

In April 2001, a 5-4 decision of the United States Supreme Court eliminated a significant tool for environmentalists and persons suffering from environmental problems under §§ 601, 602 of Title VI of the Civil Rights Act of 1964 (These sections are codified at 42 U.S.C. 2000d et. seq. (2003)). See *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001). The Court held that § 601 does not create a private right to action for violations of regulations promulgated by agencies pursuant to § 602. *Sandoval*, 532 U.S. at 285. Justice Scalia, writing for the majority, found that because § 601 limited private actions to cases involving intentional discrimination, an agency's regulations under § 602 could not also extend the private right of action to allegations of disparate-impact. *Id.* at 285-86 ("That right must come, if at all, from the independent force of § 602."). The Court concluded that Congress only intended § 602 to "effectuate the provisions" of § 601. *Id.* at 288 (quoting 42 U.S.C. § 2000d). Thus, a private right of action for violation of disparate-impact regulations is not permissible because the "[l]anguage in a regulation may [only] invoke a private right of action that Congress created ... [and] may not create a right that Congress has not." *Id.* at 291.

This case involved a claim by Sandoval against the Alabama Department of Safety (the "Department") for discrimination based upon the Department's rule to offer the test for state driver's licenses only in English. *Id.* at 279. Since the Department received funding from the Federal Departments of Justice and Transportation, the relationship subjected the Department to the restrictions of §§ 601, 602.¹ *Id.* at 278. Pursuant to § 602, the Department of Justice issued regulations prohibiting funding to anyone that "utilize[s]

¹ 42 U.S.C § 2000d (2003) states: "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-1 (2003) states: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity ... is authorized and directed to effectuate the provisions of section 601 ... by issuing rules, regulations, or orders of general applicability."

criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin....” 28 C.F.R. § 42.104(b)(2)(1999).

Using Justice Scalia’s opinion as a format, *Sandoval* first stated that “private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages.” *Sandoval*, 532 U.S. at 279. The Court found that because Congress fashioned Title VI after Title XI, Congress also intended to extend the private right of action present in Title XI to Title VI. *Id.* at 280.

Second, the Court concluded that § 601 “prohibits only intentional discrimination.” *Id.* at 280. Neither party in the action disputed this statement.

Third, Justice Scalia “assume[d] 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.” *Id.* at 281. The Court based this assumption on the fact that the regulations went beyond intentional discrimination. Under § 602, a department or agency could proscribe disparate-impact even though they were naturally beyond the reach of § 601. Obviously, this was the crux of the disagreement between the Court and the dissenters. Yet the Court held that precedent from past cases² precluded the extension of a private right of action to regulations.

Turning then to the issue of whether a violation of a disparate-impact under § 602 was enforceable as a violation of § 601, the Court resolved that “§ 601 does not include a private right to enforce these regulations.” *Id.* at 285. Justice Scalia wrote that it was no longer the job of the courts to “provide such remedies as are necessary to make effective the congressional purpose’ expressed by statute.” *Id.* at 287 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). In *Cort v. Ash*, 422 U.S. 66, 76 (1975), the Court “abandoned the understanding” that the Court could find remedies based upon congressional intent. Viewing §§ 601, 602 in this light, therefore, the Court opined that “[s]tatutes that focus on the person regulated rather

² The Court cites several cases, including: *Guardian Assn. v. Civil Serv. Comm’n of New York City*, 463 U.S. 582, 612-13 (1983), *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and *Cannon v. University of Chicago*, 441 U.S. 677, 748 n. 19 (1979).

than the individuals protected create ‘no implication of an intent to confer rights on a particular class of persons.’” *Sandoval*, 532 U.S. at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). Therefore, because Congress did not explicitly confer a private right of action for person affected by § 602—and were even excluded from any right when viewed with § 601—the Court insisted that the only possibility was that no such action existed. *Id.* at 290-91.

Following the Supreme Court’s lead in *Sandoval*, the Third Circuit further negated the ability of plaintiffs to sue for disparate-impact discrimination.³ *South Camden Citizens in Action v. NJ DEP*. 274 F.3d 771 (3d. Cir. 2001), *cert. denied*, 153 L. Ed. 2d 804, 122 S. Ct. 2621, 2002 U.S. LEXIS 4706 (2002). The Court of Appeals held that a private right of action for violations arising under regulations promulgated by § 602 did not exist pursuant to 42 U.S.C § 1983 (2003). With the *Sandoval* opinion as a roadmap, the Third Circuit reversed its previous ruling and affirmed the precedent established by the Supreme Court.

