Roger Williams University Law Review

Volume 26
Issue 1 *Winter 2021*

Article 6

Winter 2021

License to Discriminate: A Rule for Protecting Limited English Proficient Persons from National Origin Discrimination by State Departments of Motor Vehicles

Brandon T. Lozeau
Candidate for J.D., Roger Williams University School of Law, 2021, blozeau601@barrister.rwu.edu

Comments

License to Discriminate: A Rule for Protecting Limited English Proficient Persons from National Origin Discrimination by State Departments of Motor Vehicles

Brandon T. Lozeau*

> *"Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination."*
>
> President John F. Kennedy[1]

INTRODUCTION

In 1963, President John F. Kennedy advocated for Title VI of the Civil Rights Act of 1964 (Title VI), declaring: "Direct discrimination by Federal, State[,] or local governments is

* Candidate for J.D., Roger Williams University School of Law, 2021; M.A., University of Kent–Brussels School of International Studies; B.A., University of Massachusetts–Dartmouth. I would like to thank Professor Jonathan Gutoff for being my advisor, as well as Nicole Shaw Richards for providing valuable edits. Thank you to my friends and family for the love and support.

1. Special Message to the Congress on Civil Rights and Job Opportunities, 1963 PUB. PAPERS 483, 492 (June 19, 1963).

prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious . . . ."[2] The United States Department of Justice (DOJ) explains that Title VI was first proposed as a means of addressing "the then-common practice of denying certain persons access to federally funded services, programs, and activities based on their race, color, or national origin."[3] Indeed, calling out and correcting invidious discrimination, and ensuring it does not infiltrate federally funded and assisted programs and activities is the ultimate goal of Title VI and its implementing regulations.[4]

As of 2017, about sixty-seven million residents of the United States speak a language other than English at home, which is up more than seven million since 2010.[5] Further, almost forty percent[6] of those who speak a language other than English at home—roughly twenty-six million people—informed the United States Census Bureau that they speak English "less than very well."[7] According to the American Community Survey, published in 2015, approximately seven million California residents responded that they do not speak English well, while the same was true for about three-hundred thousand residents in Michigan and roughly eighty-six thousand residents in Rhode Island.[8] Vast

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2. *Id*.

3. U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL 2 (2016), https://www.masslegalservices.org/system/files/library/title_vi_legal_manual_intro_sections_9-21-16-pdf_versionbookmarks_2.pdf [https://perma.cc/3TET-B5MT].

4. *See id*.

5. Karen Zeigler & Steven A. Camarota, *Almost Half Speak a Foreign Language in America's Largest Cities*, CTR. FOR IMMIGR. STUD. (Sept. 19, 2018), https://cis.org/Report/Almost-Half-Speak-Foreign-Language-Americas-Largest-Cities [https://perma.cc/239V-DR5P]. States with the largest increases from 2010 to 2017 were "Wyoming (up [thirty-three] percent); North Dakota (up [thirty] percent); Utah (up [twenty-five] percent); Delaware (up [twenty-four] percent); Nevada (up [twenty-two] percent); Maryland, Nebraska, Kentucky, and Florida (each up [twenty-one] percent); and Minnesota (up [nineteen] percent)." *Id.*

6. Zeigler and Camarota indicate that this figure is solely based on the respondents' opinions of their own English language skills and that the U.S. Census Bureau does not measure language skills. *Id.*

7. *Id.*

8. U.S. CENSUS BUREAU, DETAILED LANGUAGES SPOKEN AT HOME AND ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER: 2009–2013 (2015). According to the 2015 American Community Survey, roughly 19.4% of

segments of the population of the United States must be able to access federally funded and assisted programs in languages other than English in order to participate fully and benefit equally from those programs. To exclude millions of people from government funded programs because they do not speak English equates to widespread and systemic discrimination based on national origin.

If federally funded and assisted programs are not offered in languages other than English, then limited English proficient (LEP) persons[9] are essentially denied meaningful access and a recipient[10] of federal funds may be found to be in violation of Title VI. This is because language can be seen as a proxy for national origin as individuals are inherently limited in their English proficiency "as a result of national origin."[11] When a recipient accepts funds from the federal government, the recipient also "accepts the obligations that go along with it, namely, the obligation not to exclude from participation, deny benefits to, or subject to discrimination an otherwise qualified" LEP person based solely on their language (i.e., national origin).[12] Under Title VI, a recipient enters into a contractual arrangement whereby the recipient agrees to comply with the statute's nondiscrimination provisions as a condition of receiving federal financial assistance.[13] The only way a recipient could avoid this

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Californians, 3.2% of Michiganders, and 8.7% of Rhode Islanders self-identified as unable to speak English well. *See id.*

9. The federal government defines LEP persons as those "[i]ndividuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English." Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74,087, 74,091 (Dec. 14, 2005). The data identifies people who speak a different language "but speak or understand English less than well." *Id.* at 74092 n.7.

