certain United States Courts of Appeals."); Friends of Richards-Gebaur Airport v. F.A.A., 251 F.3d 1178, 1184 (8th Cir. 2001) ("A court of appeals reviewing a petition for judicial review of an order of the FAA has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order.") (internal citation and quotations omitted). See also Fleming v. U.S. Dep't of Transp., 348 Fed. Appx. 736, 737 (3d Cir. 2009) ("[W]hen the resolution of a plaintiff's claims in federal court requires an examination of the underlying FAA proceedings, the district courts lack subject matter jurisdiction over any such claims.").

Having reviewed the records of decision related to the projects, the Court finds that the decisions Plaintiffs challenge are final orders of the FAA subject to 49 U.S.C. § 46110(a)'s grant of exclusive jurisdiction to the courts of appeals. Further, the challenged projects

issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.


14 Noise exposure maps are governed by 49 U.S.C. § 47501 et seq., which is within Part B of Subtitle VII.
whole or in part under this part, part B, or subsection (II) or (S) of section 114”.

The Court also notes that, even if the Court had jurisdiction over Plaintiffs' claims, those claims would be time-barred because a petition to review a final order of the FAA must be filed with the court of appeals "not later than 60 days after the order is issued." 49 U.S.C. § 46110(a). "The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day." Id. Here, Plaintiffs filed their Complaint on September 12, 2013, well beyond the 60-day period expired for the challenged projects and Plaintiffs have not provided any explanation for delay.

To the extent Plaintiffs assert a "takings" claim under the Fifth Amendment because noise from the PHL has diminished the value of their home, the Court lacks subject matter jurisdiction because exclusive jurisdiction over a takings claim against the United States for monetary damages lies with the Court of Federal Claims. See 28 U.S.C. § 1491(a)(1); Carteret Sav. Bank, F.A. v. Office of Thrift Supervision, 963 F.2d 567, 582-84 (3d Cir. 1992); see also Morgan v. United States, 101 Fed. Cl. 145, 158 (Fed. Cl. 2011) (“Pursuant to the Tucker Act, this court has exclusive subject matter jurisdiction over takings claims against the United States seeking more than $10,000 in compensation.”).

For the reasons discussed above, the Court will grant Defendant FAA's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim, with prejudice.

['377] B. Philadelphia Airport

The Philadelphia Airport filed a motion to dismiss for failure to state a claim under Rule 12(b)(6). [Docket Item 27.] First, the Philadelphia Airport argues that it is not an entity that can be sued and the City of Philadelphia should be substituted in its place. Next, the Philadelphia Airport argues that Plaintiffs' claims for violating NEPA must fail, and Plaintiffs have failed to properly plead a violation of procedural or substantive due process. Further, the City of Philadelphia is immune from tort liability under Pennsylvania Political Subdivision Tort Claims [**25] Act (“PSTCA”).

Plaintiffs filed opposition to Defendant's motion to dismiss, but mostly reiterate the allegations in their Complaint. Principally, Plaintiffs contend that the FAA projects discussed above violate NEPA and Plaintiffs contacted various city officials regarding their noise complaints, but were denied assistance.

The Philadelphia Home Rule Charter states that "the Department [of Commerce] shall itself, or by contract, maintain, improve, repair, and operate City airport facilities and equipment and when authorized by the Council acquire, design and construct additional such facilities." 351 Pa. Code § 4.4-500. Because the Philadelphia Airport is not a legal entity distinct from the City of Philadelphia, the Court will dismiss claims against the Philadelphia Airport as a matter of law and construe Plaintiffs' claims as against the City of Philadelphia.

To the extent Plaintiffs' Complaint alleges that the FAA projects discussed above violate NEPA, the City of Philadelphia is an improper defendant. The City of Philadelphia is not an entity regulated by NEPA, 42 U.S.C. § 4332, and as discussed above, the projects about which Plaintiffs complain were reviewed and approved by the FAA and subject to the exclusive-review provision of 49 U.S.C. § 46110(a). Therefore, the Court will grant Defendant's motion to dismiss for lack of subject matter jurisdiction as to Plaintiffs' claims against the City of Philadelphia under NEPA with prejudice.

Moreover, the Court finds that Plaintiffs' Complaint fails to state a claim under either substantive or procedural

on the same cases discussed supra in n.10, as well as the following New Jersey statutes: N.J. Stat. Ann. §§ 59:4-2, 4-3 (establishing liability of public entity for injury caused by dangerous conditions on its property); N.J. Stat. Ann. § 59:9-4 (discussing contributory negligence under the TCA); N.J. Stat. Ann. § 59:9-2 (discussing interest on judgments against public entities and employees under the TCA); N.J. Stat. Ann. § 59:3-14 (explaining that nothing in the TCA will exonerate a public employee from liability if conduct was outside the scope of employment).


[N]o such department shall be taken to have had, since the passage of the act to which this is a supplement, a separate corporate existence, and hereafter all suits growing out of their transactions, and all claims to be filed for removing nuisances, together with all bonds, contracts and obligations, hereafter to be entered into or received by the said departments, shall be in the name of the city of Philadelphia.


Brittany DeBord
due process. The *Fourteenth Amendment* protects against state deprivations "of life, liberty or property, without due process of law[.]" [*U.S. Const. amend. XIV § 1.* "To state a claim under § 1983 for deprivation of procedural due process rights, a plaintiff must allege that (1) he was deprived of an individual interest that is encompassed within the *Fourteenth Amendment*'s protection of 'life, liberty, or property,' and (2) [*378] the procedures available to him did not provide 'due process of law.'" [*Hill v. Borough of Kutztown, 455 F.3d 225, 233-34 (3d Cir. 2006). See also Gikas v. Wash. Sch. Dist., 328 F.3d 731, 737 (3d Cir. 2003) (citing Robb v. City of Philadelphia, 733 F.2d 286, 292 (3d Cir. 1984)).*]

To have a protected property interest, "a person clearly must have more than an abstract need or desire for it" or "a unilateral expectation of it," but rather must have "a legitimate claim of entitlement [*28*] to it." [*Robb, 733 F.2d at 292.* Courts look to state law to determine whether an asserted property interest exists. [*Dee v. Borough of Dunmore, 549 F.3d 225, 229-30 (3d Cir. 2008).*]

Plaintiffs fail to state a claim for procedural due process. Plaintiffs' complaint repeatedly states that the Philadelphia Airport and the FAA neglected to follow appropriate procedures and failed to consider the impact of the various projects on Plaintiffs' home and the surrounding area. Plaintiffs allege that "[t]he Phl Airport and FAA have violated our civil rights to live in peace and in a healthy environment and the freedom to move freely in and around our home as we wish to choose." (Compl. at 23.) However, Plaintiffs' Complaint contains no references to "procedure" or to "due process," and states only sweeping complaints regarding lack of notice or an opportunity to challenge decisions through adequate channels. Although Plaintiffs allege that noise from the PHL has adversely affected their health, interfered with the use and enjoyment of their property, and diminished the value of their home, Plaintiffs have not identified a protected property interest on which to base a due process violation. The parties [*29*] have not presented, nor has the Court found, any controlling authority establishing a protected property interest in the use and enjoyment of one's land. Also, the Court is doubtful that diminution of property value based upon a generalized governmental action is a sufficient basis for a substantive due process claim. See [*Tri-Only, Concerned Citizens Ass'n v. Carr, Civ. 98-4184, 2001 U.S. Dist. LEXIS 14933, 2001 WL 1132227, at *3-5 (E.D. Pa. Sept. 18, 2001), aff'd, 47 F. App'x 149 (3d Cir. 2002)*] (dismissing procedural and substantive due process claims after failing to find a protected property interest in the right to use and enjoy land, the right to be free from common nuisances such as odor, noise, pollution, and the right to not have property value diminished, among others). Further, Plaintiffs' disagreement with the FAA's decisions "has no bearing on Plaintiffs'] due process rights." [*Currier v. Keisler, Civ. 08-3217 (WJM), 2008 U.S. Dist. LEXIS 51757, 2008 WL 2705009, at *3 (D.N.J. July 8, 2008).*]

As such, Plaintiffs have not pleaded a controlling property right recognized by state law, and consequently their Complaint fails to state a procedural due process claim.

"To prevail [*30*] on a substantive due process claim, a plaintiff must demonstrate that an arbitrary and capricious act deprived them of a protected property interest." [*Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1292 (3d Cir. 1993).* The "core of the concept" of due process is "the protection against arbitrary action." [*County of Sacramento v. Lewis, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).* It is well-settled that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" [*Id. at 846 (citing Collins v. Harker Heights, 503 U.S. 115, 129, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)); DeShaney v. Winnebago County Dept of Social Servs., 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).* And, substantive due process is violated by executive action only when it "can be properly characterized as arbitrary, or conscience [*379*] shocking, in a constitutional sense." [*Collins, 503 U.S. at 128.*]

Even if the Court were to identify a protected property interest in Plaintiffs' Complaint, Plaintiffs fail to allege facts which can be characterized as arbitrary or conscience shocking. The records of decision for each of the challenged FAA projects outline [*31*] the procedures followed including notice and opportunities to comment. Generalized allegations that Plaintiffs' complaints to city officials and officials at the Philadelphia Airport were not resolved to their satisfaction are insufficient to state a claim for a violation of substantive due process. Therefore, Plaintiffs do not state a claim under either substantive or procedural due process.17

To the extent Plaintiffs state a tort claim against the City of Philadelphia, the City of Philadelphia is entitled to immunity under the PSTCA. Pennsylvania law at [*42 Pa.*]

17To the extent Plaintiffs assert claims for procedural or substantive due process violations against other defendants, the same reasoning applies.
should be dismissed because the NJTA is immune from applicable to federal agencies and Plaintiffs' tort claims under NEPA must fail because the act is only Loss Act ("NNLA"). The NJTA also argues that Plaintiffs' private cause of action under the New Jersey No Net

Defendant NJTA filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). [Docket Item 22.] The NJTA argues that Plaintiffs lack standing to bring a claim under NEPA which the Court will dismiss with prejudice.

Cons. Stat. § 8542 discusses the circumstances under which a local agency may be liable:

A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person [*32] not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

Section B identifies the acts by a local agency or its employees that may result in liability. Plaintiffs fail to identify any factual allegations encompassed by the enumerated acts of Subsection B. Nor do Plaintiffs identify any acts of negligence by the City of Philadelphia or its employees. Therefore, to the extent Plaintiffs assert a tort claim against the City of Philadelphia, it is entitled to immunity under the PSTCA based on the allegations in Plaintiffs' Complaint.

In light of the foregoing, the Court will grant the City of Philadelphia's motion to dismiss Plaintiffs' claims for failure to state a claim without prejudice with the exception [*33] of Plaintiffs' claim under NEPA which the Court will dismiss with prejudice.

C. New Jersey Turnpike Authority

The NJTA also argues that Plaintiffs have failed to comply with the TCA's notice requirements. Plaintiffs' Complaint refers to a petition signed by 87 residents that was presented to "the NJ Turnpike along with two decibel readings performed by the Burlington County Board of Health." (Compl. at 9.) Further, Plaintiffs allege that during 2012 and 2013 "[m]y husband and I attended many meetings with the New Jersey Turnpike including Landscape Les Hergenrother, Engineer Richard Raczynski, Assistant Director of Maintenance Robert Matthews and Executive Director Verionque Hakim. Many telephone calls were made [*34] and many letters and emails were written to the NJ Turnpike, State officials and State Departments including the NJ Department of Transportation and the US Federal Highway pleading for help to get noise abatement to bring our decibel levels to the state minimum . . . and was informed that I would need to work with the New Jersey Turnpike to resolve this issue." (Id. at 58.) The Court finds that Plaintiffs' pleadings lack sufficient detail to establish actual or substantial compliance with the TCA's notice requirements for causes of action against public entities. See N.J. Stat. Ann. § 59:8-1 et seq. It is unclear to whom Plaintiffs' letters and emails were addressed and whether this correspondence stated Plaintiffs' intent to pursue a claim under the TCA. See Ingram v. Twp. of Deptford, 911 F. Supp. 2d 289, 296 (D.N.J. 2012) (discussing substantial compliance with TCA notice requirements). The Court does not decide whether these efforts satisfy the requirements of substantial compliance with the pre-suit notice requirements of the TCA.

18 The NJTA also argues that Plaintiffs oppose the NJTA's motion, but fail to address the NJTA's legal arguments. Plaintiffs' chief complaint against the Turnpike involves an alleged [*35] violation of the NNLA for removing trees that provided a natural barrier between their home and the highway. Plaintiffs contend that the NJTA removed the trees without notice or opportunity to comment and without environmental studies being performed to evaluate the impact on the community. Plaintiffs also object to the construction of a large road sign without an opportunity to comment or consideration of community impact.

Plaintiffs cannot state a claim for a violation of the NNLA because the NNLA does not authorize a private cause of action. Under the NNLA, each State entity "shall develop, and submit to the Division of Parks and Forestry in the Department of Environmental Protection, a plan for compensatory reforestation for all areas at least one-half acre in size that are owned or maintained by that State entity and are scheduled for deforestation."


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the NNLA are statutorily prescribed under N.J.S.A. § 13:1L-23 which provides that "the [Department of Environmental Protection] may institute a civil action in a court of competent jurisdiction for injunctive relief to prohibit and prevent the violation." N.J. Stat. Ann. § 13:1L-23(a). [**36] The NNLA does not authorize a private cause of action for alleged violations of the Act. See Miller v. Zoby, 250 N.J. Super. 568, 595 A.2d 1104, 1108 (N.J. Super. Ct. App. Div. 1991) (discussing regulatory statutes where the Legislature "expressly conferred private causes of action when it wanted members of the public to have access to the civil courts for violations of remedial statutes"). Therefore, Plaintiffs cannot state a claim for a violation of the NNLA. 19

To the extent Plaintiffs assert claims against the NJTA for violating NEPA, these claims must fail because the NJTA is not a federal entity regulated by NEPA. See 42 U.S.C. § 4332.

Moreover, the Court will dismiss any tort claims asserted by Plaintiffs [**38] against the NJTA because the NJTA is immune from suit under the TCA, N.J.S.A. § 59:1-1 et seq. [**37] Under the TCA, a public entity is not liable for injury except as otherwise provided. N.J. Stat. Ann. § 59:2-1(a). The NJTA is a public entity within the meaning of N.J.S.A. 59:1-3. Nat'l Amusements, Inc. v. New Jersey Tpk. Auth., 261 N.J. Super. 468, 619 A.2d 262, 268 (N.J. Super. Ct. Div. 1992), aff'd, 275 N.J. Super. 134, 645 A.2d 1194 (N.J. Super. Ct. App. Div. 1994). No exception to immunity applies to the allegations in Plaintiffs' Complaint. Importantly, a public entity "is not liable for an injury resulting from the exercise of judgment or discretion vested in the entity." N.J. Stat. Ann. § 59:2-3(a). Further, "[a] public entity is not liable for the exercise of discretion in determining whether to seek or whether to provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services" or "the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the [**38] public entity was palpably unreasonable." N.J. Stat. Ann. § 59:2-3(c)-(d).

These provisions have been applied to public entities exercising discretion in the maintenance of trees. See Sims v. City of Newark, 244 N.J. Super. 32, 581 A.2d 524, 530 (N.J. Super. Ct. Ch. Div. 1990) (finding city immune under the TCA for maintenance of trees bordering streets). Further, public entities are immune from nuisance claims based on actions "approved in advance by the body exercising discretionary authority to give such approval." Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes, 90 N.J. 582, 449 A.2d 472, 483 (N.J. 1982) (internal citation and quotations omitted). See also E. Brunswick Twp. v. Middlesex Cnty. Bd. of Freeholders, 224 N.J. Super. 44, 539 A.2d 756, 758 (N.J. Super. Ct. Ch. Div. 1987) (finding immunity applicable to actions implicated in nuisance claim reflecting "basic policymaking decisions which were made at the 'planning' level of the administrative process"). Also, a public employee is not liable for an injury caused by a misrepresentation. See N.J. Stat. Ann. § 59:3-10. Because Plaintiffs' claims are based on the NJTA's exercise of discretion in removing trees and [**39] constructing a road sign, as well as the alleged misrepresentation that Plaintiffs were on a list for consideration of a noise wall barrier, the Court will grant the NJTA's motion to dismiss for failure to state a claim without prejudice. The Court will grant the NJTA's motion to dismiss Plaintiffs' claims for failure to state a claim without prejudice with the exception of Plaintiffs' claims under NEPA, NNLA, and NJNCA which the Court will dismiss with prejudice because no amendment to the Complaint could cure the latter deficiencies.

D. Delaware Valley Regional Planning Commission

The DVRPC filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). [Docket Item 16.] The DVRPC argues that Plaintiffs fail to state a claim against the DVRPC because the DVRPC has no rule making authority. The DVRPC also contends that this Court lacks subject matter jurisdiction to interpret the interstate compact creating the DVRPC and it is entitled to immunity under the TCA. [**40]

19 Similarly, any claims Plaintiffs may assert against the NJTA for violating the New Jersey Noise Control Act ("NJNCA") must be dismissed because the accompanying regulations expressly exempt noise from public roadways from coverage and the NJNCA does not provide a private cause of action. See N.J.A.C. § 7:29-1.5; N.J. Stat. Ann. § 13:1G-11 (granting enforcement authority to the NJDEP).

20 The DVRPC also argues that Plaintiffs have failed to comply with the notice requirements of the TCA. Plaintiffs argue that "I have attended two meetings and contact [sic] the DVRPC Environmental Justice department and [**40] have been denied assistance." (Compl. at 81.) The Court finds Plaintiffs'
Plaintiffs filed opposition to the DVRPC's motion that expands upon the factual allegations in their Complaint without addressing the DVRPC's legal arguments.