After a long and complicated court battle, this case was the judicial system’s final holding. The plaintiffs, residents of South Camden, claimed that the New Jersey Department of Environmental Protection (“NJ DEP”) discriminated against them when it issued a company an air permit. *South Camden*, 274 F.3d at 774. The plaintiffs' neighborhood was host to "a sewage treatment plant, an incinerator, scrap yards, a power generator, and a host of other industrial facilities." Brendan Cody, *South Camden Citizens in Action: Siting Decisions, Disparate Impact Discrimination, and Section 1983*, 29 Ecology L. Q. 231, 238 (2002). The neighborhood also included two superfund sites, four other sites under EPA investigation, and fifteen other sites labeled by the NJ DEP as contaminated. *Id.* The residents claimed that the permit “would have an adverse disparate racial impact upon them in violation of Title VI” and sought to enforce it through § 1983. *Id.* at 774. Previously, the a District Court in the Third Circuit upheld an injunction on the permit because it

³ See also Steven C. Russo and Elizabeth A. Read, *Views Vary on “Environmental Justice”; Communities Try to Use Federal Laws to Keep Out Polluting Facilities*, New York L. J. 9 (Dec. 17, 2001) (illustrating the first two actions filed by the South Camden Citizens in Action and the potential effects of *Sandoval*).

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found § 602 created an implied private right of action. *South Camden Citizens in Action v. NJ DEP*, 145 F.Supp.2d 446, 505 (D.N.J. 2001). The Supreme Court decided *Sandoval* only five days later.

The plaintiff then turned to § 1983 pursuant to Justice Stevens' advice in his *Sandoval* dissent. *See* 532 U.S. at 300 (Stevens, J., dissenting). On May 10, 2001, the District Court, after allowing the plaintiffs to revise their complaint to a §1983 action, granted the injunction on those grounds. *South Camden Citizens in Action v. NJ DEP*, 145 F.Supp.2d 505 (D.N.J. 2001). The company then appealed to the Third Circuit Court of Appeals.

To determine if a § 1983 action exists, the court used the Supreme Court's three-part test, first announced in *Blessing v. Freestone*, 520 U.S. 329 (1997): (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) "[T]he plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence; and (3) "[T]he statute must unambiguously impose a binding obligation on the States." *South Camden*, 274 F.3d at 779. Once these factors are proven, a rebuttable presumption for a right of a private action arises. This presumption, however, may be rebutted in two ways: (1) if "Congress specifically foreclosed a remedy under § 1983"; or (2) if it created a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 780 (quoting *Powell* 189 F.3d 387, 401 (3d Cir.), *cert. denied* 528 U.S. 1046 (1999)). In this instance, Congress included methods for the agencies to enforce the statute, but not for private rights of action.

The regulations of the NJ DEP were "too far removed from Congressional intent to constitute a 'federal right' enforceable under § 1983." *Harris v. James*, 127 F.3d 993, 1003 (11th Cir. 1997). The Court found that Congress, by only creating a right to be free from intentional discrimination, did not also intend to create a federal right to be free from disparate-impact discrimination. With that, the Court lifted the injunction preventing the cement company from continuing construction.

Locally, a district court justice for the First Circuit recently criticized the logic used by the most recent *South Camden* Court. See *Langlois v. Abington Housing Authority*, 234 F.Supp.2d 33 (2002).⁴ Like her Third Circuit counterparts, District Court Justice Nancy Gertner also applied the Blessing Test outlined in *South Camden*. However, the justice wrote that the Third Circuit misapplied the inquiry: “[s]ignificantly, the inquiry was whether the statute created a federal right. It was not whether Congress intended to create a right enforceable through § 1983.” *Id.* at 47. Justice Gertner asserted that § 1983 “by itself announced Congress’ intention to provide a remedy for state violations of rights.” *Id.* Instead of taking the narrow view utilized in *South Camden*, this decision used a broader view, as written in *South Camden*’s dissent, based upon the language of § 1983.⁵ This broader view embraced the idea that an agency’s regulations, issued pursuant to a broad congressional delegation of power, were not too far removed from Congress’ intent, especially for purposes of enforcement under § 1983.

The justice cited that the language of § 1983 includes regulations. *Id.* at 49. Thus, a court would be wrong “[t]o say that such rights contained in valid regulations issued pursuant to narrow congressional delegations, are enforceable, but that the same rights contained in valid regulations enacted pursuant to broad delegations are not, poses a distinction that exists nowhere in the language.” *Id.* at 51. Using this analysis, plaintiffs like those in *South Camden* may survive the Blessing Test and be able to pursue a private right of action to enforce the state’s regulations.⁶

⁴ Please note that this case is a district court level decision, but is the latest entry by a First Circuit court into the debate regarding the use of § 1983 to enforce disparate-impact regulations.

⁵ 42 U.S.C. § 1983 states:

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

⁶ *But see*, *Gulino v. Bd. Of Educ.*, 236 F.Supp.2d 314 (S.D.N.Y. 2002); *Campaign for Fiscal Equity v. State*, 295 A.D.2d 1, 744 N.Y.S.2d 130 (N.Y. App.Div.1st Dept. 2002).