10. For the purposes of Title VI and this Comment, "recipient" means "any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary." 28 C.F.R. § 42.102(f) (2003).

11. Exec. Order No. 13166, 65 Fed. Reg. 50,121, 50,121 (Aug. 11, 2000).

12. *See* Chester v. Univ. of Wash., No. C11-5937, 2012 WL 3599351, at *4 (W.D. Wash. Aug. 21, 2012) (recipient of federal funds could not discriminate against "otherwise qualified handicapped individual based solely by reason of her handicap.").

13. U.S. Dep't. of Transp. v. Paralyzed Veterans, 477 U.S. 597, 605 (1986). *See* 28 C.F.R. § 42.105 (2003).

obligation would be to decline federal funds altogether.[14] Thus, if a recipient is found to be in violation of Title VI it risks losing federal funds unless the recipient takes affirmative steps to rectify the discrimination.[15]

Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[16] Therefore, LEP individuals have a right to meaningful access and should be able to participate in and benefit from federally funded and assisted programs and activities to the same degree as their English-speaking neighbors. However, many LEP persons[17] find it difficult to access these services because of language barriers and inadequate language accommodations. Although LEP persons regularly experience difficulties, meaningful access is a critical issue when the services in question are essential to everyday life, such as those provided by a state's department of motor vehicles (DMV). For example, if a DMV offers driver's license examinations and state identification card (ID) applications only in English, then LEP persons may be unable obtain a driver's license or state ID. As recipients of federal financial assistance,[18] DMVs have an undeniable obligation to provide LEP persons meaningful access to their services.[19]

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14. *Chester*, 2012 WL 3599351, at *4.

15. 28 C.F.R. § 42.108(b). "If an applicant or recipient fails or refuses . . . to comply with any requirement imposed by or pursuant to [T]itle VI or this subpart, Federal financial assistance may be suspended, terminated, or refused in accordance with the procedures of [T]itle VI and this subpart." *Id.*

16. 42 U.S.C. § 2000d (1964).

17. In this Comment, the term "LEP persons" does not include those individuals who may be living in the United States undocumented. However, it should be noted that undocumented LEP persons are covered by Title VI. *See* Plyler v. Doe, 457 U.S. 202, 210–11 (1982) (undocumented individuals are considered "persons" when it comes to the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution).

18. According to the United States Department of Transportation's regulations, "[f]ederal financial assistance includes grants, cooperative agreements, training, use of equipment, donations of surplus property, and other assistance." Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74,087, 74,091 (Dec. 14, 2005).

19. *Id.* (listing state departments of transportation and state motor vehicle administrations as recipients of federal financial assistance).

The United States Supreme Court has held that individuals do not have a private cause of action under Title VI for disparate impact discrimination.[20] Further, the Supreme Court has not clearly defined the requisite intent for disparate treatment claims, therefore, every state should enhance discrimination protections for LEP persons seeking DMV services by adopting a "minimum threshold" rule that would: (1) guarantee LEP persons consistent meaningful access to DMV services as the state is the primary provider of important services; (2) help states foresee DMV service disruptions to LEP communities and take proactive measures to prevent such disruptions before they happen; (3) reduce administrative and budgetary burdens through improved planning and a reduction in interpreter and litigation expenses; and (4) provide greater certainty as to which DMV services are readily available in languages other than English for LEP customers.[21] This minimum threshold rule would require state DMVs to provide all services and materials in languages spoken by an established threshold percentage of the population.[22] Each state would enforce the rule and it would provide LEP persons with a private cause of action in state courts. In addition, LEP persons subject to discrimination would be able to file a formal complaint with the federal government and possibly litigate a Title VI claim for intentional discrimination based on national origin.[23]

This Comment will first explore three critical Supreme Court decisions that shaped Title VI's application and individuals' private right of action for disparate impact discrimination under the statute.

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20. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 281, 289–93 (2001); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 282–84 (1978) (Powell, J., plurality).

21. *See, e.g.*, HAW. REV. STAT. § 321C-3 (2012) (state health agencies and covered entities must provide written translations of vital documents to each LEP group that "constitutes five percent or one thousand, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered" by the service, program, or activity).