The DVRPC was created in 1965 through an interstate compact between Pennsylvania and New Jersey to coordinate regional planning in the area including transportation projects. See N.J. Stat. Ann. § 32:27-3. The DVRPC is an advisory agency and implementation authority remains with state and local governments or agencies. See N.J. Stat. Ann. § 32:27-18. ("The commission shall serve as an advisory agency, with actual authority for carrying out planning proposals continuing to rest in the governing bodies of the States and counties.").

Plaintiffs allege generally that the DVRPC participated in the planning of the various FAA projects about which Plaintiffs complain and failed to provide accurate information during the planning processes.

Even if the Court could decipher specific conduct on which Plaintiffs' claims against the DVRPC rest, Plaintiffs' claims fail because the DVRPC is entitled to sovereign immunity based on the allegations in Plaintiffs' Complaint. N.J.S.A. § 32:27-25 provides:

The commission, as an instrumentality of the State of New Jersey and the Commonwealth of Pennsylvania exercising a governmental function may not be sued in any court of law or equity and shall be vested with such attribute of sovereign immunity in its transactions within the boundaries of one or the other of the 2 States as shall apply to the respective highway and/or transportation departments thereof and no more.

N.J. Stat. Ann. § 32:27-25. The DVRPC is thus entitled to the same immunity under the TCA as discussed above with regard to the NJTA. The DVRPC may not be liable for injury resulting from its participation in project planning and exercise of discretion in the policymaking decisions identified in Plaintiffs' Complaint. See N.J. Stat. Ann. § 59:2-3(a); Costa v. Josey, 83 N.J. 49, 415 A.2d 337, 340 (N.J. 1980) (*N.J.S.A. 59:2-3(a) refers to actual, high-level policymaking decisions involving the balancing of competing considerations . . . . These discretionary determinations [*42] likely include such decisions as whether to utilize the Department's resources and expend funds for the maintenance of (a) road; whether to repair the road by patching or resurfacing; (and) what roads should be repaired.*) (internal citations and quotations omitted). Therefore, the Court will grant the DVRPC's motion to dismiss for failure to state a claim without prejudice.

E. Mount Laurel Municipal Utilities Authority

The MUA filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6).21 [Docket Item 43.] The MUA argues that Plaintiffs' NEPA claims must fail because the [*383] MUA is not a federal agency. The MUA also argues that Plaintiffs have failed to state a claim upon which relief may be granted and failed to comply with the notice requirements of the TCA.22 In opposition, Plaintiffs reiterate the factual allegations in their complaint and argue that the MUA was on notice as to Plaintiffs' claims because they attended two meetings of the MUA board to raise their concerns regarding noise pollution. Plaintiffs also note that they provided the MUA decibel reading documents confirming their complaints.23

Plaintiffs' allegations against the MUA focus on the construction of a solar farm at 200 1/2 Ramblewood

21 Defendant MUA filed an Answer on November 8, 2013. [Docket Item 19.] On February 4, [*43] 2014, the MUA filed the instant motion to dismiss. A motion to dismiss made after an answer is filed is a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(h)(2). The differences between Rules 12(b)(6) and 12(c) are purely procedural and the pleading standards of Rule 12(b)(6) are applied for both. Turbe v. Gov't of the Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1991).

22 Plaintiffs allege that "[w]e attended several Board of Director meetings requesting help to repair our area and were denied assistance. When this issue was addressed with the Mt. Laurel Municipality Utility Authority they informed us that it is not there [sic] noise and therefore would not help to correct the escalated noise issue that was caused by the removal of these trees." (Compl. at 62.) The Court finds that Plaintiffs' pleadings lack sufficient detail to establish actual or substantial compliance with the TCA's notice requirements for causes of action against public entities. See N.J. Stat. Ann. § 59:8-1 et seq.

23 The authority cited in Plaintiffs' opposition is inapposite. In addition to the cases discussed supra in n.10, Plaintiffs rely on [*44] N.J. Stat. Ann. §§ 59:4-2, 4-3 (establishing liability of public entity for injury caused by dangerous conditions on its property).
Parkway in February 2010. Plaintiffs complain of a lack of notice regarding the solar farm and the removal of two acres of trees "surrounding MUA property and within Turnpike property," including "19 very large trees" that "contributed to the natural tree line that protected the residents." (Compl. at 61.) Plaintiffs allege that no environmental studies were performed prior to the tree removal. (Id.) However, Plaintiffs' Complaint acknowledges that the NJDEP "reviewed the Mt. Laurel Solar Farm Project in accordance with the NJAC 7:22-10 based on planning information submitted" and approved funding for the solar project. (Id. at 63.)

To the extent Plaintiffs assert claims against the MUA for violating NEPA, these claims must fail because the MUA is not an entity regulated by NEPA. See 42 U.S.C. § 4332. The NJDEP filed a motion to dismiss for failure to state a claim under Rule 12(b)(6). [Docket Item 23.] The NJDEP's sole argument is that it is entitled to sovereign immunity. Plaintiffs did not file opposition.

Plaintiffs' allegations against the NJDEP emphasize its role in reviewing and approving funding for the Mount Laurel Solar Farm Project without sufficient consideration of community and environmental impact, as well as the removal of 94 trees as part of the solar farm project.

The NJDEP, as a public entity of the State of New Jersey, is entitled to immunity under the Eleventh Amendment and the TCA for the discretionary decisions implicated by Plaintiffs' Complaint. See Lawson v. K2 Sports USA, Civ. 08-6330 (GEB), 2009 U.S. Dist. LEXIS 32673, 2009 WL 995180, at *3 (D.N.J. Apr. 13, 2009) (finding NJDEP protected from suit in federal court pursuant to the Eleventh Amendment); Cummings v. Jackson, Civ. 07-4046 (MLC), 2008 U.S. Dist. LEXIS 50629, 2008 WL 2625223, at *3 (D.N.J. June 30, 2008). Further, Plaintiffs' reference to N.J.A.C. § 7:22-10 is inapprisite because these regulations establish the requirements for environmental assessment that apply to state assisted environmental infrastructure facilities under N.J.A.C. §§ 7:22 and 7:22A and N.J.A.C. 7:22-10.1(a) does not create a private cause of action. Therefore, the Court will grant NJDEP's motion to dismiss for failure to state a claim without prejudice.

G. Township of Mount Laurel

The Township of Mount Laurel filed a motion to dismiss for failure to state a claim arguing that the conduct which forms the basis of Plaintiffs' Complaint falls within the discretionary functions of the municipality. [Docket Item 11.] The Township further argues that it does not have jurisdiction over the NJTA, the Philadelphia Airport, or the FAA and cannot be liable for their decisions. Finally, the Township contends that Plaintiffs' claim for punitive damages should be dismissed because the Township's conduct does not rise to the level of egregious conduct necessary for punitive damages.

Plaintiffs' opposition to the Township's motion does not respond to the Township's legal arguments for dismissal.²⁴

F. New Jersey Department of Environmental Protection

The NJDEP filed a motion to dismiss for failure to state a claim under Rule 12(b)(6). [Docket Item 23.] The NJDEP's sole argument is that it is entitled to sovereign immunity. Plaintiffs did not file opposition.

²⁴The authority cited by Plaintiffs is inapposite. Plaintiffs again rely on the cases discussed supra in n.10, as [*48] well as the following New Jersey statutes: N.J. Stat. Ann. §§ 59:4-2, 4-3 (establishing liability of public entity for injury caused by
Plaintiffs’ allegations against the Township include generalized complaints of noise and air pollution resulting from the Turnpike and the PHL, as well as complaints that the Township has not practiced good land use in the area. Plaintiffs also allege that Ramblewood Parkway has not been repaved in over 25 years and Mount Laurel did not follow zoning regulations in the construction of the solar farm on Ramblewood Parkway.

Plaintiffs have provided no basis for holding the Township responsible for the alleged noise and air pollution emanating from the Turnpike or the PHL. Further, as discussed above, public entities are immune from liability under the TCA for the exercise of their discretionary authority as implicated by the allegations in Plaintiffs’ Complaint. See N.J. Stat. Ann. § 59:2-3(a).

As for Plaintiffs’ claim that the Township has not repaved Ramblewood Parkway in over 25 years, Plaintiffs do not allege that the Township failed to protect against a dangerous condition. Plaintiffs only argue that the road surface contributes to noise levels near their home. As such, Plaintiffs’ fail to state a claim that would remove the Township's conduct from immunity for discretionary acts of public entities under the TCA. See Costa v. Josey, 160 N.J. Super. 1, 388 A.2d 1019, 1024 (N.J. Super. Ct. App. Div. 1978), aff'd, 83 N.J. 49, 415 A.2d 337 (N.J. 1980) (“[T]he matters of resurfacing, when, where and how, were high-level discretionary decisions falling within the appropriate exclusive jurisdiction of the government to decide.”).

While the Court acknowledges that a private citizen may use mandamus to demand performance of a public duty such as enforcement of zoning ordinances, Plaintiffs have not identified any zoning laws the Township violated in constructing the solar farm. See Mullen v. Ippolito Corp., 428 N.J. Super. 85, 50 A.3d 673, 684 (N.J. Super. Ct. App. Div. 2012) (discussing prerequisites to seeking mandamus relief to enforce zoning ordinance). Generally, the enforcement of municipal zoning is a matter for the Superior Court of New Jersey, subject to the requirements for seeking review of the municipality's final action with respect to the zoning code. Here, Plaintiffs give no indication of the provisions of the municipal zoning code that were allegedly violated.

Therefore, the Court will grant the Township's motion to dismiss for failure to state a claim without prejudice.

V. CONCLUSION

Consistent with the foregoing, the Court will grant all pending motions to dismiss. The Court will grant Defendant FAA's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim with prejudice. However, the Court will grant the remaining defendants' motions to dismiss without prejudice with the exception of Plaintiffs' claims under NEPA, NNLA, and NJNCA which the Court will dismiss with prejudice. An accompanying Order will be entered.

April 15, 2014

Date

/s/ Jerome B. Simandle

JEROME B. SIMANDLE

Chief U.S. District Judge

ORDER

This matter having come before the Court on seven motions to dismiss: Defendant Township of Mount Laurel's motion to dismiss [Docket Item 11]; Defendant Delaware Valley Regional Planning Commission's ("DVRPC") motion to dismiss [Docket Item 16]; Defendant New Jersey Turnpike Authority's ("NJTA") motion to dismiss [Docket Item 22]; Defendant New Jersey Department of Environmental Protection ("NJDEP") [Docket Item 23]; Defendant Philadelphia Airport's motion to dismiss [Docket Item 28]; Defendant Federal Aviation Administration's ("FAA") motion to dismiss [Docket Item 38]; and Defendant Mount Laurel Township Municipal Utilities Authority's ("MUA") motion to dismiss [Docket Item 43]. The Court having considered the submissions of the parties; for the reasons explained in the Opinion of today's date; and for good cause shown;

IT IS this 15th day of April, 2014, hereby

ORDERED that Defendant Township of Mount Laurel's motion to dismiss [Docket Item 11] is GRANTED WITHOUT PREJUDICE; and it is further

25 Further, as the Township notes, Plaintiffs' have pleaded no facts on which a claim for punitive damages may rest.
ORDERED that Defendant DVRPC's motion to dismiss [Docket Item 16] is GRANTED WITHOUT PREJUDICE; and it is further

ORDERED that Defendant NJTA's motion to dismiss [Docket Item 22] is GRANTED WITHOUT PREJUDICE; and it is further

ORDERED that Defendant NJDEP's motion to dismiss [Docket Item 23] is GRANTED WITHOUT PREJUDICE; and it is further

ORDERED that Defendant Philadelphia Airport's motion to dismiss [Docket Item 28] is GRANTED WITHOUT PREJUDICE; and it is further

ORDERED that Defendant FAA's motion to dismiss [Docket Item 38] is GRANTED WITH PREJUDICE; and it is further

ORDERED that Defendant MUA's motion to dismiss [Docket Item 43] is GRANTED WITHOUT PREJUDICE; and it is further

ORDERED that Plaintiffs' claims against all defendants are dismissed with prejudice to the extent they assert violations of the National Environmental Policy Act, the New Jersey No Net Loss Act, or the New Jersey Noise Control Act; and it is further

ORDERED that the Clerk of Court shall close this case upon the docket.

/s/ Jerome B. Simandle

JEROME B. SIMANDLE

Chief U.S. District Judge
Alexander v. Sandoval

Supreme Court of the United States

January 16, 2001, Argued ; April 24, 2001, Decided

No. 99-1908

JAMES ALEXANDER, DIRECTOR, ALABAMA DEPARTMENT OF PUBLIC SAFETY, ET AL., PETITIONERS v. MARTHA SANDOVAL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

Prior History: [****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

Disposition: 197 F.3d 484, reversed.

Core Terms

regulations, private right of action, disparate-impact, cases, agencies, intentional discrimination, statutes, remedies, cause of action, decisions, intent of congress, disparate impact, civil rights, regulations promulgated, private cause of action, private action, Amendments, courts, rights, authorizes, joined, private party, discriminating, promulgated, recipients, legislative history, antidiscrimination, effectuate, provisions, suits

Case Summary

Procedural Posture

Class action respondent sued, inter alia, petitioner state public safety director, alleging that petitioner's administration of driver's license examinations only in English discriminated against non-English speakers based on national origin. Respondent further argued that such policy violated federal regulations prohibiting funding recipients from conduct that had the effect of subjecting individuals to discrimination, which regulations implemented Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq. The United States Supreme Court held that, even assuming that the regulations were statutorily authorized and resulted in discriminatory impact, there was no private right of action to enforce the regulations. Title VI prohibited only intentional discrimination, and the remedies available for violations of Title VI could not be extended by regulation to remedy disparate impact discrimination. Further, the express language permitting the implementing regulations included no provision for implementing private enforcement rights, especially in view of the elaborate statutory remedial scheme for termination of funding for regulatory violations.

Outcome

Judgment was reversed.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Federally Assisted Programs > General Overview

Civil Rights Law > Protection of Rights > Federally Assisted Programs > Scope

Section 601 of Title VI of the Civil Rights Act of
1964, 42 U.S.C.S. § 2000d et seq., provides that no person 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 covered by Title VI. 42 U.S.C.S. § 2000d. Section 602 of Title VI authorizes federal agencies to effectuate the provisions of § 601 of Title VI by issuing rules, regulations, or orders of general applicability. 42 U.S.C.S. § 2000d-1.

Private individuals may sue to enforce § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., and obtain both injunctive relief and damages.

Section 1003 of the Rehabilitation Act Amendments of 1986, 42 U.S.C.S. § 2000d-7, expressly abrogates states’ sovereign immunity against suits brought in federal court to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., and provides that, in a suit against a state, remedies, including remedies both at law and in equity, are available to the same extent as such remedies are available in the suit against any public or private entity other than a state. 42 U.S.C.S. § 2000d-7(a)(2).

Regulations applying the ban on intentional discrimination of § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. 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.
simply apply § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., since they indeed forbid conduct that § 601 of Title VI permits, and therefore the private right of action to enforce § 601 of Title VI does not include a private right to enforce these regulations. A private plaintiff may not bring a suit based on a regulation against a defendant for acts not prohibited by the text of the statute.

Governments > Legislation > Statutory Remedies & Rights

HN1[¶] Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > Statutory Remedies & Rights

HN7[¶] Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Civil Rights Law > Protection of Rights > Federally Assisted Programs > General Overview

HN8[¶] Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., authorizes federal agencies to effectuate the provisions of § 601 of Title VI by issuing rules, regulations, or orders of general applicability. 42 U.S.C.S. § 2000d-1.

Governments > Federal Government > Employees & Officials

Governments > Legislation > Statutory Remedies & Rights

HN10[¶] Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Enforcement Actions

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN11[¶] Section 602 of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., empowers agencies to enforce their regulations either by terminating funding to the particular program, or part thereof, that has violated the regulation or by any other means authorized by law, 42 U.S.C.S. § 2000d-1. No enforcement action may be taken, however, 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. And every agency enforcement action is subject to judicial review. 42 U.S.C.S. § 2000d-2.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

HN13[¶] The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.
Neither as originally enacted nor as later amended does Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602, 42 U.S.C.S. § 2000d-1. The court therefore holds that no such right of action exists.

Lawyers' Edition Display

Decision

Private individuals held not to have right to sue to enforce regulations, promulgated under Title VI of Civil Rights Act of 1964 (42 USCS 2000d et seq.), which proscribed activities having disparate impact on racial groups.

Summary

Under Title VI of the Civil Rights Act of 1964 (42 USCS 2000d et seq.), 601 of the 1964 Act (42 USCS 2000d) prohibits discrimination based on race, color, or national origin in covered programs and activities. Also, 602 of the 1964 Act (42 USCS 2000d-1) authorizes federal agencies to effectuate 601 by issuing regulations. The United States Department of Justice (DOJ), in an exercise of this authority, promulgated a regulation forbidding federal funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination based on the prohibited grounds (28 CFR 42.104(b)(2)). Alabama’s department of public safety accepted grants of federal financial assistance and thus was subject to the restrictions of Title VI. The state of Alabama amended its constitution to make English the official language of Alabama. The department, in response to this amendment and allegedly as a matter of public safety, required that all state driver's license tests be administered in English. An Alabama resident—representing a class of all Alabama residents who were otherwise qualified to obtain a private vehicle driver's license but could not do so because they were not sufficiently fluent in English—filed a class action suit against the department and its director in the United States District Court for the Middle District of Alabama. The District Court, in granting summary judgment for the class, (1) rejected the argument that Title VI did not provide a private cause of action to enforce the DOJ regulation, (2) concluded that the English-only policy subjected non-English speakers to discrimination based on their national origin, (3) enjoined the policy as violative of the DOJ regulation, and (4) ordered the department to accommodate non-English speakers. The United States Court of Appeals for the Eleventh Circuit affirmed (197 F3d 484).