22. States' rules should include a provision where the minimum threshold is either a specific percentage of the population or a minimum number of individuals, whichever is less, who are "eligible to be served or likely to be affected or encountered" by the DMVs' services, programs, or activities to ensure maximum coverage. *See id.*

23. Because there is not a private cause of action for disparate impact discrimination under Title VI, individuals' complaints must be filed with the federal agency or department from which the recipient receives Federal financial assistance and any litigation would be brought forward by the agency on behalf of the complainant. *See Sandoval*, 532 U.S. at 289–93.

In *Lau v. Nichols*, the Supreme Court held that Title VI allowed individuals to properly sue a recipient of federal funding for both intentional discrimination and disparate impact discrimination.[24] Later, the Supreme Court narrowed Title VI's scope in *Regents of the University of California v. Bakke*, finding that Section 601 of the statute proscribed only intentional discrimination.[25] In 2001, the Supreme Court held in *Alexander v. Sandoval* that if regulations promulgated under Section 602[26] of Title VI prohibit disparate impact discrimination, individuals cannot sue to enforce those regulations because Section 601 of Title VI forbids only intentional discrimination as the Court decided in *Bakke*.[27]

Post-*Sandoval*, the Supreme Court has offered little direction as to exactly what sort of evidence a plaintiff must proffer to constitute the requisite "intent" for a disparate treatment claim under Title VI. This Comment will survey standards and factors set out in subsequent district court and circuit court opinions, as well as incorporate the DOJ's Executive Order (EO) 13166 implementation guidance, to show—in the wake of *Bakke* and *Sandoval*—that one may still be able to show intent when a DMV's facially neutral policies and procedures fail to provide meaningful access for LEP persons. Finally, this Comment will advocate that states adopt a minimum threshold rule to guarantee meaningful access for LEP persons as required by law, lessen states' civil rights complaints and potential litigation, and prevent federal tax dollars

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24. Lau v. Nichols, 414 U.S. 563, 568 (1974).

25. *See Bakke*, 438 U.S. at 318–19 (Powell, J., plurality); *see also Sandoval*, 532 U.S. at 281 (reinforcing that *Bakke* stood for the proposition that "Title VI itself reaches only instances of intentional discrimination." (quoting Alexander v. Choate, 469 U.S. 287, 293 (1985))).

26. Section 602 of Title VI, in pertinent part, states:

> 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.

42 U.S.C. § 2000d-1 (1964).

27. *See Sandoval*, 532 U.S. at 293.

from being used to discriminate against anyone based on race, color, or national origin at state DMVs.

I. BACKGROUND

A. *The Original Purpose and Scope of Title VI*

There are several important civil rights laws and regulations that are meant to protect individuals from discrimination, including Title VI. Specifically, Section 601 of the statute 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" receiving federal financial assistance.[28] The phrase "program or activity" includes the operations of "a department, agency, special purpose district, or other instrumentality of a State or a local government."[29] The DOJ's Title VI regulations provide in pertinent part:

> A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect* of subjecting individuals to discrimination because of their race, color, or national origin, or *have the effect of defeating or substantially impairing accomplishment of the objectives of the program* as respects individuals of a particular race, color, or national origin.[30]

While Congress passed Title VI initially out of concern for public school desegregation, the statute includes "every other area of federal concern, from agriculture to transportation."[31] Section 602 of the statute authorized and directed all federal departments and agencies that provide federal financial assistance to any program or activity[32] "to effectuate the provisions of [S]ection 601

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28. 42 U.S.C. § 2000d (2008).

29. *Id.* § 2000d–4a(1)(A).

30. 28 C.F.R § 42.104(b)(2) (2003) (emphasis added).

31. Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 1, 1 (1981).

32. Under Title VI, federal financial assistance could be in the form of a "grant, loan, or contract other than a contract of insurance or guaranty." 42 U.S.C. § 2000d–1.

with respect to such program or activity by issuing rules, regulations, or orders of general applicability . . . consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."[33] Supreme Court Justice John Paul Stevens supported this construction, arguing Section 602 "exists for the sole purpose of promoting the antidiscrimination ideals laid out in [Section] 601."[34] Later, President William J. Clinton signed EO 13166, which sought to "improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency (LEP)."[35]

Title VI is an important and effective tool—independent of the Fourteenth Amendment's Equal Protection Clause[36]—in the fight against invidious discrimination based on race, color, or national origin.[37] In a comprehensive review of Title VI's legislative history and its subsequent revisions, Professor Charles Abernathy found that the 88th United States Congress "neither intended to mimic the Constitution's [E]qual [P]rotection [C]lause nor to create a new rigid standard."[38] As part of a complicated legislative compromise, Congress embraced "a regulatory model for [T]itle VI that invested federal departments and agencies with the power to define the discrimination forbidden by [T]itle VI."[39] Rather than adopting the Supreme Court's effects test or intent test, Congress "authorized agencies to make the choice through regulations."[40] Although, as

33. *Id.*

34. Alexander v. Sandoval, 532 U.S. 275, 304 (2001) (Stevens, J., dissenting).

35. Exec. Order No. 13,166, 65 Fed. Reg. 50,121, 50,121 (Aug. 11, 2000).

36. *See* U.S. CONST. amend. XIV, § 1.