On certiorari, the United States Supreme Court reversed. In an opinion by Scalia, J., joined by Rehnquist, Ch. J., and O'Connor, Kennedy, and Thomas, JJ., it was held that Title VI did not create a private right of action to enforce the disparate-impact regulations—withstanding that private individuals could sue to enforce 601—for (1) the private right of action to enforce 601 did not include a private right to enforce these regulations; (2) that right had to come from the independent force of 602; (3) a failure to comply with regulations promulgated under 602 that was not also a failure to comply with 601 was not actionable; (4) congressional intent to create a private right of action had to be derived from the text and structure of Title VI; (5) “rights-creating” language was completely absent from 602, which limited agencies to effectuating rights already created by 601; (6) 602 did not focus on the individuals protected or on the funding recipients being regulated, but rather on the agencies that would do the regulating; (7) the methods that 602 provided for enforcement did not manifest an intent to create a private remedy; and (8) amendments to Title VI in 1003 of the Rehabilitation Act Amendments of 1986 (42 USCS 2000d-7) and 6 of the Civil Rights Restoration Act of 1987 (42 USCS 2000d-4a) could not be said to have ratified Supreme Court decisions that purportedly found an implied private right of action to enforce the regulations.

Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting, expressed the view that (1) prior Supreme Court cases had consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI, and (2) a fair reading of those cases—and coherent implementation of the statutory scheme—required the same result under Title VI's implementing regulations.

Headnotes

CIVIL RIGHTS §22 > -- private right of action -- disparate-
Private individuals may not sue to enforce regulations, promulgated under Title VI of the Civil Rights Act of 1964 (42 USCS 2000d), which proscribe activities that have a disparate impact on racial groups— notwithstanding that private individuals may sue to enforce 601 of the 1964 Act (42 USCS 2000d), which prohibits discrimination based on race, color, or national origin in covered programs and activities—for (1) disparate-impact regulations do not simply apply 601 since such regulations forbid conduct that 601 permits—and thus the private right of action to enforce 601 does not include a private right to enforce these regulations; (2) that right must come from the independent force of 602 of the 1964 Act (42 USCS 2000d-1), which authorizes federal agencies to effectuate 601 by issuing regulations; (3) a failure to comply with regulations promulgated under 602 that is not also a failure to comply with 601 is not actionable; (4) congressional intent to create a private right of action must be derived from the text and structure of Title VI; (5) “rights-creating” language is completely absent from 602, which limits agencies to effectuating rights already created by 601; (6) 602 does not focus on the individuals protected or on the funding recipients being regulated, but rather on the agencies that will do the regulating; (7) the methods that 602 provides for enforcement do not manifest an intent to create a private remedy; and (8) amendments to Title VI in 1003 of the Rehabilitation Act Amendments of 1986 (42 USCS 2000d-7) and 6 of the Civil Rights Restoration Act of 1987 (42 USCS 2000d-4a) cannot be said to have ratified United States Supreme Court decisions that purportedly found an implied private right of action to enforce the regulations. (Stevens, Souter, Ginsburg, and Breyer, JJ., dissented from this holding.)

On certiorari to review a Federal Court of Appeals’ judgment as to whether individuals may sue to enforce a regulation promulgated under Title VI of the Civil Rights Act of 1964 (42 USCS 2000d), the United States Supreme Court will not inquire as to whether the regulation was authorized by 602 of the 1964 Act (42 USCS 2000d-1) or whether the courts below were correct to hold that a state policy which gave rise to the suit had the effect of discriminating on the basis of national origin, where (1) the petition for writ of certiorari raised only the question whether there was a private cause of action under 602, and (2) the Supreme Court agreed to review only the latter question.

With respect to Title VI of the Civil Rights Act of 1964 (42 USCS 2000d), private individuals may sue to enforce 601 of the 1964 Act (42 USCS 2000d)—which prohibits discrimination based on race, color, or national origin in covered programs and activities— and may obtain both injunctive relief and damages.

Under Title VI of the Civil Rights Act of 1964 (42 USCS 2000d), 601 of the 1964 Act (42 USCS 2000d)—in prohibiting discrimination based on race, color, or national origin in covered programs and activities—prohibits only intentional discrimination.

On certiorari to review a Federal Court of Appeals’ judgment as to whether, with respect to Title VI of the Civil Rights Act of 1964 (42 USCS 2000d), individuals may sue to enforce a regulation promulgated under 602 of the 1964 Act (42 USCS 2000d-1), the United States Supreme Court will assume that regulations promulgated under 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under 601 of the 1964 Act (42 USCS 2000d).
Like substantive law itself, private rights of action to enforce federal law must be created by Congress; the judicial task is to interpret the statute that Congress has passed to determine whether the statute displays an intent to create not just a private right but a private remedy; without such intent, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter or how compatible with the statute; in determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent that it clarifies text; statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons; although language in a regulation may invoke a private right of action that Congress has created through statutory text, such language may not create a right that Congress has not created.

STATUTES §152 > legislative construction -- inaction

Headnote: ****

Where Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, it is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the United States Supreme Court’s prior statutory interpretation.

Syllabus

As a recipient of federal financial assistance, the Alabama Department of Public Safety (Department), of which petitioner Alexander is the Director, is subject to Title VI of the Civil Rights Act of 1964. Section 601 of that Title prohibits discrimination based on race, color, or national origin in covered programs and activities. Section 602 authorizes federal agencies to effectuate § 601 by issuing regulations, and the Department of Justice (DOJ) in an exercise of this authority promulgated a regulation forbidding funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination based on the prohibited grounds. Respondent Sandoval brought this class action to enjoin the Department’s decision to administer state driver’s license examinations only in English, arguing that it violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin. Agreeing, the District Court enjoined the policy and ordered the Department to accommodate non-English speakers. The Eleventh Circuit affirmed. Both courts rejected petitioners’ argument that Title VI did not provide respondents a cause of action to enforce the regulation.

Held: There is no private right of action to enforce disparate-impact regulations promulgated under Title VI. Pp. 3-17.

(a) Three aspects of Title VI must be taken as given. First, private individuals may sue to enforce § 601. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 694, 696, 699, 703, 710-711, 60 L. Ed. 2d 560, 99 S. Ct. 1946. Second, § 601 prohibits only intentional discrimination. See, e.g., Alexander v. Choate, 469 U.S. 287, 293, 83 L. Ed. 2d 661, 105 S. Ct. 712. Third, it must be assumed for purposes of deciding this case that regulations promulgated under § 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601. Pp. 3-5.

(b) This Court has not, however, held that Title VI disparate-impact regulations may be enforced through a private right of action. Cannon was decided on the assumption that the respondent there had intentionally discriminated against the petitioner, see 441 U.S. at 680. In Guardians Assn. v. Civil Serv. Comm’n of New York City, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221, the Court held that private individuals could not recover compensatory damages under Title VI except for intentional discrimination. Of the five Justices who also voted to uphold disparate-impact regulations, three expressly reserved the question of a direct private right of action to enforce them, 463 U.S. at 645, n. 18. Pp. 5-7.

(c) Nor does it follow from the three points taken as given that Congress must have intended such a private right of action. There is no doubt that regulations applying § 601’s ban on intentional discrimination are covered by the cause of action to enforce that section. But the disparate-impact regulations do not simply apply § 601 -- since they forbid conduct that § 601 permits -- and thus the private right of action to enforce § 601 does not include a private right to enforce these regulations. See Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U.S. 164, 173, 128 L. Ed. 2d 119, 114 S. Ct. 1439. That right must
come, if at all, from the independent force of § 602. Pp. 7-10.

(d) Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. Touche Ross & Co. v. Redington, 442 U.S. 560, 578, 61 L. Ed. 2d 82, 99 S. Ct. 2479. This Court will not revert to the understanding of private causes of action, represented by J. I. Case Co. v. Borak, 377 U.S. 426, 433, 12 L. Ed. 2d 423, 84 S. Ct. 1555, that held sway when Title VI was enacted. That understanding was abandoned in Cort v. Ash, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080. Nor does the Court agree with the Government's contention that cases interpreting statutes enacted prior to Cort v. Ash have given dispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-379, 72 L. Ed. 2d 182, 102 S. Ct. 1825; Cannon, supra, at 698-699; and Thompson v. Thompson, 484 U.S. 174, 98 L. Ed. 2d 512, 108 S. Ct. 513, distinguished. Pp. 10-12.

(e) The search for Congress's intent in this case begins and ends with Title VI's text and structure. The "rights-creating" language so critical to Cannon's § 601 analysis, 441 U.S. at 690, n. 13, is completely absent from § 602. Whereas § 601 decrees that "no person . . . shall . . . be subjected to discrimination," § 602 limits federal agencies to "effectuating" rights created by § 601. And § 602 focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the regulating agencies. Hence, there is far less reason to infer a private remedy in favor of individual persons, Cannon, supra, at 690-691. The methods § 602 expressly provides for enforcing its regulations, which place elaborate restrictions on agency enforcement, also suggest a congressional intent not to create a private remedy through § 602. See, e.g., Karahalios v. Federal Employees, 489 U.S. 527, 533, 103 L. Ed. 2d 539, 109 S. Ct. 1282, Pp. 12-15, 489 U.S. 527, 103 L. Ed. 2d 539, 109 S. Ct. 1282.

(f) The Court rejects arguments that the regulations at issue contain rights-creating language and so must be privately enforceable; that amendments to Title VI in § 1003 of the Rehabilitation Act Amendments of 1986 and § 6 of the Civil Rights Restoration Act of 1987 "ratified" decisions finding an implied private right of action to enforce the regulations; and that the congressional intent to create a right of action must be inferred under Curran, supra, at 353, 381-382. Pp. 15-17.

197 F. 3d 484, reversed.

Counsel: Jeffrey S. Sutton argued the cause for petitioners.

Eric Schapper argued the cause for private respondents.

Seth P. Waxman argued the cause for the United States, as amicus curiae, by special leave of court.

Judges: SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined.

Opinion by: SCALIA

Opinion

[***523] [**1515] [*278] JUSTICE SCALIA delivered the opinion of the Court.

[LEDHN] This case presents the question whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964.

The Alabama Department of Public Safety (Department), of which petitioner James Alexander is the Director, accepted grants of financial assistance from the United States Department of Justice (DOJ) and Department of Transportation (DOT) and so subjected itself to the restrictions of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d et seq. Section 601 of that Title provides that no person 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" covered by Title VI. 42 U.S.C. § 2000d. Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability," 42 U.S.C. § 2000d-1, and the DOJ in an exercise of this authority promulgated a regulation forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ." 28 CFR § 42.104(b)(2) (1999). See also 49 CFR § 21.5(b)(2)
The State of Alabama amended its Constitution in 1990 to declare English "the official language of the state of Alabama." Amdt. 509. Pursuant to this provision and, petitioners have argued, to advance public safety, the Department decided to administer state driver's license examinations only in English. Respondent Sandoval, as representative of a class, brought suit in the United States District Court for the Middle District of Alabama to enjoin the English-only policy, arguing that it violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin. The District Court agreed. It enjoined the policy and ordered the Department to accommodate non-English speakers. Sandoval v. Hagan, 7 F. Supp. 2d 1234 (1998). Petitioners appealed to the Court of Appeals for the Eleventh Circuit, which affirmed. Sandoval v. Hagan, 197 F.3d 484 (1999). Both courts rejected petitioners' argument that Title VI did not provide respondents a cause of action to enforce the regulation.

[2] We do not inquire here whether the DOJ regulation was authorized by § 602, 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. The petition for writ of certiorari raised, and we 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. 530 U.S. 1305 (2000).

II

Although Title VI has often come to this Court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands. For purposes of the present case, however, it is clear from our decisions, from Congress's amendments of Title VI, and from the parties' concessions that three aspects of Title VI must be taken as given. First, private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages. In Cannon v. University of Chicago, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 [*280] (1979), the Court held that a private right of action existed to enforce Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. § 1681 et seq. The reasoning of that decision embraced the existence of a private right to enforce Title VI as well. "Title IX," the Court noted, "was patterned after Title VI of the Civil Rights Act of 1964." 441 U.S. at 694. [*11] And, "in 1972 when Title IX was enacted, the [parallel] language in Title VI had already been construed as creating a private remedy." Id., at 696. That meant, the Court reasoned, that Congress had intended Title IX, like Title VI, to provide a private cause of action. Id., at 699, 703, 710-711. Congress has since ratified Cannon's holding.

Section 1003 of the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, expressly abrogated States' sovereign immunity against suits brought in federal court to enforce Title VI and provided that in a suit against a State "remedies (including remedies both at law and in equity) are available . . . to the same extent as such remedies are available . . . in the suit against any public or private entity other than a State," § 2000d-7(a)(2). We recognized in Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992), that § 2000d-7 "cannot be read except as a validation of Cannon's holding." Id., at 72; [*12] see also id., at 78 (SCALIA, J., concurring in judgment) (same). It is thus beyond dispute that private individuals may sue to enforce § 601.

Second, it is similarly beyond dispute -- and no party disagrees -- that § 601 prohibits only intentional discrimination. In Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), the Court reviewed a decision of the California Supreme Court that had enjoined the University of California Medical School from "accord[ing] any consideration to race in its admissions process." Id., at 272. Essential to the Court's holding reversing that aspect of the California court's decision was the determination that § 601 "proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." Id., at 287 (opinion of Powell, J.); see also id., at 325, 328, 352 (opinion of Brennan, White, Marshall, and Blackmun, [*13] JJ.). In Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), the Court made clear that under Bakke only intentional discrimination was forbidden by § 601. 463 U.S. at 610-611 (Powell, J., joined by Burger, C. J., and [*525] REHNQUIST, J., concurring in judgment); id., at 612 (O'CONNOR, J., concurring in judgment); id., at 642 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting). What we said in Alexander v. Choate, 469 U.S. 287, 293, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985), is true today: "Title VI itself directly reaches only instances of intentional
Third, 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. Though no opinion of this Court has held that, five Justices in Guardians voiced that view of the law at [282] least as alternative grounds for their decisions, see 463 U.S. at 591-592 (opinion of White, J.); id., at 623, n. 15 (Marshall, J., dissenting); id., at 643-645 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting), and dictum in Alexander v. Choate is to the same effect, see 469 U.S. at 293, 295, n. 11. These statements are in considerable tension with the rule of Bakke and Guardians that § 601 forbids only intentional discrimination, see, e.g., Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 599, 103 S. Ct. 2759 (1983); see also Primary Steel, Inc., 497 U.S. 116, 131, 111 L. Ed. 2d 94, 110 S. Ct. 841 (1992); Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131, 111 L. Ed. 2d 94, 110 S. Ct. 2759 (1990); Sullivan v. Everhart, 494 U.S. 83, 103-104, n. 6, 108 L. Ed. 2d 72, 110 S. Ct. 960 (1990) (STEVENS, J., dissenting). “(It is, of course, of no importance that [an opinion] predates Chevron . . . . As we made clear in Chevron, the interpretive maxims summarized therein were ‘well-settled principles’”.

—[***14] [**1517]—

1 Since the parties do not dispute this point, it is puzzling to see JUSTICE STEVENS go out of his way to disparage the decisions in Regents of Univ. of Cal. v. Bakke, 436 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), and Guardians Assn. v. Civil Serv. Comm’n of New York City, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), as “somewhat haphazard,” post, at 16, particularly since he had already accorded stare decisis effect to the former 18 years ago, see Guardians, 463 U.S. at 639-642 (dissenting opinion), and since he participated in creating the latter, see ibid. Nor does JUSTICE STEVENS’ reliance on Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), see post, at 17-18, explain his aboutface, since he expressly reaffirms, see post, at 17-18, n. 18, the settled principle that decisions of this Court declaring the meaning of statutes prior to Chevron need not be reconsidered after Chevron in light of agency regulations that were already in force when our decisions were issued, Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-537, 117 L. Ed. 2d 79, 112 S. Ct. 841 (1992); Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131, 111 L. Ed. 2d 94, 110 S. Ct. 2759 (1990); see also Sullivan v. Everhart, 494 U.S. 83, 103-104, n. 6, 108 L. Ed. 2d 72, 110 S. Ct. 960 (1990) (STEVENS, J., dissenting). “(It is, of course, of no importance that [an opinion] predates Chevron . . . . As we made clear in Chevron, the interpretive maxims summarized therein were ‘well-settled principles’”).

2 Although the dissent acknowledges that “the breadth of [Cannon's] precedent is a matter upon which reasonable jurists may differ,” post, at 21, it disagrees with our reading of Cannon's holding because it thinks the distinction we draw between disparate-impact and intentional discrimination was “wholly foreign” to that opinion, see post, at 5. Cannon, however, was decided less than one year after the Court in Bakke had drawn precisely that distinction with respect to Title VI, see supra, at 4, and it is absurd to think that Cannon meant, without discussion, to ban under Title IX the very disparate-impact discrimination that Bakke said Title VI permitted. The only discussion in Cannon of Title IX's scope is found in Justice Powell's dissenting opinion, which simply assumed that the conclusion that Title IX would be limited to intentional discrimination was "forgone in light of our holding" in Bakke. Cannon v. University of Chicago, 441 U.S. 677, 748, n. 19, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979). The dissent's additional claim that Cannon provided a private right of action for "all the discrimination prohibited by the regulatory scheme contained in Title IX," post, at 5, n. 4 (emphasis added), simply begs the question at the heart of this case, which is whether a right of action to enforce disparate-impact regulations must be independently identified, see infra, at 7-10.
exists to enforce the Title VI regulations against private parties does not compel the conclusion that a private right of action to enforce the regulations, and the petitioners' rights under Title VI . . . the petitioners concluded that because respondents in that case had "violated the regulations promulgated under § 601," and were awarded by the District Court." 463 U.S. at 645.