37. EO 13166 is more bark than bite because Section 5 provides that "[t]his order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person." Exec. Order No. 13,166, 65 Fed. Reg. at 50,121.

38. Abernathy, *supra* note 31, at 3.

39. *Id.*

40. *Id.*

Professor Bradford Mank noted, the Supreme Court's cases that help interpret Title VI are "complex and not easy to summarize."[41]

In its first Title VI case, *Lau v. Nichols*, in 1974, a unanimous Supreme Court adopted the effects test and held that recipients of federal financial assistance may not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination" or those that have "the effect of defeating or substantially impairing accomplishment of the objectives of the program [with] respect [to] individuals of a particular race, color, or national origin."[42] Under *Lau*, recipients that utilize such "criteria or methods of administration" could be held in violation of Title VI not only for intentional discrimination but also disparate impact discrimination.[43] However, the Supreme Court in 1978 significantly curtailed Title VI's application in *Regents of the University of California v. Bakke*.[44] There, a fractured bench[45] strongly suggested proof of intentional discrimination was required to establish that a recipient had violated Title VI.[46] While *Bakke* did not invalidate *Lau*'s effects test, the Supreme Court took a significant step towards eliminating individuals' right to sue for disparate impact discrimination under the statute.[47]

Despite the *Bakke* decision, federal agencies were still allowed to adopt regulations under Section 602 that would prohibit disparate impact discrimination.[48] The Title VI landscape was completely altered in *Alexander v. Sandoval* when the Supreme Court held that private parties could no longer sue to enforce

41. Bradford C. Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. OF CIN. L. REV. 517, 517 (2003).

42. Lau v. Nichols, 414 U.S. 565, 568 (1974) (quoting 45 C.F.R. § 80.3(b)(2)).

43. *Id.* at 567–68.

44. Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001) (explaining that *Bakke*'s limitation of Title VI discrimination to that under the Equal Protection Clauses of the Fifth and Fourteenth Amendments rendered disparate impact discrimination outside of the scope of the statute).

45. In *Bakke*, nine justices issued a total of six opinions: Justice Powell wrote the judgment and two different blocs composed of four justices each joined various parts of Powell's opinion. *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1973).

46. *See id.* at 318–19; Mank, *supra* note 41, at 522.

47. *See Bakke*, 438 U.S. at 318-19.

48. 42 U.S.C. § 2000d–1.

regulations promulgated under Section 602 that include types of discrimination not covered under Section 601, namely disparate impact discrimination.[49] Following *Sandoval*, private causes of action for disparate impact discrimination under Title VI are not justiciable.[50]

B. *Providing Meaningful Access Under Title VI and Executive Order 13166*

EO 13166 directed the DOJ to develop implementation guidance for recipients funded through the department's programs.[51] The DOJ published its guidance in 2002 and it subsequently became the model for all federal departments and agencies.[52] The guidance suggests recipients consider four factors when they develop policies to provide meaningful access for LEP persons:

> (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP [persons] come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs.[53]

The DOJ emphasized that the intent of the above guidance was to "suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing *undue* burdens on small business, *local* government, or small nonprofits."[54] The DOJ implicitly recognized that state-government departments and

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49. *Sandoval*, 532 U.S. at 292.

50. *Id.* Individuals can lodge Title VI disparate impact discrimination claims with federal funding agencies through an administrative process. *See, e.g.*, *File a Title VI Complaint with the FRA*, U.S. DEP'T OF TRANSP., https://railroads.dot.gov/resource-center/title-vi-civil-rights-act-1964/file-title-vi-complaint-fra [https://perma.cc/4L68-VBGM] (last visited Nov. 15, 2020).

51. *See* Exec. Order No. 13166, 65 Fed. Reg. 50,121, 50,121 (Aug. 11, 2000).

52. *See* Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,455 (June 18, 2002).

53. *Id.* at 41,459.