We of course accept the statement by the author of the dissent that he "thought" at the time of Guardians that disparate-impact regulations could be enforced "in an implied action against private parties," post, at 9, n. 6. But we have the better interpretation of what our colleague wrote in Guardians. In the closing section of his opinion, JUSTICE STEVENS concluded that because respondents in that case had "violated the petitioners' rights under [the] regulations . . . the petitioners were therefore entitled to the compensation they sought under 42 U.S.C. § 1983 and were awarded by the District Court." 463 U.S. at 645. The passage omits any mention of a direct private right of action to enforce the regulations, and the footnote we have quoted in text -- which appears immediately after this concluding sentence, see id., at 645, n. 18 -- makes clear that the omission was not accidental.

Ultimately, the dissent agrees that "the holding in Guardians does not compel the conclusion that a private right of action exists to enforce the Title VI regulations against private parties . . . ." Post, at 9.

It is true, as the dissent points out, see post, at 3-4, that three Justices who concurred in the result in Lau relied on regulations promulgated under § 602 to support their position, see Lau v. Nichols, 414 U.S. 563, 570-571, 39 L. Ed. 2d 1, 94 S. Ct. 786 (1974) (Stewart, J., concurring in result). But the five Justices who made up the majority did not, and their holding is not made coextensive with the concurrence because their opinion does not expressly preclude (is "consistent with," see post, at 4) the concurrence's approach. The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found it unnecessary (and did not wish) to address, under compulsion of JUSTICE STEVENS' new principle that
[****21] We must face now the question [***528] avoided by Lau, because we have since rejected Lau's interpretation of § 601 as reaching beyond intentional discrimination. See supra, at 4. It is clear now that HNG[†] 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. See Central Bank of Denver, [**26] N. A. v. First Interstate Bank of Denver, N. A., 511 U.S. 164, 173, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994) (a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]"). That right must come, if at all, from the independent force of § 602. As stated earlier, we assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations 6; the question remains whether it confers a private right of action to enforce them. If not, we must conclude [****22] that a failure to comply with regulations promulgated under § 602 that is not also a failure to comply with § 601 is not actionable.

[***528] Implicit in our discussion thus far has been a particular understanding of the genesis of private causes of action. HNG[†] Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. Touche Ross & Co. v. Redington, 442 U.S. 560, 578, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979) (remedies available are those "that Congress enacted into law"). The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979). Statutory intent on this latter point is determinative. See, e.g., Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102, 115 L. Ed. 2d 923, **1520 111 S. Ct. 2749 (1991); Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 812, n. 9, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986) (collecting cases). Without it, a cause of action does not [****24] exist and courts may not [***527] create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. See, e.g., Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145, 148, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985); Transamerica Mortgage Advisors, Inc. v. Lewis, supra, at 23; Touche Ross & Co. v. Redington, supra, at 575-576. [***529] "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991) (SCALIA, J., concurring in part and concurring in judgment).

Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted. That understanding is captured by the Court's statement in J. I. Case Co. v. Borak, 377 U.S. 426, 433, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964), that "it is the duty of the courts to be alert to provide such remedies as are necessary [****25] to make effective the congressional purpose" expressed by a statute. We abandoned that understanding in Cort v. Ash, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975) -- which itself interpreted a statute enacted under the ancien regime -- and have not returned to it since. Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in Borak have we applied Borak's method for discerning and defining causes of action. See Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., supra, at 188; Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 291-293, 124 L. Ed. 2d 194, 113 S. Ct. 2085 (1993); Virginia Bankshares, Inc. v. Sandberg, supra, at 1102-1103; Touche Ross & Co. v. Redington, supra, at 576-578. Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.

[***26] To Cort v. Ash have given "dispositive weight" to the "expectations" that the enacting Congress had formed "in light of the 'contemporary legal context.'" Brief for United States 14. Only three of our legion implied-right-of-action cases have found this sort of "contemporary silence implies agreement.

6For this reason, the dissent's extended discussion of the scope of agencies' regulatory authority under § 602, see post, at 13-15, is beside the point. We cannot help observing, however, how strange it is to say that disparate-impact regulations are "inspired by, at the service of, and inseparably intertwined with" § 601, post, at 15, when § 601 permits the very behavior that the regulations forbid. See Guardians, 463 U.S. at 613 (O'CONNOR, J., concurring in judgment) ("If, as five members of the Court concluded in Bakke, the purpose of Title VI is to proscribe only purposeful discrimination . . . , 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").
legal [*288] context" relevant, and two of those involved Congress's enactment (or reenactment) of the verbatim statutory text that courts had previously interpreted to create a private right of action. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-379, 72 L. Ed. 2d 182, 102 S. Ct. 1825 (1982); Cannon v. University of Chicago, 441 U.S. at 698-699.

In the third case, this sort of "contemporary legal context" simply buttressed a conclusion independently supported by the text of the statute. See Thompson v. Thompson, 484 U.S. 174, 98 L. Ed. 2d 512, 108 S. Ct. 513 (1988). We have never accorded dispositive weight to context short of text. In determining whether statutes create private rights of action, as in interpreting statutes generally, see Blatchford v. Native Village of Noatak, 501 U.S. 775, 784, 115 L. Ed. 2d 868, 111 S. Ct. 2578 (1991); [*27] legal context matters only to the extent it clarifies text.

We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI. 7 [HN8] Section 602 authorizes federal agencies [*1521] "to effectuate [*530] the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability."

42 U.S.C. § 2000d-1. It is immediately clear that the "rights-creating" language so critical to the Court's analysis in Cannon of § 601, see 441 U.S. at 690 n. 13, is completely absent from § 602. Whereas § 601 decrees that "no person . . . shall . . . be subjected to discrimination," 42 U.S.C. § 2000d, the text of § 602 provides that "each Federal department and [*289] agency . . . is authorized and directed to effectuate the provisions of [§ 601]." 42 U.S.C. § 2000d-1. [*28] Far from displaying congressional intent to create new rights, HN9 § 602 limits agencies to "effectuating" rights already created by § 601. And the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. HN10 Statutes that focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." California v. Sierra Club, 451 U.S. 287, 294, 68 L. Ed. 2d 101, 101 S. Ct. 1775 (1981). Section 602 is yet a step further removed: it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. Like the statute found not to create a right of action in Universities Research Assn., Inc. v. Couty, 450 U.S. 754, 67 L. Ed. 2d 662, 101 S. Ct. 1451 (1981), § 602 is "phrased as a directive to federal agencies engaged in the distribution of public funds," id., at 772. [*29] When this is true, "there [is] far less reason to infer a private remedy in favor of individual persons," Cannon v. University of Chicago, supra, at 690-691. So far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action.

Nor do the methods [*30] that § 602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy; if anything, they suggest the opposite. HN11 Section 602 empowers agencies to enforce their regulations either by terminating funding to the "particular program, or part thereof," that has violated the regulation or "by any other means authorized by law," 42 U.S.C. § 2000d-1. No enforcement action may be taken, however, "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." Ibid. And every agency enforcement action is subject to judicial review. § 2000d-2. If an agency attempts to terminate program funding, still [*290] more restrictions apply. The agency head 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 the grounds for such action." § 2000d-1. And the termination [*31] of funding does not "become [*531] effective until thirty days have elapsed after the filing of such report." Ibid. Whatever these elaborate restrictions on agency enforcement may imply for the private enforcement of rights created outside of § 602, compare Cannon v. University of Chicago, supra, at 706, n. 41, 712, n. 49; Regents of Univ. of Cal. v. Bakke, 438 U.S. at 419, n. 26 (STEVENS, J., concurring in judgment in part and dissenting in part), with Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. at 609-610 (Powell, J., concurring in judgment); Regents of Univ. of Cal. v. Bakke, supra, at 382-383 (opinion of White, J.), they tend to contradict a congressional intent to create privately enforceable rights through § 602 itself. HN12 The express provision of one method of enforcing
amendments to Title VI "ratified" this Court's decisions and the Government's bow is their argument that two
[7]The last string to respondents' but not the sorcerer himself.

May play the sorcerer's apprentice Agencies
[***532] action that has not been authorized by Congress.

[****34] regulation can conjure up a private cause of it is most certainly incorrect to say that language in a
determine whether or not it is privately enforceable. But correct that the intent displayed in each regulation can
private enforcement of regulations, it may perhaps be
when a statute has provided a general authorization for
of the statute and not the rules must control). Thus,
create substantive private rights. See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 19-20, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981). In the present case, the claim of exclusivity for the
[291] express remedial scheme does not even have to overcome such obstacles. The question whether § 602's
[***33] 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.

Both the Government and respondents argue that the
regulations contain rights-creating language and so must be privately enforceable, see Brief for United States 19-20; Brief for Respondents 31, but that argument skips an analytical step. Language in a regulation may invoke a private right of action to enforce even those statutes that admittedly create substantive private rights. See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 19-20, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981). In the present case, the claim of exclusivity for the
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private right to enforce regulations promulgated under § 602.

[7]The last string to respondents' and the Government's bow is their argument that two amendments to Title VI "ratified" this Court's decisions finding an implied private right of action to enforce the disparate-impact regulations. See Rehabilitation Act Amendments of 1986, § 1003, 42 U.S.C. § 2000d-7; Civil Rights Restoration Act of 1987, § 6, 102 Stat. 31, 42 U.S.C. § 2000d-4a. One problem with this argument is that, as explained above, none of our decisions establishes (or even assumes) the private right of action at issue here, see supra, at 5-8, which is why in Guardians three Justices were able expressly to reserve the question. See 463 U.S. at 645, n. 18 (STEVENS, J., dissenting). Incorporating
[292] our cases in the amendments would thus not help respondents. Another problem is that the incorporation
[***35] claim itself is flawed. Section 1003 of the Rehabilitation Act Amendments of 1986, on which only respondents rely, by its terms applies only to suits "for a violation of a statute," 42 U.S.C. § 2000d-7(a)(2) (emphasis added). It therefore does not speak to suits for violations of regulations that go beyond the statutory proscription of § 601. Section 6 of the Civil Rights Restoration Act of 1987 is even less on point. That provision amends Title VI to make the term "program or activity" cover larger portions of the institutions receiving federal financial aid than it had previously covered, see Grove City College v. Bell, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984). It
[1523] is impossible to understand what this has to do with implied causes of action -- which is why we declared in Franklin v. Gwinnett County Public Schools, 503 U.S. at 73, that § 6 did not "in any way alter the existing rights of action and the corresponding remedies permissible under . . . Title VI." Respondents point to Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. at 381-382, which inferred congressional intent to ratify lower court decisions regarding a particular statutory provision when Congress comprehensively revised the statutory scheme but did not amend that provision. But we recently criticized Curran's reliance on congressional inaction, saying that "as a general matter . . . [the] argument deserves little weight in the interpretive process." Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U.S. at 187. And when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: "It is impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." Patterson v. McLean Credit Union, 491 U.S. 164, 175, n. 1, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989) (quoting Johnson
Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists. Since we reach this conclusion applying our standard test for discerning private causes of action, we do not address petitioners' additional argument that implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear statement rule of Pennsylvania School and Hospital v. Hardman, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981). See Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 656-657, 684-685, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) (KENNEDY, J., dissenting).

The judgment of the Court of Appeals is reversed.

It is so ordered.

Dissent by: STEVENS

Dissent

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In 1964, as part of a groundbreaking and comprehensive civil rights Act, Congress prohibited recipients of federal funds from discriminating on the basis of race, ethnicity, or national origin. Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d-7; Pursuant to powers [*294] expressly delegated by that Act, the federal agencies and departments responsible for awarding and administering federal contracts immediately adopted regulations prohibiting federal contractees from adopting policies that have the "effect" of discriminating on those bases. At the time of the promulgation of these regulations, prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law. Relying both on this presumption and on independent analysis of Title VI, this Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI. A fair reading of those cases, and coherent implementation of the statutory scheme, requires the same result under Title VI's implementing regulations.

In separate lawsuits spanning several decades, we have endorsed an action identical in substance to the one brought in this case, see Lau v. Nichols, 414 U.S. 563, 563, 36 L. Ed. 2d 1, 94 S. Ct. 786 (1974); demonstrated that Congress intended a private right of action to protect the rights guaranteed by Title VI, see Cannon v. University of Chicago, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979); [*534] and concluded that private individuals may seek declaratory and injunctive relief against state officials for violations of regulations promulgated pursuant to Title VI, see Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983). Giving fair import to our language and our holdings, every Court of Appeals to address the question has concluded that a private right of action exists to enforce the rights guaranteed [*39] both by the text of Title VI and by any regulations validly promulgated pursuant to that Title, and Congress has adopted several statutes that appear to ratify the status quo.

Today, in a decision unfounded in our precedent and hostile to decades of settled expectations, a majority of this Court carves out an important exception to the right of private action long recognized under Title VI. In so doing, the [*295] Court makes three distinct, albeit interrelated, errors. First, the Court provides a muddled account of both the reasoning and the breadth of our prior decisions endorsing a private right of action under Title VI, thereby obscuring the conflict between those opinions and today's decision. Second, the Court offers a flawed and unconvincing analysis of the relationship between §§ 601 and 602 of the Civil Rights Act of 1964, ignoring more plausible and persuasive explanations

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8 The dissent complains that we "offer little affirmative support" for this conclusion. Post, at 24. But as JUSTICE STEVENS has previously recognized in an opinion for the Court, "affirmative" evidence of congressional intent must be provided for an implied remedy, not against it, for without such intent "the essential predicate for implication of a private remedy simply does not exist," Northwest Airlines, Inc., 451 U.S. at 94. The dissent's assertion that "petitioners have marshaled substantial affirmative evidence that a private right of action exists to enforce Title VI and the regulations validly promulgated thereunder," post, at 24-25, n. 26 (second emphasis added), once again begs the question whether authorization of a private right of action to enforce a statute constitutes authorization of a private right of action to enforce regulations that go beyond what the statute itself requires.
detailed in our prior opinions. Finally, the Court badly misconstrues the theoretical linchpin of our decision in Cannon v. University of Chicago, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979), mistaking that decision's careful contextual analysis for judicial fiat. [*41]

I

The majority is undoubtedly correct that this Court has never said in so many words that a private right of action exists to enforce the disparate-impact regulations promulgated under § 602. However, the failure of our cases to state this conclusion explicitly does not absolve the Court of the responsibility to canvass our prior opinions for guidance. Reviewing these opinions with the care they deserve, I reach the same conclusion as the Courts of Appeals: This Court has already considered the question presented today and concluded that a private right of action exists. [*535]

[*42] [*1525] [*296] When this Court faced an identical case 27 years ago, all the Justices believed that private parties could bring lawsuits under Title VI and its implementing regulations to enjoin the provision of governmental services in a manner that discriminated [*535] against non-English speakers. See Lau v. Nichols, 414 U.S. 563, 39 L. Ed. 2d 1, 94 S. Ct. 786 (1974). While five Justices saw no need to go beyond the command of § 601, Chief Justice Burger, Justice Stewart, and Justice Blackmun relied specifically and exclusively on the regulations to support the private action, see id., at 569 (Stewart, J., concurring in result) (citing Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1973); Thorpe v. Housing Authority of Durham, 393 U.S. 268, 280-281, 21 L. Ed. 2d 474, 89 S. Ct. 518 (1969)). There is nothing in the majority's opinion in Lau, or in earlier opinions of the Court, that is not fully consistent with the analysis of the concurring Justices or that would have differentiated between private actions to enforce the text [*43] of § 601 and private actions to enforce the regulations promulgated pursuant to § 602. See Guardians, 463 U.S. at 591 (principal opinion of White, J.) (describing this history and noting that, up to that point, no Justice had ever expressed disagreement with Justice Stewart's analysis in Lau). [*297]

[*44] [*297] Five years later, we more explicitly considered whether a private right of action exists to enforce the guarantees of Title VI and its gender-based twin, Title IX. See Cannon v. University of Chicago, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979). In that case, we examined the text of the statutes, analyzed the purpose of the laws, and canvassed the relevant legislative history. Our conclusion was unequivocal: "We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." Id., at 703.

The majority acknowledges that Cannon is binding precedent with regard to both Title VI and Title IX, ante, at 3-4, but seeks to limit the scope of its holding to cases involving allegations of intentional discrimination.

1 Just 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. For decisions holding so most explicitly, see, e.g. Powell v. Ridge, 189 F.3d 387, 400 (CA3 1999); Chester Residents Concerned for Quality Living v. Self, 132 F.3d 925, 936-937 (CA3 1997), summarily dism'd, 524 U.S. 974 (1998); David K. v. Lane, 839 F.2d 1265, 1274 (CA7 1988); Sandoval v. Hagan, 197 F.3d 484 (CA11 1999) (case below). See also Latinos Unidos De Chicago v. Secretary of Housing and Urban Development, 799 F.2d 774, 785, n. 20 (CA1 1986); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (CA2 1995); Ferguson v. Charleston, 186 F.3d 469 (CA4 1999), rev'd on other grounds, Ferguson v. City of Charleston, 532 U.S. 67, 149 L. Ed. 2d 205, 121 S. Ct. 1281 (2001); Castaneda v. Pickard, 781 F.2d 456, 465, n. 11 (CA5 1986); Buchanan v. Bolivar, 99 F.3d 1352, 1356, n. 5 (CA6 1996); Larry P. v. Riles, 793 F.2d 969, 981-982 (CA9 1986); Villanueva v. Carere, 85 F.3d 481, 486 (CA10 1996). No Court of Appeals has ever reached a contrary conclusion. But cf. New York City Environmental Justice Alliance v. Giuliani, 214 F.3d 65, 72 (CA2 2000) (suggesting that the question may be open).