54. *Id.* (emphasis added).

agencies could shoulder a greater burden than small businesses, local government, or small nonprofits, and could make the investments necessary to provide meaningful access in compliance with Title VI.[55]

1. The Supreme Court's Interpretation of Title VI in Lau v. Nichols *Protected LEP Persons from Disparate Impact Discrimination*

In *Lau*, representatives of nearly two thousand "non-English-speaking students of Chinese ancestry" claimed that San Francisco school officials failed to provide instruction on par with instruction given to the students' English-speaking peers, denying thousands of non-English-speaking students a meaningful education in violation of the plaintiffs' rights under the Equal Protection Clause and Title VI.[56] Lower courts held that the school officials did not intentionally discriminate against the students because the city provided the plaintiffs with the same educational opportunities afforded to all other students[57] and any inequality in educational outcomes was the result of the plaintiffs' own "advantages and disadvantages" they "[brought] to the starting line of [their] educational career[s]."[58]

The Supreme Court overturned the court of appeals, reasoning that because school attendance in California was compulsory and students were required to demonstrate English proficiency in order to graduate, there was "no equality of treatment" since the plaintiffs were "effectively foreclosed from any meaningful education."[59] Using an "effects test," the Supreme Court found that violations under Title VI included any action that had the effect of discrimination to "national-origin minorities."[60] This meant that individuals subjected to "disparate impact" discrimination[61] based

55. *See id.*
56. Lau v. Nichols, 414 U.S. 563, 564 (1974).
57. Abernathy, *supra* note 31, at 16.
58. *Id.* (quoting *Lau*, 493 F.2d at 797).
59. *Lau*, 414 U.S. at 566; Abernathy, *supra* note 31, at 16.
60. Abernathy, *supra* note 31, at 17.
61. "Disparate impact discrimination" is discrimination resulting from policies, practices, or rules that may be neutral on the surface, but have a disproportionate impact on a protected group of people. *What are Disparate Impact and Disparate Treatment?,* SOC'Y OF HUMAN RES. MANAGERS,

on race, color, or national origin may sue a recipient under Title VI.[62] The *Lau* Court "clearly considered [T]itle VI to be more than simply a remedy for equal protection violations."[63] If Title VI were only a remedy for equal protection violations, there would not have been much of a reason to include the title in the Civil Rights Act in the first place. Professor Abernathy argued that "[t]he Court in *Lau* relied on the statute, and its underlying regulations, to define a violation as *any* action that has the 'effect' of denying educational opportunities to national-origin minorities."[64] The regulations in question "forbade funding recipients to take actions that *had the effect of* discriminating on the basis of race, color, or national origin."[65] Correctly, the Court proclaimed that Title VI prohibited disparate impact discrimination because "[d]iscrimination is barred which has the effect even though no purposeful design is present."[66]

C. *The Supreme Court Questions* Lau *and Title VI's Scope*

In *Guardians Association v. Civil Service Commission of the City of New York*, Supreme Court Justice Thurgood Marshall pointed out that Congress did not define the term "discrimination" in the statute, arguing Congress deliberately chose not to do so in order to grant federal agencies the flexibility to define the word's meaning in a way most suitable to their individual needs.[67] At the time, Justice Marshall's interpretation of the statute allowed for a private cause of action for both intentional and disparate impact discrimination.[68] Indeed, even the late Supreme Court Justice Antonin Scalia argued that courts "should refuse to consider a

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https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disparateimpactdisparatetreatment.aspx [https://perma.cc/KP53-B7EQ] (last visited Nov. 15, 2020).

62. Abernathy, *supra* note 31, at 17.

63. *Id.*

64. *Id.* (quoting *Lau*, 414 U.S. at 566, 568) (emphasis added).

65. Mank, *supra* note 41, at 521 (emphasis added).

66. *Lau*, 414 U.S at 568. *See also* Mank, *supra* note 41, at 521. Professor Mank underlined the Court's stance in *Lau*, noting that "[t]he Court stated that the [S]ection 602 disparate impact regulations simply '[made] sure that recipients of federal aid . . . conduct[ed] any federally financed projects consistently with [Section] 601.'" *Id.* (quoting *Lau*, 414 U.S. at 570).

67. Mank, *supra* note 41, at 529 (citing Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C., 463 U.S 582, 622–23 (1983) (Marshall, J., dissenting)).