2 Indeed, it would have been remarkable if the majority had offered any disagreement with the concurring analysis as the concurring Justices grounded their argument in well-established principles for determining the availability of remedies under regulations, principles that all but one Member of the Court had endorsed the previous Term. See Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1973); id., at 378 (Douglas, J., joined by Stewart and REHNQUIST, JJ., concurring in part and dissenting in part) (agreeing with the majority's analysis of the regulation in question); but see, id., at 383 n. 1 (Powell, J., dissenting) (reserving analysis of the regulation's validity). The other decision the concurring Justices cited for this well-established principle was unanimous and only five years old. See Thorpe v. Housing Authority of Durham, 393 U.S. 268, 21 L. Ed. 2d 474, 89 S. Ct. 518 (1969).
The distinction the majority attempts to impose is wholly foreign to Cannon's text and reasoning. The opinion in Cannon consistently treats the question presented in that case as whether a private right of action exists to enforce *Title IX* (and by extension *Title VI*), and does not draw any distinctions between the various types of discrimination outlawed by the operation of those statutes. Though the opinion did not reach out to affirmatively preclude the drawing of every conceivable distinction, it could hardly have been more clear as to the scope of its holding: A private right of action exists for "victims of the prohibited discrimination." *441 U.S. at 703* (emphasis added). Not some of the prohibited discrimination, but all of it. 4

Moreover, Cannon was itself a disparate-impact case. In that case, the plaintiff brought suit against two private universities challenging medical school admissions policies that set age limits for applicants. Plaintiff, a 39-year-old woman, alleged that these rules had the effect of discriminating against women because the incidence of interrupted higher education is higher among women than among men. In providing a shorthand description of her claim in the text of the opinion, we ambiguously stated that she had alleged that she was denied admission "because she is a woman," but we appended a lengthy footnote setting forth the details of her disparate-impact claim. Other than the shorthand description of her claim, there is not a word in the text of the opinion even suggesting that she had made the improbable allegation that the University of Chicago and Northwestern University had intentionally discriminated against women. In the context of the entire opinion (including both its analysis and its uncontested description of the facts of the case), that single ambiguous phrase provides no basis for limiting the case's holding to incidents of intentional discrimination. 5

Our fractured decision in Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), reinforces the conclusion that this issue is effectively settled. While the various opinions in that case took different views as to the spectrum of relief available to plaintiffs in Title VI cases, a clear majority of the Court expressly stated that private parties may seek injunctive relief against governmental practices that have the effect of discriminating against racial and ethnic minorities. *Id., at 594-595, 607* (White, J.); *id., at 634* (Marshall, J., dissenting); *id., at 638* (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting). As this case involves just such an action, its result ought to follow naturally from Guardians.

As I read today's opinion, the majority declines to accord precedential value to Guardians because the five Justices in the majority were arguably divided over the mechanism through which private parties might seek such injunctive relief. 5 This argument inspires

5 None of the relevant opinions was absolutely clear as to whether it envisioned such suits as being brought directly under the statute or under 42 U.S.C. § 1983. However, a close reading of the opinions leaves little doubt that all of the Justices making up the Guardians majority contemplated the availability of private actions brought directly under the statute. Justice White fairly explicitly rested his conclusion on Cannon's holding that an implied right of action exists to enforce the terms of both Title VI and Title IX. Guardians, 463 U.S. at 594-595. Given that fact and the added consideration that his opinion appears to have equally contemplated suits against private and public parties, it is clear that he envisioned the availability of injunctive relief directly under the statute. Justice Marshall's opinion never mentions § 1983 and refers simply to "Title VI actions." *Id., at 625*. In addition, his opinion can only be read as contemplating suits on equal terms against both public and private grantees, thus also suggesting that he assumed such suits could be brought directly under the statute. That leaves my opinion. Like Justice White, I made it quite clear that I believed the right to sue to enforce the disparate-impact regulations followed directly from Cannon.


4 The majority is undoubtedly correct that Cannon was not a case about the substance of Title IX but rather about the remedies available under that statute. Therefore, Cannon can not stand as a precedent for the proposition either that Title IX and its implementing regulations reach intentional discrimination or that they do not do so. What Cannon did hold is that all the discrimination prohibited by the regulatory scheme contained in Title IX may be the subject of a private lawsuit. As the Court today concedes that Cannon's holding applies to Title VI claims as well as Title IX claims, *ante*, at 3-4, and assumes that the regulations promulgated pursuant to § 602 are validly promulgated antidiscrimination measures, *ante*, at 5, it is clear that today's opinion is in substantial tension with Cannon's reasoning and holding.

Brittany DeBord
two responses. First, to the extent that the majority
denies relief to the respondents merely because they
neglected to mention 42 U.S.C. § 1983 [*300] in
framing their Title VI claim, this case is something of a
sport. Litigants who in the future wish to enforce the
Title VI regulations against state actors in all likelihood
must only reference § 1983 to obtain relief; indeed, the
plaintiffs in this case (or other similarly situated individuals)
prohibitively retain the option of re-challenging Alabama's English-only policy in a complaint
that invokes § 1983 even after today's decision.

[****49] More important, the majority's reading of
Guardians is strained even in reference to the broader
question whether injunctive relief is available to remedy
violations of the Title VI regulations by nongovernmental grantees. As Guardians involved an action against a
governmental entity, making § 1983 relief available, the
Court might have discussed the availability of judicial
relief without addressing the scope of the implied private
right of action available directly under Title VI. See 463
U.S. at 638 (STEVENS, J.) ("Even if it were not settled
by now that Title VI authorizes appropriate relief, both
prospective and retroactive, to victims of racial
discrimination at the hands of recipients of federal
funds, the same result would follow in this case because
the petitioners have sought relief under 42 U.S.C. §
1983") (emphasis deleted). However, the analysis in
each of the relevant opinions did not do so. 6 [*51]

and, hence, was built directly into the statute. 463 U.S. at
635-636, and n. 1. However, I did also note that, in the
alternative, relief would be available in that particular case
under § 1983.

6 The Court today cites one sentence in my final footnote in
Guardians that it suggests is to the contrary. Ante, at 7 (citing
463 U.S. at 645, n. 18). However, the Court misreads that
sentence. In his opinion in Guardians, Justice Powell had
stated that he would affirm the judgment for the reasons stated
in his dissent in Cannon, see 463 U.S. at 609-610 (opinion
concurring in judgment), and that he would also hold that
private actions asserting violations of Title VI could not be
brought under § 1983, id., at 610, and n. 3. One reason that
he advanced in support of these conclusions was his view that
the standard of proof in a § 1983 action against public officials
would differ from the standard in an action against private
defendants. Id., at 608, n. 1. In a footnote at the end of my
opinion, id., at 645, n. 18, I responded (perhaps inartfully) to
Justice Powell. I noted that the fact that § 1983 authorizes a
lawsuit against the police department based on its violation of
the governing administrative regulations did not mean, as
Justice Powell had suggested, "that a similar action would be
unavailable against a similarly situated private party." Ibid.
I added the sentence that the Court quotes today, ante at 7, not

Rather than focusing on considerations [*301] specific to
[***528] § 1983, each of these opinions looked instead to our
[***538] opinion in Cannon, to the intent of the Congress that adopted Title VI and the [****50]
contemporaneous executive decisionmakers who crafted the disparate-impact regulations, and to general
principles of remediation. 7

In summary, there is clear precedent of this Court for
the proposition that the plaintiffs in this case can seek
injunctive relief either through an implied right of action
or through § 1983. Though the holding in Guardians
does not compel the conclusion that a private right of
action exists to enforce the Title VI regulations against
private parties, the rationales of the relevant opinions
strongly imply that result. When that fact is coupled with
our holding in Cannon and our unanimous decision in
Lau, the answer to the question presented in this case is
overdetermined. 8 [*52] Even absent my [*302]
continued belief that Congress intended a private right
of action to enforce both Title VI and its implementing
regulations, I would answer the question presented in the
affirmative and affirm the decision of the Court of
Appeals as a matter of stare decisis. 9

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532 U.S. 275, *299; 121 S. Ct. 1511, **1527; 149 L. Ed. 2d 517, ***537; 2001 U.S. LEXIS 3367, ****48
Underlying the majority's dismissive treatment of our prior cases is a flawed understanding of the structure of Title VI and, more particularly, of the relationship between §§ 601 and 602. To some extent, confusion as to the relationship between the provisions is understandable, as Title VI is a deceptively simple statute. Section 601 of the Act lays out its straightforward commitment: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Section 602 "authorizes and directs" all federal departments and agencies empowered to extend federal financial assistance to issue "rules, regulations, or orders of general applicability" in order to "effectuate" § 601's antidiscrimination mandate. 42 U.S.C. § 2000d-1. 10

On the surface, the relationship between §§ 601 and 602 is unproblematic -- § 601 states a basic principle, § 602 authorizes agencies to develop detailed plans for defining the contours of the principle and ensuring its enforcement. In the context of federal civil rights law, however, nothing is ever so simple. As actions to enforce § 601's antidiscrimination principle have worked their way through the courts, we have developed a body of law giving content to § 601's broadly worded commitment. E.g., United States v. Fordice, 505 U.S. 717, 732, n. 7, 120 L. Ed. 2d 575, 112 S. Ct. 2727 (1992); Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). As the majority emphasizes today, the Judiciary's understanding of what conduct may be remedied in actions brought directly under § 601 is, in certain ways, more circumscribed than the conduct prohibited by the regulations. See, e.g., ante, at 5.

Given that seeming peculiarity, it is necessary to examine closely the relationship between §§ 601 and 602, in order to understand the purpose and import of the regulations at issue in this case. For the most part, however, the majority ignores this task, assuming that the judicial decisions interpreting § 601 provide an authoritative interpretation of its true meaning and treating the regulations promulgated by the agencies charged with administering the statute as poor stepcousins -- either parroting the text of § 601 (in the case of regulations that prohibit intentional discrimination) or forwarding an agenda untethered to § 601's mandate (in the case of disparate-impact regulations).

The majority's statutory analysis does violence to both the text and the structure of Title VI. Section 601 does
not stand in isolation, but rather as part of an integrated remedial scheme. Section 602 exists for the sole purpose of forwarding the antidiscrimination ideals laid out in § 601.  The majority's persistent belief that the two sections somehow forward different agendas finds no support in the statute. Nor does Title VI anywhere suggest, let alone state, that for the purpose of determining their legal effect, the "rules, regulations, [*56] [and] orders of general applicability" adopted by the agencies are to be bifurcated by the judiciary into two categories based on how closely the courts believe the regulations track the text of § 601.

[305] What makes the Court's analysis even more troubling is that our cases have already adopted a simpler and more sensible model for understanding the relationship between the two sections. For three decades, we have treated § 602 as granting the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in § 601, even if the [*1530] conduct captured by these rules is at times broader than that which would otherwise be prohibited.

In Lau,[****57] our first Title VI case, the only three Justices whose understanding of § 601 required them to reach the question explicitly endorsed the power of the agencies to adopt broad prophylactic rules to enforce the aims of the statute. As Justice Stewart explained, regulations promulgated pursuant to § 602 may "go beyond . . . § 601" as long as they are "reasonably related" to its antidiscrimination mandate. 414 U.S. at 571 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in result). In Guardians, at least three Members of the Court adopted a similar understanding of the statute. See 463 U.S. at 643 (STEVENS, J., joined by Brennan and Blackmun, J.J., dissenting). Finally, just 16 years ago, our unanimous opinion in Alexander v. Choate, 469 U.S. 287, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985), treated this understanding of Title VI's structure as settled law. Writing for the Court, Justice Marshall aptly explained the interpretation of § 602's grant of regulatory power that necessarily underlies our prior [*1530] caselaw: "In essence, then, we [have] held that Title VI [has] delegated to the agencies in the[*58] first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that have produced those impacts." Id., at 293-294.

This understanding is firmly rooted in the text of Title VI. As § 602 explicitly states, the agencies are authorized to adopt regulations to "effectuate" § 601's antidiscrimination mandate. 42 U.S.C. § 2000d-1. The plain meaning of the [*306] text reveals Congress' intent to provide the relevant agencies with sufficient authority to transform the statute's broad aspiration into social reality. So too does a lengthy, consistent, and impassioned legislative history. 12

[****59] This legislative design reflects a reasonable -- indeed inspired -- model for attacking the often-intractable problem of racial and ethnic discrimination. On its own terms, the statute supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races). With regard to more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others), the statute does not establish a static approach but instead empowers the relevant agencies to evaluate social circumstances to determine whether there is a need for stronger measures. 13[*1531] [307] Such an

12 See, e.g., 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination"); id., at 1520 (statement of Rep. Celler) (describing § 602 as requiring federal agencies to "reexamine" their programs "to make sure that adequate action has been taken to preclude . . . discrimination").

13 It is important, in this context, to note that regulations prohibiting policies that have a disparate impact are not necessarily aimed only -- or even primarily -- at unintentional discrimination. Many policies whose very intent is to discriminate are framed in a race-neutral manner. It is often difficult to obtain direct evidence of this motivating animus. Therefore, an agency decision to adopt disparate-impact regulations may very well reflect a determination by that agency that substantial intentional discrimination pervades the industry it is charged with regulating but that such discrimination is difficult to prove directly. As I have stated before: "Frequently the most probative evidence of intent will
approach builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.

[***60] The "effects" regulations at issue in this case represent the considered judgment of the relevant agencies that discrimination on the basis of race, ethnicity, and national origin by federal contractors are significant social problems that might be remedied, or at least ameliorated, by the application of a broad prophylactic [***542] rule. Given the judgment underlying them, the regulations are inspired by, at the service of, and inseparably intertwined with § 601's antidiscrimination mandate. Contrary to the majority's suggestion, they "apply" § 601's prohibition on discrimination just as surely as the intentional discrimination regulations the majority concedes are privately enforceable. Ante, at 7.

To the extent that our prior cases mischaracterize the relationship between §§ 601 and 602, they err on the side of underestimating, not overestimating, the connection between the two provisions. While our cases have explicitly adopted an understanding of § 601's scope that is somewhat narrower than the reach of the regulations, 14 they have done so in an unorthodox and somewhat haphazard fashion.

[***61] Our conclusion that the legislation only encompasses intentional discrimination was never the subject of thorough consideration by a Court focused on that question. In Bakke, five Members of this Court concluded that § 601 only prohibits race-based affirmative action programs in situations where the Equal Protection Clause would impose a similar ban. 438 U.S. at 287 (principal opinion of Powell, J); id., at *308 325, 328, 352 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). 15 In Guardians, the majority of the Court held that the analysis of those five Justices in Bakke compelled as a matter of stare decisis the conclusion that § 601 does not on its own terms reach disparate impact cases. 463 U.S. at 610-611 (Powell, J., concurring in judgment); id., at 612 (O'CONNOR, J., concurring in judgment); id., at 642 (STEVENS, J., joined by Brennan and Blackmun, JJ.). However, the opinions adopting that conclusion did not engage in any independent analysis of the reach of § 601. Indeed, the only writing on this subject[***62] came from two of the five Members of the Bakke "majority," each of whom wrote separately to reject the remaining Justices' understanding of their opinions in Bakke and to insist that § 601 does in fact reach some instances of unintentional discrimination. 463 U.S. at 589-590 (White, J.); id., at 623-624 (Marshall, J., dissenting). 16 [***63] The Court's occasional rote invocation of this [***543] Guardians [***1532] majority in later cases ought not obscure the fact that the question whether § 601 applies to disparate-impact claims has never been analyzed by this Court on the merits. 17

[*309] In addition, these Title VI cases seemingly ignore the well-established principle of administrative law that is now most often described as the "Chevron doctrine.

15 Of course, those five Justices divided over the application of the Equal Protection Clause -- and by extension Title VI -- to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in Bakke as constituting a majority for any particular substantive interpretation of Title VI.

16 The fact that Justices Marshall and White both felt that the opinion they coauthored in Bakke did not resolve the question whether Title VI on its face reaches disparate-impact claims belies the majority's assertion that Bakke "had drawn precisely that distinction," ante, at 6, n. 2, much less its implication that it would have been "absurd" to think otherwise, ibid.

17 In this context, it is worth noting that in a variety of other settings the Court has interpreted similarly ambiguous civil rights provisions to prohibit some policies based on their disparate impact on a protected group. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 432, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971) (Title VII); City of Rome v. United States, 446 U.S. 156, 172-173, 64 L. Ed. 2d 119, 100 S. Ct. 1548 (1980) (§ 5 of the Voting Rights Act); cf. Alexander v. Choate, 469 U.S. at 292-296 (explaining why the Rehabilitation Act of 1973, which was modeled after § 601, might be considered to reach some instances of disparate impact and then assuming that it does for purposes of deciding the case).

See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). In most other contexts, when the agencies charged with administering a broadly-worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute's breadth as controlling unless it presents an unreasonable construction of the statutory text. See *ibid*. While there may be some dispute as to the boundaries of *Chevron* deference, see, e.g., *Christensen v. Harris County*, 529 U.S. 576, 146 L. Ed. 2d 621, 120 S. Ct. 1655 (2000), it is paradigmatically appropriate when Congress has clearly delegated agencies the power to issue regulations with the force of law and established formal procedures for the promulgation of such regulations. 18

18 In relying on the *Chevron* doctrine, I do not mean to suggest that our decision in *Chevron* stated a new rule that requires the wholesale reconsideration of our statutory interpretation precedents. Instead, I continue to adhere to my position in *Sullivan v. Everhart*, 494 U.S. 103-104, n. 6, 108 L. Ed. 2d 72, 110 S. Ct. 960 (1990) (stating that *Chevron* merely summarized "well-settled principles"). In suggesting that, with regard to Title VI, we might reconsider whether our prior decisions gave sufficient deference to the agencies' interpretation of the statute, I do no more than question whether in this particular instance we paid sufficient consideration to those "well-settled principles."

The legislative history strongly indicates that the Congress that adopted Title VI and the administration that proposed the statute intended that the agencies and departments would utilize the authority granted under § 602 to shape the substantive contours of § 601. For example, during the hearings that preceded the passage of the statute, Attorney General Kennedy agreed that the administrators of the various agencies would have the power to define "what constitutes discrimination" under Title VI and "what acts or omissions are to be forbidden." Civil Rights -- The Presidents Program, 1963: Hearings before the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 399-400 (1963); see also Civil Rights: Hearings before the House Committee on the Judiciary, 88th Cong., 1st Sess., pt. 4, p. 2740 (1963) (remarks of Attorney General Kennedy) (only after the agencies "establish the rules" will recipients "understand what they can and cannot do"). It was, in fact, concern for this broad delegation that inspired Congress to amend the pending bill to ensure that all regulations issued pursuant to Title VI would have to be approved by the President. See 42 U.S.C. § 2000d-1 (laying out the requirement); 110 Cong. Rec. 2499 (1964) (remarks of Rep. Lindsay introducing the amendment). For further discussion of this legislative history, see *Guardians, 463 U.S. at 615-624* (Marshall, J., dissenting); *Abernathy, Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 Geo. L. J. 1 (1981).

The majority twice suggests that I "beg the question" whether a private right of action to enforce Title VI necessarily encompasses a right of action to enforce the regulations validly promulgated pursuant to the statute. *Ante*, at 6, n. 2, 17, n. 8. As the above analysis demonstrates, I do no such thing. On the contrary, I demonstrate that the disparate-impact regulations promulgated pursuant to § 602 are -- and have always been considered to be -- an important part of an integrated remedial scheme intended to promote the statute's antidiscrimination goals. Given that fact, there is simply no logical or legal justification for differentiating between actions to enforce the regulations and actions to enforce the statutory text. Furthermore, as my integrated approach reflects the longstanding practice of this Court, see n. 2, * supra*, it is the majority's largely unexplained assumption that a private right of action to enforce the disparate-impact regulations must be independently established that "begs the question."

Brittany DeBord
who are reluctant to interpret statutes to allow for private rights of action and those who are willing to do so if the claim of right survives a rigorous application of the criteria set forth in Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975).\[^{**68}\] As the majority narrates our implied right of action jurisprudence, ante, at 10-11, the Court's shift to a more skeptical approach represents the rejection of a common-law judicial activism in favor of a principled recognition of the limited role of a contemporary "federal tribunal." Ante, at 10. According to its analysis, the recognition of an implied right of action when the text and structure of the statute do not absolutely compel such a conclusion is an act of judicial self-indulgence. As much as we would like to help those disadvantaged by discrimination, we must resist the temptation to pour ourselves "one last drink." Ante, at 11. To do otherwise would be to "venture beyond Congress's intent." Ibid.

\[^{*545}\] Overwrought imagery aside, it is the majority's approach that blinds itself to congressional intent. While it remains true that, if Congress intends a private right of action to support statutory rights, "the far better course is for it to specify as much when it creates those rights," Cannon, 441 U.S. at 717, its failure to do so does not absolve us of the responsibility to endeavor to discern its intent. In a series of\[^{**69}\] cases since Cort v. Ash, we have laid out rules and developed strategies for this task.

The very existence of these rules and strategies assumes that we will sometimes find manifestations of an implicit intent to create such a right. Our decision in Cannon represents one such occasion. As the Cannon opinion iterated and reiterated, the question whether the plaintiff had a right of action that could be asserted in federal court was a "question of statutory construction," 441 U.S. at 688, see also id., at 717 (REHNQUIST, J., concurring), not a question of policy for the Court to decide. Applying the Cort v. Ash factors, we examined the nature of the rights at issue, the text and structure of the statute, and the [**1534] relevant legislative history.\[^{**70}\]

Our conclusion was that Congress unmistakably intended a private right of action to enforce both Title IX and Title VI. Our reasoning -- and, as I have demonstrated, our holding -- was equally applicable to intentional discrimination and disparate impact claims.\[^{22}\]

Underlying today's opinion is the conviction that Cannon must be cabined because it exemplifies an "expansive rights-creating [*313] approach." Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 77, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992) (SCALIA, J. concurring in judgment). But, as I have taken pains to explain, it was Congress, not the Court, that created the cause of action, and it was the Congress that later ratified the Cannon holding in 1986 and again in 1988. See 503 U.S. at 72-73.

In order to impose its own preferences as to the availability of judicial remedies, the Court today adopts a methodology that blinds itself to important evidence of congressional intent. It is one thing for the Court to ignore the import of our holding in Cannon, as the breadth of that precedent is a matter upon which reasonable jurists may differ.\[^{**71}\] It is entirely another thing for the majority to ignore the reasoning of that opinion and the evidence contained therein, as those arguments and that evidence speak directly to the question at issue today. As I stated above, [***546] see n. 21, supra, Cannon carefully explained that both Title VI and Title IX were intended to benefit a particular class of individuals, that the purposes of the statutes would be furthered rather than frustrated by the implication of a private right of action, and that the legislative histories of the statutes support the conclusion that Congress intended such a right. See also Part IV, infra. Those conclusions and the evidence supporting them continue to have force today.

Similarly, if the majority is genuinely committed to deciphering congressional intent, its unwillingness to even consider evidence as to the context in which Congress legislated is perplexing. Congress does not legislate in a vacuum. As the respondent and the Government suggest, and as we have held several times, the objective manifestations of congressional

\[^{21}\] The text of the statute contained "an unmistakable focus on the benefited class," 441 U.S. at 691; its legislative history "rather plainly indicates that Congress intended to create such a remedy," id., at 694; the legislators' repeated references to private enforcement of Title VI reflected "their intent with respect to Title IX," id., at 696-698; and the absence of legislative action to change the prevailing view with respect to Title VI left us with "no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of prohibited discrimination," id., at 703.

\[^{22}\] We should not overlook the fact that Cannon was decided after the Bakke majority had concluded that the coverage of Title VI was co-extensive with the coverage of the Equal Protection Clause.

At the time Congress was considering Title VI, it was normal practice for the courts to infer that Congress intended a private right of action whenever it passed a statute designed to protect a particular [*1535] class that did not contain enforcement mechanisms which would be thwarted by a private remedy. See Merrill Lynch, 456 U.S. at 374-375 [*73] (discussing this history). Indeed, the very year Congress adopted Title VI, this Court specifically stated that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.” J. I. Case Co. v. Borak, 377 U.S. 426, 433, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964). Assuming, as we must, that Congress was fully informed as to the state of the law, the contemporary context presents important evidence as to Congress’ intent -- evidence the majority declines to consider.

Ultimately, respect for Congress’ prerogatives is measured in deeds, not words. Today, the Court coins a new rule, holding that a private cause of action to enforce a statute does not encompass a substantive rule that the Court has forthrightly acknowledged was judicially created in exactly the way the majority now condemns. See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975) (describing private actions under Rule 10b-5 as “a judicial oak which has grown from little more than a legislative acorn”). As the action in question was in effect a common-law right, the Court was more within its rights to limit that remedy than it would be in a case, such as this one, where we have held that Congress clearly intended such a right. 25

[*75] This rule might be proper if we were the [*547] kind of [*315] "common-law court" the majority decries, ante, at 10, inventing private rights of action never intended by Congress. For if we are not construing a statute, we certainly may refuse to create a remedy for [*74] violations of federal regulations. But if we are faithful to the commitment to discerning congressional intent that all Members of this Court profess, the distinction is untenable. There is simply no reason to assume that Congress contemplated, desired, or adopted a distinction between regulations that merely parrot statutory text and broader regulations that are authorized by statutory text. 25

IV

Beyond its flawed structural analysis of Title VI and an evident antipathy toward implied rights of action, the majority offers little affirmative support for its conclusion that Congress did not intend to create a private remedy for violations of the Title VI regulations. 26 The Court that the Exchange Act does not even permit the SEC to pursue aidsers and abettors in civil enforcement actions under § 10(b) and Rule 10b-5”). Second, that case involved a right of action that the Court has forthrightly acknowledged was judicially created in exactly the way the majority now condemns. See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975) (describing private actions under Rule 10b-5 as "a judicial oak which has grown from little more than a legislative acorn"). As the action in question was in effect a common-law right, the Court was more within its rights to limit that remedy than it would be in a case, such as this one, where we have held that Congress clearly intended such a right.

23 See Guardians, 463 U.S. at 636 (STEVENS, J., dissenting) ("It is one thing to conclude, as the Court did in Cannon, that the 1964 Congress, legislating when implied causes of action were the rule rather than the exception, reasonably assumed that the intended beneficiaries of Title VI would be able to vindicate their rights in court. It is quite another thing to believe that the 1964 Congress substantially qualified that assumption but thought it unnecessary to tell the Judiciary about the qualification").

24 Only one of this Court's myriad private right of action cases even hints at such a rule. See Central Bank of Denver, N. A. v. First InterstateBank of Denver, N. A., 511 U. S. 164, 173, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994). Even that decision, however, does not fully support the majority's position for two important reasons. First, it is not at all clear that the majority opinion in that case simply held that the regulation in question could not be enforced by private action; the opinion also permits the reading, assumed by the dissent, that the majority was in effect invalidating the regulation in question. Id., at 200 (STEVENS, J., dissenting) ("The majority leaves little doubt

25
Brittany DeBord offers [**1536] essentially [*316] two reasons for its position. First, it attaches significance to the fact that the "rights-creating" language in § 601 that defines the classes protected by the statute is not repeated in § 602. Ante, at 13-14. But, of course, [***76] there was no reason to put that language in § 602 because it is perfectly obvious that the regulations authorized by § 602 must be designed to protect precisely the same people protected by § 601. Moreover, it is self-evident that, linguistic niceties notwithstanding, any statutory provision whose stated purpose is to "effectuate" the eradication of racial and ethnic discrimination has as its "focus" those individuals who, absent [***548] such legislation, would be subject to discrimination.

[***77] Second, the Court repeats the argument advanced and rejected in Cannon that the express provision of a fund cut-off remedy "suggests that Congress intended to preclude others." Ante, at 14. In Cannon, 441 U.S. at 704-708, we carefully explained why the presence of an explicit mechanism to achieve one of the statute's objectives (ensuring that federal funds are not used "to support discriminatory practices") does not preclude a conclusion that a private right of action was intended to achieve the statute's other principal objective ("to provide individual citizens effective protection against those practices"). In support of our analysis, we offered policy arguments, cited evidence from the legislative history, and noted the active support of the relevant agencies. Ibid. In today's decision, the Court does not grapple [*317] with -- indeed, barely acknowledges -- our rejection of this argument in Cannon.

Like much else in its opinion, the present majority's unwillingness to explain its refusal to find the reasoning in Cannon persuasive suggests that today's decision is the unconscious product of the majority's profound distaste for implied[*78] causes of action rather than an attempt to discern the intent of the Congress that enacted Title VI of the Civil Rights Act of 1964. Its colorful disclaimer of any interest in "venturing beyond Congress's intent," ante, at 11, has a hollow ring.

V

The question the Court answers today was only an open question in the most technical sense. Given the prevailing consensus in the Courts of Appeals, the Court should have declined to take this case. Having granted certiorari, the Court should have answered the question differently by simply according respect to our prior decisions. But most importantly, even if it were to ignore all of our post-1964 writing, the Court should have answered the question differently on the merits.

I respectfully dissent. [***79]

References

15 Am Jur 2d, Civil Rights 493-514
42 USCS 2000d et seq.
L Ed Digest, Civil Rights 22
L Ed Index, Civil Rights and Discrimination

Annotation References:

Implication of private right of action from provision of federal statute not expressly providing for one-- Supreme Court cases. 61 L Ed 2d 910.

Race discrimination-- Supreme Court cases. 94 L Ed 1121, 96 L Ed 1291, 98 L Ed 882, 100 L Ed 488, 3 L Ed 2d 1556, 6 L Ed 2d 1302, 10 L Ed 2d 1105, 15 L Ed 2d 990, 21 L Ed 2d 915.

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Chester Residents Concerned for Quality Living v. Seif

United States Court of Appeals for the Third Circuit

September 25, 1997, Argued ; December 30, 1997, Filed

No. 97-1125

Reporter
132 F.3d 925 *; 1997 U.S. App. LEXIS 36797 **; 28 ELR 20487; 46 ERC (BNA) 1065

CHESTER RESIDENTS CONCERNED FOR QUALITY LIVING; ZULENE MAYFIELD; CATHY MORSE; OSSIE MORSE; KING MCDONALD; ANGELA MCDONALD; CARLENE P. STEVENSON; LOUIS S. MORSE; RICK OTTEN; LINDA MORSE ROTHWELL; ARTHUR H. ROTHWELL, III; MARGARITA SANTIAGO; RICARDO SANTIAGO; DANIEL MURPHY; JANET WEISS; REAGAN OTTEN; RENEE D. DALE; FRANCES ROTHWELL; LISA GILLIAM v. JAMES M. SEIF, in his capacity AS SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; CAROL R. COLLIER, in her capacity AS DIRECTOR OF THE SOUTHEASTERN REGION OF DEPARTMENT OF ENVIRONMENTAL PROTECTION; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION - SOUTHEAST REGION Chester Residents Concerned for Quality, Zulene Mayfield, Cathy Morse, King McDonald, Angela McDonald, Carlene P. Stevenson, Appellants


Disposition: Reversed and remanded for further proceedings, including a consideration of the remaining grounds for dismissal contained in defendants' Motion to Dismiss.

Core Terms
regulations, private right of action, discriminatory effect, private plaintiff, disparate impact, implementing regulations, requirements, civil rights, funding, district court, intentional discrimination, promulgated, termination, regulations promulgated, applications, legislative scheme, injunctive, citations, recipient, agencies, purposes, cases, prong, discriminatory intent, national origin, discriminatory, implementing, allegations, remedies, factors

Case Summary

Procedural Posture
Appellant residents group challenged an order from the United States District Court for the Eastern District of Pennsylvania, which dismissed appellants' Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq. complaint against appellee state department of environmental protection. Appellants alleged that the issuance of a permit to a third party to operate a facility in a predominantly black community violated their civil rights.

Overview
Appellant residents group brought suit under Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., alleging that the issuance of a permit by appellee state department of environmental protection to a third party to operate a facility in a predominantly black community violated their civil rights. The district court dismissed the complaint, finding that there was no private cause of action under 42 U.S.C.S. § 602. The appeals court reversed, holding that there was a three-prong test for determining when it was appropriate to
imply private rights of action to enforce regulations. The court stated that the test required a court to inquire whether the agency rule was properly within the scope of the enabling statute, whether the statute under which the rule was promulgated properly permitted the implication of a private right of action, and whether implying a private right of action would further the purpose of the enabling statute. The court concluded that all three parts of the test were met. The court stated that there was legislative intent to create a private cause of action under § 602 and that such private right would further the purpose of the statute.

Outcome
The judgment dismissing appellant residents group's Title VI discrimination claims was reversed and the case remanded because appellants could maintain a private cause of action against appellee state department of environmental protection for the alleged wrongful issuance of a permit. The court found that appellants met all three prongs for determining whether it was appropriate to find a private cause of action under a statute.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964
Civil Rights Law > Protection of Rights > Federally Assisted Programs > Federal Assistance
Civil Rights Law > Protection of Rights > Federally Assisted Programs > Scope


Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964


Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964


Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
Civil Procedure > Appeals > Standards of Review > De Novo Review


Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964
Civil Rights Law > Protection of Rights > Federally Assisted Programs > General Overview

[HN5] A private right of action exists under 42 U.S.C.S. § 601, but this right only reaches instances of intentional discrimination as opposed to instances of discriminatory effect or disparate impact.

Civil Rights Law > General Overview
Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964
Environmental Law > Public Enforcement > Environmental Justice


Administrative Law > Agency Rulemaking > General Overview
Civil Rights Law > General Overview
Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964
Environmental Law > Public Enforcement > Environmental Justice

[HN7] 40 C.F.R. § 7.35(b) clearly incorporates a discriminatory effect standard.
The court has established a three-prong test for determining when it is appropriate to imply private rights of action to enforce regulations. The test requires a court to inquire: (1) whether the agency rule is properly within the scope of the enabling statute; (2) whether the statute under which the rule was promulgated properly permits the implication of a private right of action; and (3) whether implying a private right of action will further the purpose of the enabling statute.

Actions having an unjustifiable disparate impact on minorities can be redressed through agency regulations designed to implement the purposes of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq.

The factors relevant for determining if there is a private cause of action to enforce regulations are: (1) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; and (2) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff. The other court factors for determining whether there is a private cause of action: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff; and (2) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.

In determining whether there is a private cause of action under Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., a court must determine whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.


See 40 C.F.R. § 7.120(a).

The third prong for determining whether there is a private cause of action under Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., requires the court to inquire whether implying a private right of action will further the purpose of the enabling statute.

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James M. Seif, in his capacity as Secretary of the Pennsylvania Department of Environmental Protection, Pennsylvania Department of Environmental Protection, Carol R. Collier, in her capacity as Director of the Southeastern[*2] Region of Department of Environmental Protection, Pennsylvania Department of Environmental Protection, Southeast Region. Seth M. Galanter, Esq., United States Department of Justice, Civil Rights Division, Washington, D.C., COUNSEL FOR AMICUS- APPELLANT, United States of America.


Judges: BEFORE: COWEN, ROTH and LEWIS, Circuit Judges

Opinion by: Cowen

Opinion

[*927] OPINION OF THE COURT

Cowen, Circuit Judge.

This appeal presents the purely legal question of whether a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI. See 944 F. Supp. 413 (E.D. Pa. 1996). In so doing, [**3] it relied largely on our decision in Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317 (3d Cir. 1982).