68. *Id.*

statute's legislative history because it is the text alone that is enacted by Congress and presented to the President for his signature or veto."[69] A textualist approach would lead one to believe that because the statute does not prohibit *only* intentional discrimination, then the statute proscribes both intentional discrimination *and* disparate impact discrimination because both fall within the plain meaning of discrimination as it is written in Title VI.[70] As Justice Stevens explained in *Sandoval*, "[Section] 602 explicitly states . . . agencies are authorized to 'effectuate' [Section] 601's antidiscrimination mandate," arguing that "[t]he plain meaning of the text reveals Congress' intent to provide the relevant agencies with sufficient authority to transform the statute's broad aspiration into social reality."[71]

While *Bakke* did not overrule *Lau*, the Supreme Court openly questioned the fundamental result of *Lau*'s holding and expressed "serious doubts concerning correctness of what appear[ed] to be the premise of [the *Lau*] decision."[72] In *Bakke*, the respondent alleged the University of California at Davis admissions program[73] violated

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69. *Id.* at 530 (citing W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 98–99 (1991); Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring); John F. Manning, *Textualism and the Equity of the Statute,* 101 COLUM. L. REV. 1, 70–77 (2001)).

70. *Id.*

71. Alexander v. Sandoval, 532 U.S. 275, 305–06 (2001) (Stevens, J., dissenting) (citing 42 U.S.C. § 2000d–1). This Comment will not address the "*Chevron* doctrine," a well-established principle of administrative law, which provides that "when the agencies charged with administering a broadly worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, [the Court] treat[s] their interpretation of the statute's breadth as controlling unless it presents an unreasonable construction of the statutory text." *Id.* at 309.

72. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 352 (1978) (Brennan, J., concurring in part and dissenting in part).

73. The medical school's admissions program in 1973 allowed candidates to indicate on their applications whether they wanted to be considered as "economically and/or educationally disadvantaged." *Id.* at 274 (Powell, J., plurality). On the 1974 version of the medical school's application, the school asked applicants if they wanted to be considered as part of a "minority group," that is, whether the student was "black," "Chicano," "Asian," or "American Indian." Students that indicated they were a member of a minority group were then separated out and went through a similar admissions procedure to non-minority students, except that they were not required to meet the minimum 2.5 grade point average threshold applied to non-minority applicants. *Id.* While many white disadvantaged students applied through the special

the California Constitution, Title VI, and the Fourteenth Amendment's Equal Protection Clause because it considered race in the school's admissions decisions.[74] While the University's admissions procedures led to an increase in enrollment of Black, Mexican-American, Asian, and American Indian students, the school's special admissions program for "disadvantaged" applicants did not accept any white students even when white applicants qualified as "disadvantaged."[75] Respondent Allan Bakke had a strong application,[76] but the medical school rejected him while four slots remained available through the special admissions program, slots for which he was not considered.[77] As a result, Bakke claimed the special admissions program effectively excluded him from the medical school on the basis of race.[78]

The Supreme Court then suggested the constitutional standards of the Equal Protection Clause were also applicable to Title VI.[79] Writing for the majority, Supreme Court Justice Lewis F. Powell, Jr., opined that Title VI prohibited only those racial

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admissions program, none were considered for places as the special admissions committee only considered special applicants that were members of one of the above minority groups. *Id.* at 276.

74. *Id.* at 269–70.

75. *Id.* at 275–76. While the University did not explicitly define the term "disadvantaged" in its admissions procedures, each application submitted via the special admissions program was reviewed to see if it "reflected economic or educational deprivation." *Id.* at 274–75.

76. In both years in which Bakke's application was rejected, he scored higher on the MCAT, had a better grade point average, and received a higher benchmark admission score than several applicants admitted under the special admissions program. *Id.* at 277.

77. *Id.* at 276.

78. *Id*. at 277–78.

79. Abernathy, *supra* note 31, at 2 (citing *Bakke*, 438 U.S. at 287 (Powell, J., plurality) (Title VI prohibits only state actions that would violate the Fifth Amendment or the Fourteenth Amendment's Equal Protection Clause)); *Bakke*, 438 U.S. at 325, 352 (Brennan, J., concurring in part and dissenting in part) (Title VI meaning of discrimination mirrors its meaning in Constitutional context). The Equal Protection Clause of the Fourteenth Amendment prohibits only intentional discrimination, which can occur in any of three ways: (1) a law or policy may explicitly classify citizens on the basis of a protected category; (2) a facially neutral law or policy may be applied differently on the basis of membership in a protected category; or (3) a facially neutral law or policy may be applied evenhandedly but motivated by discriminatory intent. Faith Action for Cmty. Equity v. Hawaii, No. 13-00450, 2015 U.S. Dist. WL 751134 at *5 (D. Haw. Feb. 23, 2015).

classifications that would violate the Equal Protection Clause or the Fifth Amendment, finding that legislative intent was clear in that Title VI gave no rights other than those guaranteed by the Constitution.[80] However, the Supreme Court ultimately decided not to address whether Title VI granted a private cause of action for disparate impact discrimination because the issue was neither argued nor decided in the lower courts.[81] Thus, the question remained unresolved until *Alexander v. Sandoval*.[82]