We find that Chowdhury is not dispositive on this issue. Subsequent jurisprudence, namely Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983), and its progeny, provides support for the existence of a private right of action. Moreover, Chowdhury did not apply this court's test for determining when it is appropriate to imply a private right of action to enforce regulations. We agree with the overwhelming number of courts of appeals that have indicated, with varying degrees of analysis, that a private right of action exists under section 602 of Title VI and its implementing regulations. We will reverse.

I.

The non-profit corporation CRCQL brought suit against the Pennsylvania Department of Environmental Protection ("PADEP") and James M. Seif, in his capacity as Secretary of PADEP, and other related defendants. CRCQL alleges that PADEP's issuance of a permit to Soil Remediation Services, Inc., to operate a facility in the City of Chester, a predominantly black community, violated the civil rights of CRCQL's members. [**4] Specifically, the complaint asserts that PADEP's grant of the permit violated: (1) section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.; [**5] (2) the EPA's civil rights regulations, 40 C.F.R. § 7.10 et seq., promulgated pursuant to section 602 of Title VI; [**3]

1The City of Chester is located in Delaware County, Pennsylvania, and has a population of approximately 42,000, of which 65% is black and 32% is white. Delaware County, excluding Chester, has a population of approximately 502,000, of which 6.2% is black and 91% is white. CRCQL alleges that PADEP granted five waste facility permits for sites in the City of Chester since 1987, while only granting two permits for sites in the rest of Delaware County. It further alleges that the Chester facilities have a total permit capacity of 2.1 million tons of waste per year, while the non-Chester facilities have a total permit capacity of only 1,400 tons of waste per year.

2Section 601 of Title VI provides, HN1 "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

3 HN2 Section 602 of Title VI provides, in part, that:
and (3) PADEP’s assurance [*928] pursuant to the regulations that it would not violate the regulations. This appeal concerns only Count Two.


Title VI and the EPA’s civil rights regulations implementing Title VI condition PADEP’s receipt[*6] of federal funding on its assurance that it will comply with Title VI and the regulations. See 40 C.F.R. § 7.80(a) (1997).  4 In part, these regulations prohibit recipients of federal funding from using “criteria or methods . . . which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex . . . .” 40 C.F.R. § 7.35(b).

The district court dismissed Count One of CRCQL’s complaint without prejudice. It found that CRCQL failed to allege intentional [*7] discrimination on the part of PADEP, which is a required element for an action brought under section 601 of Title VI.  5 The court, however, granted leave to amend Count One, affording CRCQL the opportunity to allege intentional discrimination. CRCQL subsequently informed the district court that it would not amend the complaint, and the district court entered a final judgment on that count.

The district court dismissed Counts Two and Three with prejudice, finding that no private right of action exists under which CRCQL could enforce the EPA’s civil rights regulations. 6 In reaching this determination, it relied on our statements in Chowdhury, which concerned whether a private plaintiff must first exhaust administrative remedies under section 602 of Title VI [*8] and its implementing regulations before bringing suit directly under section 601. In holding that a plaintiff need not do so, we reasoned in Chowdhury:

Congress explicitly provided for an administrative enforcement mechanism, contained in section 602, by which the funding agency attempts to secure voluntary compliance and, failing that, is empowered to terminate the violator’s federal funding. Under the regulations promulgated pursuant to this section, an aggrieved individual may file a complaint with the funding agency but has no role in the investigation or adjudication, if any, of the complaint. The only remedies contemplated by the language of the Act and the Regulations are voluntary compliance and funding termination. There is no provision for a remedy for the victim of the discrimination, such as injunctive relief or damages.

[*929] 677 F.2d at 319-20 (footnotes omitted). The district court took these statements to signify that no private right of action exists under the EPA’s civil rights regulations. Although the district court noted that the Supreme Court's decision in Guardians and the decisions of other courts of appeals provide support for

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, 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.


4 This provision requires: HN3

Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this Part. Applicants must also submit any other information that the OCR determines is necessary for preaward review. The applicant’s acceptance of EPA assistance is an acceptance of the obligation of this assurance and this Part.

40 C.F.R. § 7.80(a)(1).

5 See Alexander v. Choate, 469 U.S. 287, 293, 105 S. Ct. 712, 716, 83 L. Ed. 2d 661 (1985) (clarifying that the Court’s decision in Guardians established that “Title VI itself directly reaches only instances of intentional discrimination”).

6 CRCQL only appeals the dismissal of Count Two. We have no occasion to consider the issue, raised by Count Three, of whether a private cause of action exists to enforce 40 C.F.R. § 7.80(a), which requires applicants for EPA assistance to “submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of [the regulations].”
implying a private right of action, it determined that Chowdhury required the opposite conclusion. See 944 F. Supp. at 417 n.5 ("We find that the Supreme Court has never decided the question of whether there is an implied right of action under the regulations and that our Court of Appeals's Chowdhury decision is authoritative on us.").

II.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over the district court's construction of Title VI and its conclusions of law. See In re Corestates Trust Fee Litig., 39 F.3d 61, 63 (3d Cir. 1994); Unger v. Natl' Residents Matching Program, 928 F.2d 1392, 1394 (3d Cir. 1991).

III.

It is important to distinguish at the outset between section 601 of Title VI, which was the basis of Count One of CRCQL's complaint, and section 602, which was the basis of Count Two. A private right of action exists under section 601, but this right only reaches instances of intentional discrimination as opposed to instances of discriminatory effect or disparate impact. See Alexander, 469 U.S. at 293, 105 S. Ct. at 716 ("Title VI itself directly reaches only instances of intentional discrimination.").

In contrast, section 602 merely authorizes agencies that distribute federal funds to promulgate regulations implementing section 601. The EPA promulgated such implementing regulations, which provide in relevant part:

40 C.F.R. § 7.35(b). This regulation clearly incorporates a discriminatory effect standard. The Supreme Court subsequently held that the promulgation of regulations incorporating this standard is a valid exercise of agency authority. See Alexander, 469 U.S. at 292-94, 105 S. Ct. at 716. CRCQL seeks the right to proceed against PADEP under this standard, rather than the more stringent standard required under section 601.

A.

We look first to the applicable Supreme Court jurisprudence. CRCQL contends that the Court's decisions in Guardians and Alexander establish a private right of action. Guardians is a fragmented decision consisting of five separate opinions. It concerned a suit by black and Hispanic police officers alleging that certain lay-offs by their department violated Title VI and Title VII of the Civil Rights Act of 1964, as well as the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, and other state and federal laws. The Supreme Court has now made it undeniably clear that Guardians stands for at least two propositions: (1) a private right of action exists under section 601 of Title VI that requires plaintiffs to show intentional discrimination; and (2) discriminatory effect regulations promulgated by agencies pursuant to section 602 are valid exercises of their authority under that section. See Alexander, 469 U.S. at 292-94, 105 S. Ct. at 716.

i.

Guardians did not explicitly address whether a private right of action exists under discriminatory effect regulations promulgated under section 602. CRCQL contends that Guardians nevertheless implicitly validated the existence of a private right of action. CRCQL makes two principal arguments in support of its position: (1) a majority of the Court in Guardians determined that private plaintiffs in disparate impact cases can recover injunctive or declaratory relief; and (2) if a private right of action did not exist, the Court would have dismissed the plaintiffs' claims under the regulations sua sponte for failure to state a claim.

A close reading of the opinions in Guardians reveals that five Justices agreed that injunctive and declaratory relief are available in discriminatory effect cases. For instance, Justice White stated in his opinion that he would allow private plaintiffs to proceed under section 601 with a discriminatory effect claim and to recover injunctive or declaratory relief. See 463 U.S. at 584, 589-93, 103 S. Ct. at 3223, 3226-28 (opinion of White, J.). Justice White did not comment on section 602 and its implementing regulations. We can infer, however, from his willingness to allow a private plaintiff to proceed under section 601 in cases of discriminatory effect that he would have allowed private actions to proceed under section 602 and its implementing
regulations, where a discriminatory effect standard applies. 7

Justice Marshall stated in his dissent that he would allow private plaintiffs in discriminatory effect cases to proceed under section 601 but, unlike Justice White, would allow them to recover injunctive, declaratory, or compensatory relief. See 463 U.S. at 615, 103 S.Ct. at 3239-40 (Marshall, J., dissenting). As with Justice White, we can infer that Justice Marshall would have allowed similar actions under section 602 and its implementing regulations. Justice Stevens, joined by Justices Brennan and Blackmun, determined: (1) private plaintiffs may seek injunctive, declaratory, or compensatory relief under Title VI; (2) intentional discrimination is a necessary element under section 601 of Title VI; and (3) regulations that incorporate a disparate impact standard are valid. See 463 U.S. at 641-45, 103 S.Ct. at 3253-55 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). Although Justice Stevens did not distinguish between a private right of action and an administrative remedy, he concluded by saying, "Although petitioners had to prove that the respondents' actions were motivated by an invidious intent in order to prove a violation of Title VI, they only had to show that the respondents' actions were producing discriminatory effects in order to prove a violation of [the regulations]." Id. at 645, 103 S.Ct. at 3255.

Based on the foregoing, we can find an implicit approval by five Justices of the existence of a private right of action under discriminatory effect regulations implementing section 602 of Title VI. We hesitate, however, to hold that Guardians is dispositive of this appeal because the Court did not directly address the issue now before us.

CRCQL's second argument based on Guardians also has some merit. CRCQL argues that a private right of action exists because the Guardians Court did not dismiss the plaintiffs' action sua sponte for failure to state a claim. It is important to remember, however, that no party in Guardians raised, by Rule 12(b)(6) of the Federal Rules of Civil Procedure or otherwise, the issue of whether a private right of action exists under section 602 and its implementing regulations. The Court did not have reason to speak directly to the issue, and based on the foregoing discussion, it is clear that it did not. Consequently, we find that CRCQL's second argument also lacks sufficient force to dispose of this appeal.

ii.

The Court offered some clarification of Guardians in its unanimous decision in Alexander, which involved section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulations. With respect to Guardians, the Alexander Court stated:

In Guardians, we confronted the question whether Title VI of the Civil Rights Act of 1964, which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in Guardians, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

[**17] 469 U.S. at 292-94, 105 S.Ct. at 716 (citation and footnotes omitted). The most plausible reading of this language is that it confirms that a private right of action exists under section 601 of Title VI and that the promulgation of discriminatory effect regulations is a valid exercise of agency authority under section 602.

CRCQL argues that the Court recognized the existence of a private right of action in the following language from Alexander:

Guardians, therefore, does not support petitioners’ blanket proposition that federal law proscribes only intentional discrimination against the handicapped.

Indeed, to the extent our holding in Guardians is relevant to the interpretation of § 504, Guardians

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7 We recognize that this inference requires a supposition, because sections 601 and 602 differ in substantial respects, as the discussion in section III.C.ii., infra, indicates.
suggests that the regulations implementing § 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case.

469 U.S. at 294, 105 S. Ct. at 716. 8 Stitching together CRCQL’s arguments and those made by the Trial Lawyers for Public Justice (“TLPJ”) and the Southern Poverty Law Center (“SPLC”) as amici, the argument in favor of inferring the existence of a private right of action from Alexander[**18] proceeds as follows. The Alexander Court noted in the above-quoted language that, to the extent that Title VI jurisprudence is relevant to the Rehabilitation Act, Guardians “suggests” that a party can proceed with a disparate impact claim under section 504’s implementing regulations. This suggestion obtains, the argument must go, because Guardians itself stands for the proposition that a party can proceed with a disparate impact claim under the regulations implementing section 602. Alexander, therefore, implicitly confirms that Guardians recognized the existence of a private right of action.

[**19] While CRCQL’s argument has some merit, we are not persuaded. The Court in Alexander spoke in the passive voice — "could make actionable" — and did not indicate whether Guardians stood for the proposition that a private plaintiff, or the relevant agency, could proceed under a disparate impact standard. CRCQL’s argument requires the inference that because Alexander was a suit brought by private plaintiffs, and because Guardians was also brought by private plaintiffs, the Alexander Court must have been speaking of private plaintiffs when it used the passive voice. This inference from Guardians may be justified, but we find no direct authority in Alexander that either confirms or denies the existence of a private right of action. Consequently, we decline to hold that a private right of action exists based on Guardians and Alexander alone. 9

Having determined that the applicable Supreme Court precedent is not dispositive, we look to our own precedent. The district court relied on our statements in Chowdhury for the conclusion that no private right of action exists. See 944 F. Supp. at 417. CRCQL, and TLPJ and SPLC as amici, argue that reliance on Chowdhury is questionable because: (1) Chowdhury did not apply this Circuit's three-prong test for determining when it is appropriate to infer a private right of action to enforce regulations; and (2) Chowdhury was decided before Guardians.

The sole question in Chowdhury was whether a private plaintiff must first exhaust administrative remedies under section 602 and its implementing regulations before bringing suit directly under section 601. In holding that a plaintiff need not do so, we reasoned that "an aggrieved individual may file a complaint with the funding agency but has no role in the investigation or adjudication, if any, of the complaint." 677 F.2d at 319 (footnotes omitted). Moreover, we stated that "there is no provision for a remedy for the victim of the discrimination, such as injunctive relief or damages." Id. at 320 (footnote[**21] omitted).

Chowdhury appears to decide that no private right of action exists under the regulations, and we readily addressed Title VI in a single footnote, which stated in relevant part:

Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. We thus treat the issues in these cases as they are implicated under the Constitution.

8 The issue that the Alexander Court was addressing when it made these statements was whether discriminatory intent is required to establish a violation of section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and its implementing regulations. The Court ultimately determined that some, but not all, disparate impact showings constitute a prima facie case under the Rehabilitation Act. 469 U.S. at 292-99, 105 S. Ct. at 715-19.

9 PADEP argues that the Court's opinion in United States v. Fordice, 505 U.S. 717, 112 S. Ct. 2727, 120 L. Ed. 2d 575 (1992), indicates that no private right of action to enforce Title VI regulations exists. PADEP misconstrues Fordice. Fordice Id. at 732 n.7, 112 S. Ct. at 2738 n.7 (citations omitted). Fordice did not indicate that private plaintiffs were barred from asserting a claim under the regulation quoted. Rather, the Court merely noted that the affirmative action called for under the statute could not reach beyond that afforded by the Constitution itself. Hidden within the Court's statement may be an indication that implementing regulations, such as the EPA's, that incorporate a discriminatory effect standard are invalid, because they extend further than the Fourteenth Amendment. We thus treat the issues in these cases as they are implicated under the Constitution.
understand why the district court reached this conclusion. We nevertheless disagree with that conclusion. *Chowdhury* does not hold that no private right of action exists under section 602 and its implementing regulations. It merely indicates that the regulations themselves do not expressly provide for a significant role for private parties, which is apparent on the face of the regulations. *Chowdhury* says nothing about the appropriateness of implying a private right of action. Section 602 and its implementing regulations were only relevant in *Chowdhury* to the extent that they, on their face, afforded private plaintiffs a peripheral role in administrative proceedings. The *Chowdhury* court took this peripheral role as an indication that private plaintiffs should not have to pursue their claims under the regulations before initiating a direct action pursuant to their rights under section 601. The district court misapplied our statements in *Chowdhury*.

Looking to our other precedent, CRCQL and amici cite our decision in *Pfeiffer v. Marion Ctr. Area* [*22*], 917 F.2d 779 (3d Cir. 1990), a post-*Guardians* opinion, in support of the existence of a private right of action. *Pfeiffer* involved a suit by a high school student alleging gender discrimination in her dismissal from the local chapter of the National Honor Society. The plaintiff asserted claims under Title IX of the Education Amendments of 1972 and its implementing regulations, as well as other federal and state statutes. *Pfeiffer* is only significant to this appeal because we made therein the following statements concerning *Guardians*:

In *Guardians*, the "threshold issue before the Court [was] whether . . . private plaintiffs . . . need to prove discriminatory intent to establish a violation of Title VI . . . and administrative implementing regulations promulgated thereunder." A majority of the Court agreed that a violation of the statute itself requires proof of discriminatory intent. A different majority seemed to suggest that proof of discriminatory effect suffices to establish liability when suit is brought to enforce the regulations rather than the statute itself.

917 F.2d at 788 (quoting *Guardians*, 463 U.S. at 584, 103 S. Ct. at 3223) (footnotes omitted).

It is of course informative to read an interpretation of *Guardians* by a prior panel. The interpretation, however, is dicta and not [*933*] binding on this panel. *Pfeiffer* concerned a claim of intentional gender discrimination, not discriminatory effect. *See id.* ("This is, therefore, not a case of discriminatory effect, but one of discriminatory intention."). The issue before the court was whether the district court's finding that school authorities dismissed the plaintiff from the National Honor Society because of premarital sex and not gender discrimination was clearly erroneous. *See id. at 780*. The court had no reason to consider the status of a private right of action under section 602 and its implementing regulations. In addition, the above-quoted language from *Pfeiffer*, like the Supreme Court's opinion in *Alexander*, is in the passive voice--"when suit is brought"--and fails to specify who may bring suit to enforce the regulations. Although *Pfeiffer* is instructive, we find it insufficient to dispose of this appeal.

C.

Since our own precedent does not resolve the matter, we must now determine whether to imply a private [*24*] right of action. *HN8* This court has established a three-prong test for determining when it is appropriate to imply private rights of action to enforce regulations. The test requires a court to inquire: "(1) 'whether the agency rule is properly within the scope of the enabling statute'; (2) 'whether the statute under which the rule was promulgated properly permits the implication of a private right of action'; and (3)'whether implying a private right of action will further the purpose of the enabling statute.'" *Polaroid Corp. v. Disney*, 862 F.2d 987, 994 (3d Cir. 1988) (quoting *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 947 (3d Cir. 1985)). We discuss each prong in turn.

i.

There is no question that the EPA's discriminatory effect regulation satisfies the first prong. The Supreme Court's unanimous opinion in *Alexander* makes clear that *HN9* actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI.* 469 U.S. at 293, 105 S. Ct. at 716* (footnote omitted).

ii.

The second and third prongs are the crux of this case. In addressing the second, a court will consider the [*25*] factors set out by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), and its progeny. *See Angelastro*, 764 F.2d at 947. *HN10* The factors relevant here are: (1) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; and (2)
whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." Cort, 422 U.S. at 78, 95 S. Ct. at 2088 (citations omitted). 10

[**26] The United States, as amicus, contends that the implication of a private right of action is consistent with legislative intent because Congress acknowledged the existence of the right when it amended Title VI. The purpose of the amendment was to broaden the scope of coverage of Title VI in response to the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984), where the Court narrowly construed the terms "program or activity." 11 The United States cites various items of legislative history which it claims indicates an "understanding . . . [of] [**934] the existence of the discriminatory effects regulations and the fact that they could be enforced in federal court by private parties." Amicus Br. at 21.

First, the United States relies on a House Report on an early version of the relevant bill, which states [**27] that the "private right of action which allows a private individual or entity to sue to enforce Title IX would continue to provide the vehicle to test [certain] regulations in Title IX and their expanded meaning to their outermost limits." H.R. REP. NO. 963, Pt. 1, 99th Cong., 2d Sess. 24 (1986). 12 Second, the United States relies on several legislators' comments in the Congressional Record, where the legislators appear to recognize the existence of a private right of action. 13


[**29] PADEP presents two responses. First, PADEP emphasizes that the purpose of the amendment of Title VI was to address the Supreme Court's decision in Grove City, not to confirm or announce the existence of a private right of action. Second, PADEP reminds the court that many of the above-cited comments may only reflect the views of individual members of Congress.

10 The other Cort factors are: (1) whether the plaintiff is "one of the class for whose especial benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff "; and (2) whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78, 95 S. Ct. at 2088 (citations and internal quotation marks omitted). Clearly, CRCQL satisfies the first. The second is irrelevant because Title VI is federal law.

11 Section 601 of Title VI prohibits any "program or activity" receiving Federal funds from discriminating on various grounds. See 42 U.S.C. § 2000d.

12 Courts have regarded Title IX and Title VI jurisprudence as, more or less, interchangeable. See Cannon v. University of Chicago, 441 U.S. 677, 694-96, 99 S. Ct. 1946, 1956-57, 60 L. Ed. 2d 560 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class. . . . The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." (footnotes omitted)).

13 The United States quotes the following observations of Senator Hatch:

The failure to provide a particular share of contract opportunities to minority-owned businesses, for example, could lead Federal agencies to undertake enforcement action asserting that the failure to provide more contracts to minority-owned firms, standing alone, is discriminatory under agency disparate impact regulations implementing Title VI. . . . Of course, advocacy groups will be able to bring private lawsuits making the same allegations before federal judges.

134 CONG. REC. 4,257 (1988). The United States also quotes a portion of the following statement by Representative Fields: "If a greater percentage of minority than white students fail a bar exam or a medical exam . . . will a State be subject to private lawsuits because the tests have a disproportionate impact on minorities[,]" 130 CONG. REC. 18,880 (1984).

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PADEP does not, however, cite to any statements in the Congressional Record or elsewhere that would undermine those cited by the United States. We therefore find that there is some indication in the legislative history, here uncontroverted, of an intent to create a private right of action, in satisfaction of the Cort factors.

This finding, however, does not end our inquiry. The Cort factors also require HN11 a court to determine whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff."

Relevant to this inquiry is PADEP's argument that section 602 and the regulations situate the EPA as, in essence, a gatekeeper to enforcement, and that the implication of a private right of action would be inconsistent with this legislative scheme. According to PADEP, section 602 imposes what PADEP terms as "strict preconditions" on the use of this enforcement apparatus. 14 Specifically, HN12 section 602 provides:

No such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, 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.

No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1. EPA enforcement action can occur only after the agency has negotiated these procedural requirements. Should we find that it is appropriate to imply a private right of action, PADEP emphasizes that private plaintiffs [**31] would not have to negotiate these requirements.

In addition, PADEP emphasizes that the EPA's regulations expressly provide private parties with an administrative mechanism through which they can raise allegations of unintentional discrimination. [**32] See 40 C.F.R. §§ 7.120-7.130. These regulations provide, in relevant part:

HN14 A person who believes that he or she or a specific class of persons has been discriminated against in violation of this Part may file a complaint. The complaint may be filed by an authorized representative. A complaint alleging employment discrimination must identify at least one individual aggrieved by such discrimination.

We recognize that PADEP's argument has some force. There is, however, a more convincing counter-argument. The procedural requirements in section 602 and the regulations situate the EPA as a gatekeeper to enforcement, with private parties submitting their allegations to the agency and its discretion. PADEP contends [**33] that a private right of action is inconsistent with this legislative scheme.

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As a [**936] result, the purpose that the requirements serve is not as significant in private lawsuits, where the potential remedy does not include the result (i.e., termination of funding) at which Congress directed the requirements. Stated differently, the requirements were designed to cushion the blow of a result that private plaintiffs cannot effectuate. Based on the foregoing, we find that the implication of a private right of action would be consistent with the legislative scheme of Title VI.

[**34] In sum, we find that there is some indication in the legislative history of an intent to create a private right of action and that the implication of a private right of action would be consistent with the legislative scheme of Title VI, in accordance with the relevant Cort factors. Accordingly, we find that "the statute under which the rule was promulgated properly permits the implication of a private right of action," Polaroid Corp., 862 F.2d at 994 (quoting Angelastro, 764 F.2d at 947), and that the second prong of the test is satisfied.

iii. 

The third prong of the test requires the court to inquire "whether implying a private right of action will further the purpose of the enabling statute." Id. (quoting Angelastro, 764 F.2d at 947). The United States contends that this prong is satisfied because the implication of a private right of action under section 602 and the regulations will further the dual purposes of Title VI, which are to: (1) combat discrimination by entities who receive federal funds; and (2) provide citizens with effective protection against discrimination. See Cannon, 441 U.S. at 704, 99 S. Ct. at 1961. A private right of action will [**35] further these purposes, the argument goes, because it will deputize private attorneys general who will enforce section 602 and its implementing regulations. The United States, moreover, points out that the EPA itself lacks sufficient resources to achieve adequate enforcement.

We agree with the United States that, to the extent that a private right of action will increase enforcement, the implication of that right will further the dual purposes of Title VI. Consequently, we find that the third prong of the test is also satisfied.

iv.

Lastly, although no other court of appeals has rendered a holding on the precise issue before this court, we note that the decisions of other courts of appeals indicate support for our reasoning. See, e.g., Latinos Unidos de Chelsea v. Secretary of Hous. & Urban Dev., 799 F.2d 774, 785 n.20 (1st Cir. 1986) ("Under the statute itself, plaintiffs must make a showing of discriminatory intent; under the regulations, plaintiffs simply must show a discriminatory impact." (citation omitted)); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) ("Courts considering claims under analogous Title VI regulations have looked to Title [**36] VII disparate impact cases for guidance. A plaintiff alleging a violation of the DOT regulations must make a prima facie showing that the alleged conduct has a disparate impact.") (citations omitted)); Castaneda by Castaneda v. Pickard, 781 F.2d 456, 465 n.11 (5th Cir. 1986) ("Thus a Title VI action can now be maintained in either the guise of a disparate treatment case, where proof of discriminatory motive is critical, or in the guise of a disparate impact case, involving employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another. In this latter type of case, proof of discriminatory intent is not necessary.") (citation omitted)); Buchanan v. City of Bolivar, Tenn., 99 F.3d 1352, 1356 n.5 (6th Cir. 1996) ("A plaintiff may pursue a claim under a disparate impact theory as well. However, a disparate impact theory is not applicable in the case at hand.") (citation omitted)); David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988) ("It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act. Moreover, plaintiffs [**37] need not show intentional discriminatory conduct to [**937] prevail on a claim brought under these administrative regulations. Evidence of a discriminatory effect is sufficient.") (citation omitted)); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1044-45 (7th Cir. 1987) ("Although the voting of the Justices may be difficult for the reader to discern at first, a majority of the Court in Guardians Association concluded that a discriminatory-impact claim could be maintained under those regulations, although not under the statute.") (citations omitted)); Larry P. by Lucille P. v. Riles, 793 F.2d 969, 981-82 (9th Cir. 1984) ("Proof of

**15** While it is well established that private plaintiffs do not have the authority to compel a termination of funding, we make no determination at this time as to what alternative remedies offer appropriate relief for plaintiffs who prevail in actions to enforce agency regulations brought pursuant to section 602. See NAACP v. Medical Center, Inc., 599 F.2d 1247, 1254 n.27 (3d Cir. 1979). See also Cannon, 441 U.S. at 711-17, 99 S. Ct. at 1965-68 (discussing the legislative history of Title VI as it relates to the implication of a private remedy for victims of discrimination). Rather, should relief prove warranted in this case, we leave the determination of the appropriate remedy to the district court in the first instance.
discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute rather than the statute itself."

(footnote omitted)); 

Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996) ("Although Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent." (citation omitted));

Elston v. Talladega County Bd. of Edu., [**38] 997 F.2d 1394, 1406 (11th Cir. 1993) ("While Title VI itself, like the Fourteenth Amendment, bars only intentional discrimination, the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory." (citations omitted));

Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985) ("There is no doubt that the plaintiffs predicated this cause of action on the regulations. As a result, the district court correctly applied disparate impact analyses to their Title VI claims." (footnote omitted)).

v.

In conclusion, the district court misapplied our decision in Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317 (3d Cir. 1982). Chowdhury did not apply this court’s three-prong test for determining when it is appropriate to imply a private right of action to enforce regulations and was decided before the Supreme Court’s decision in Guardians. Applying that three-prong test, we hold that private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative [*39] agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964. Accordingly, we will reverse and remand for further proceedings, including a consideration of the remaining grounds for dismissal contained in defendants’ Motion to Dismiss.

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Environmental Justice: Why Race and Class (Still) Matter
New Jersey State Bar Association Annual Meeting
Co-sponsored by the Diversity Committee and the Environmental Law Section
Thursday, May 18, 2017

SPEAKER BIOGRAPHIES

DR. NICKY SHEATS
Director, Center for the Urban Environment
John S. Watson Institute for Public Policy
Thomas Edison State University, New Jersey

Dr. Nicky Sheats, Esq., is the director of the Center for the Urban Environment of the John S. Watson Institute for Public Policy at Thomas Edison State University and has defined the primary mission of the Center as providing support for the environmental justice (EJ) community. Among the issues he works on are air pollution, climate change, cumulative impacts, developing EJ legal strategies and increasing the working capacity of the EJ community. Sheats is a founding member of the NJ EJ Alliance, EJ Leadership Forum on Climate Change, the EJ and Science Initiative and an informal NE EJ attorneys group. He has been appointed to the NJ Clean Air Council, EPA’s Clean Air Act Advisory Committee and National EJ Advisory Council, and was a co-author of the human health chapter of the 2014 national climate assessment.

Early in his career Sheats practiced law as a public interest attorney. During that time he served as a law clerk for the Chief Judge of the District of Columbia Court of Appeals (the local court), as a landlord-tenant and housing attorney at Camden Regional Legal Services, as a public defender in New Brunswick, NJ, and as a legal instructor at a community legal education and college preparatory program in Harlem.

Sheats holds a B.A. from Princeton University and was also a post-baccalaureate student at the City College of NY. He earned a Ph.D. in Earth and Planetary Sciences, J.D. and M.P.P. from Harvard University.

ALBERT HUANG
Senior Attorney and Director of Environmental Justice
Natural Resources Defense Council (NRDC), New York, NY

Al Huang directs the environmental justice work at NRDC. By utilizing a model that emphasizes community-led initiatives, he litigates and advocates in partnership with low-income communities and communities of color throughout the country that are fighting environmental hazards. He joined NRDC in 2005 after working as an attorney for several community-based environmental justice and civil rights organizations in California. He received his law degree and a master’s degree in environmental law and policy from Vermont Law School. Huang currently serves on the Environmental Justice Committee of the American Bar Association and is an adjunct professor of law at the Fordham School of Law. He is based in New York City.
GAIL HOWIE CONENELLO  
Chair, Environmental Law Section (NJSBA)  
K&L Gates, Newark, NJ

Ms. Conenello’s environmental practice is focused in the areas of CERCLA and Spill Act remediations and liability actions, private cost recovery actions, environmental justice actions, RCRA, environmental insurance coverage actions, due diligence for corporate and real estate transactions, and various environmental remediation, permitting, compliance, regulatory and enforcement matters. At K&L Gates, Ms. Conenello has also counseled clients on environmental issues in order to facilitate corporate and real estate transactions. She has worked on numerous multi-million dollar transactions for a wide range of clients, from pharmaceutical companies to manufacturers, and has extensive experience assisting clients with compliance and remediation issues associated with New Jersey’s Industrial Site Recovery Act.

As a complement to her work in the environmental arena, she has also been involved in developing community outreach programs for major industrial clients. These outreach programs develop and maintain ongoing forums for positive working relationships and effective communication between manufacturers and key stakeholders in the local and regional communities on key issues related to the daily operations of industrial facilities and legacy site remediation issues associated with former industrial operations.

Gail received her B.A. from Rutgers College, Rutgers University and her J.D. from New York University School of Law. She is currently the Chair of the Environmental Law Section of the New Jersey State Bar Association and is a frequent speaker at bar association and trade association programs.
STUART J. LIEBERMAN
Past Chair, Real Property, Trusts & Estates Section (NJSBA)
Lieberman & Blecher, P.C., Princeton, NJ

Stuart Lieberman is a founding Shareholder of Lieberman & Blecher with over 25 years of experience representing individual, business and governmental clients in all facets of environmental and land use matters. With a primary focus on environmental litigation, Mr. Lieberman has litigated a wide variety of cases through state, federal and administrative courts. His litigation experience ranges from pre-trial and trial practice in complex litigation, to extensive appellate advocacy. He has argued before the New Jersey Supreme Court on several occasions, including successfully arguing the seminal beach access case in New Jersey, Raleigh Avenue Beach Assoc. v. Atlantis Beach Club, Inc., 185 N.J. 40 (2005), which concerned the application of the public trust doctrine to privately owned beaches.

As a former Deputy Attorney General for the State of New Jersey who was assigned to the Environmental Protection Section, Mr. Lieberman also uses his vast experience to assist a wide array of business and individual clients through complex environmental regulatory matters. His primary focus in regulatory representation includes industrial operations, gasoline stations and dry cleaning operations, among other heavily regulated business and land use activities.

In addition, Mr. Lieberman has represented developers and community organizations before planning boards and zoning boards of adjustment in virtually every county in New Jersey. These cases have included site plan, subdivision, and variance approvals and challenges concerning issues relating to steep slopes, stormwater design, well-water suitability, septic design and other issues. Mr. Lieberman has also represented many organizations in cell tower and billboard challenges throughout the state.

Mr. Lieberman has also been at the forefront of toxic tort litigation for over a decade. Along with partner Shari M. Blecher, he participated in one of the first methyl tertiary butyl ether (MTBE), involving over 100 families in Bayville, New Jersey whose wells were contaminated by the now outlawed gasoline additive. Mr. Lieberman also served as co-counsel in the class action litigation concerning mercury contamination at the Kiddie Kollege daycare facility in Gloucester County, New Jersey. Most recently, he was named class counsel representing hundreds of homeowners in Lopatcong, New Jersey concerning alleged faulty radon mitigation systems.

In addition to being a practitioner, Mr. Lieberman is also an accomplished published author and speaker. In 2009, he was presented with the Distinguished Service Award for Excellence in Continuing Legal Education by the New Jersey Institute for Continuing Legal Education for his work in both lecturing and moderating numerous programs throughout his career. He is the co-author of New Jersey Brownfields Law, has written numerous articles in the New Jersey Law Journal and New Jersey Lawyer, and wrote a syndicated environmental column called Environmental Issues Affecting the Home for 11 years. Mr. Lieberman also serves as the Chair of the Board of Consultants for the Real Property, Trust and Estate Law Section of the New Jersey State Bar Association.
SHAWN M. LATOURETTE (Moderator)
Member, Diversity Committee & Environmental Law Section (NJSBA)
Gibbon P.C., Newark, New Jersey

Mr. LaTourette is a counselor and litigator concentrating in environmental and closely related legal fields. He assists clients with compliance, enforcement, permitting, litigation, government relations and strategic planning. In every counseling, litigation, and transactional matter, he seeks to deeply understand his client's business operations and strategic goals, and devise creative solutions to their specific legal, regulatory and public relations concerns. With deep knowledge of environmental, health and safety laws, he guides clients across various industries with respect to regulatory compliance, environmental cleanup, infrastructure projects, facility siting, government enforcement, acquisitions, public relations, and high stakes litigation.

Mr. LaTourette’s representative engagements have included infrastructure development, industrial facility siting and construction, environmental cleanup and cost recovery disputes, natural resource damage claims, toxic exposure lawsuits, and state and federal class actions (primarily for alleged environmental and consumer products/services violations). Mr. LaTourette’s representative organizational clients have included heavy machinery manufacturers, chemical manufacturers, infrastructure developers, pharmaceutical companies, real estate investment trusts, electronics manufacturers and waste management facilities.

Mr. LaTourette began his legal practice at a prominent international law firm, serving the environmental law and litigation needs of major corporations and investment banks, and continued to developed deep expertise in land use, environmental, health and safety laws at boutique and regional firms concentrating in those areas. Prior to his law practice, Mr. LaTourette served as a judicial intern at the New Jersey Supreme Court and the Third Circuit Court of Appeals, and as a law clerk for the Environmental Practice Group of the New Jersey Attorney General’s Office. He became a practicing attorney after a decade in law firm management and paralegal roles also focused in environmental law and related fields.