D. Sandoval *Significantly Curtailed Title VI's Scope, Limiting Private Individuals' Right to Action to Only Instances of Intentional Discrimination*

In a contentious five–four decision issued on April 24, 2001, the Supreme Court further restricted Title VI's effectiveness and severely limited communities' ability to fight invidious discrimination.[83] Martha Sandoval, individually and on behalf of all others similarly situated, brought a class action suit against the State of Alabama.[84] Sandoval asserted that the State's policy of administering driver's license examinations only in English[85] had a discriminatory impact on non-English speakers based on their national origin, which Sandoval claimed violated her rights under Title VI.[86] Both the United States District Court for the Middle District of Alabama and the United States Court of Appeals for the Eleventh Circuit rejected Alabama's argument that Title VI did not give Sandoval a cause of action to enforce disparate impact regulations promulgated under Section 602.[87] However, the Supreme Court held that "[n]either as originally enacted nor as

80. *Bakke*, 438 U.S. at 287 (Powell, J., plurality).

81. *Id.* at 283.

82. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

83. *See id.*

84. *Id.* at 279.

85. In 1990, the State of Alabama amended its constitution to declare that English was the state's official language—pursuant to its newly amended constitution, the Alabama Department of Public Safety decided to administer state driver's license exams only in English. *Id.* at 278–79 (citing ALA. CONST. amend. 509 (1990)).

86. *Id.* at 279.

87. *Id.*; *see* Sandoval v. Hagan, 197 F.3d 484, 511 (11th Cir. 1999); *see also* Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1273 (M.D. Ala. 1998).

later amended [did] Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under [Section] 602."[88] Thus, Sandoval did not have a private cause of action absent proof of intentional discrimination.

Invoking prior Title VI decisions, Justice Scalia emphasized that "the Court made clear under *Bakke* only intentional discrimination was forbidden by [Section] 601,"[89] and reaffirmed the Court's previous holding that "Title VI itself directly reaches only instances of intentional discrimination."[90] *Sandoval* found that it was "clear now that the disparate-impact regulations do not simply apply [Section] 601—since they indeed forbid conduct that [Section] 601 permits—and therefore clear that the private right of action to enforce [Section] 601 does not include a private right to enforce these regulations."[91] *Sandoval* finally put to rest the question of whether Title VI conferred a private cause of action to enforce disparate impact regulations under Section 602.[92] Justice Scalia concluded that Section 602 did not confer a private cause of action to enforce disparate impact regulations because "a failure to comply with regulations promulgated under Section 602 that is not also a failure to comply with Section 601 is not actionable."[93] The Supreme Court further opined that Section 602 did not create new rights, but merely limited federal agencies to "effectuating" those rights already created under Section 601.[94] Justice Scalia highlighted a lack of evidence "anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under [Section] 602."[95] However, this textualist

88. *Sandoval*, 532 U.S. at 293.

89. *Id.* at 281 (citing Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C., 463 U.S. 582, 610–11 (1983)).

90. *Id.* (quoting Alexander v. Choate, 469 U.S. 287, 293 (1985) (internal quotes omitted)).

91. *Id.* at 285–86 (citing Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (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]")).

92. *Id.* at 286.

93. *Id.* The Court also noted that "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Id.* (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)).

94. *Id.* at 289.

95. *Id.* at 291.

argument works both ways as there is also no evidence anywhere in Title VI that Congress intended to *exclude* disparate impact from the discrimination described in Section 601.[96]

Arguing *stare decisis*,[97] Justice Stevens pointed out in his dissent that "[w]hen this Court faced an identical case [twenty-seven] 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 against non-English speakers."[98] Comparing Title VI to its "gender-based twin," Title IX, Justice Stevens highlighted the Supreme Court's decision in *Cannon v. University of Chicago*, where the Court looked at Title VI and Title IX side by side and "examined the text of the statutes, analyzed the purpose of the laws, and canvassed the relevant legislative history,"[99] concluding that there was "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."[100] In addition, Justice Stevens concluded that one must assume Congress was "fully informed as to the state of the law" and would have indicated its intention to limit Title VI to only intentional discrimination because it was not Congress' first time writing legislation and Congress would have included language limiting Title VI to only intentional discrimination if that was its legislative intent.[101] Indeed, Title VI went through a rigorous legislative process that offered many opportunities to make such a change before the

96. Section 601 simply states that "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 (1964).

97. Justice Stevens argued that he would have affirmed "the decision of the Court of Appeals as a matter of *stare decisis*." *Sandoval*, 532 U.S. at 302 (Stevens, J. dissenting) (emphasis in the original).

98. *Id.* at 296 (emphasis added). Justice Stewart explained in *Lau* that regulations promulgated under section 602 may "go beyond . . . [Section] 601" provided that they are "reasonably related" to section 601's antidiscrimination mandate. Lau v. Nichols, 414 U.S. 563, 571 (1974) (Stewart, J., concurring).

99. *Sandoval*, 532 U.S. at 297.

100. *Id.* (citing Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979)).

101. *Id.* at 314.

statute passed both the United States House of Representatives and the Senate.[102]

As Professor Mank pointed out, even if private plaintiffs may no longer enforce Title VI disparate impact regulations through a private cause of action, the Supreme Court at some point must consider "whether federal agencies may invoke penalties or terminate funding to recipients because of a finding of disparate impact discrimination."[103] Professor Mank argued that "[e]very significant federal agency has disparate impact regulations pursuant to [S]ection 602 of Title VI," and that inevitably a recipient "will appeal an adverse decision by a federal agency using disparate impact regulations and courts will have to address the issue."[104]

E. *Determining "Intent" Under a Post-*Sandoval *Scheme*

Sandoval requires plaintiffs to prove intentional discrimination in Title VI claims,[105] however, the Supreme Court did not provide much additional guidance or factors for how lower courts should assess whether or not an official action that results in discrimination based on a person's race, color, or national origin rises to the requisite level of intent for a plaintiff to succeed in a private cause of action.[106] However, subsequent cases in district courts in Hawaii, New Jersey, Ohio, and the Third Circuit Court of Appeals,[107] paired with guidance from the DOJ, are instructive and collectively provide some useful tests for future Title VI claims.[108]

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102. *See id.*

103. Mank, *supra* note 41, at 540. Professor Mank also pointed out, "[p]ursuant to [S]ection 602 of Title VI, federal agencies must investigate complaints of discrimination and may impose sanctions if there is evidence of discriminatory impacts." *Id.* at n.155 (citing 42 U.S.C. § 2000d–1).

104. *Id.*

105. *See Sandoval*, 532 U.S. at 279.

106. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 497 (D.N.J. 2003).

107. *See* Pryor v. NCAA, 288 F.3d 548 (3rd Cir. 2002); Faith Action for Cmty. Equity v. Hawaii, No. 13-00450, 2015 U.S. Dist. WL 751134 at *1 (D. Haw. Feb. 23, 2015); Almendares v. Palmer, 284 F. Supp. 2d 799 (N.D. Ohio 2003).

108. It is worth noting that the DOJ's guidance for federal funding recipients on how to provide meaningful access for LEP persons was published in 2002 (after *Sandoval*) and serves as the model for all federal departments

Even absent a cause of action for disparate impact under either the Equal Protection Clause or Title VI, the United States District Court for the District of Hawaii in *Faith Action for Community Equity v. Hawaii* (*FACE*) stressed that "disparate impact 'is not irrelevant' to a claim of intentional discrimination."[109]

Post-*Sandoval*, at least one federal district court has found that a recipient's agreement to administer a federally-assisted program and subsequent failure to provide services in accordance with Title VI's nondiscrimination provisions were enough to defeat a motion for judgment on the pleadings.[110] In *Almendares v. Palmer*, the Ohio Department of Job and Family Services (ODJFS) and the Lucas County Department of Job and Family Services (LCDJFS) accepted federal funding for the county's food stamp program, and, therefore, agreed to administer the program in accordance with the Food Stamp Act (FSA) and Title VI.[111] The plaintiffs in *Almendares* were "low-income Spanish-speaking persons" who contended that "notices, applications, and written communications from ODJFS and LCDJFS [were] almost exclusively in English," and that LCDJFS "[did] not have employees available who [were] able to speak to plaintiffs in Spanish."[112] The plaintiffs asserted that defendants effectively denied them their right to "participate equally in the federal food stamp program."[113] The plaintiffs alleged that the ODJFS and LCDJFS failed to conduct the program in accordance with the FSA and Title VI "by using criteria or methods of program administration that intentionally discriminate[d] on the basis of national origin."[114]

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and agencies. *See generally* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002).

109. Faith Action for Cmty. Equity v. Hawaii, 2015 U.S. Dist. LEXIS 21136, at *15 (D. Haw. Feb. 23, 2015) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977)).

110. *See Almendares*, 284 F. Supp. 2d at 803.

111. *Id.* at 802. "Title VI excludes from participation in federal assistance recipients of aid that discriminate against racial groups. The ODJFS and LCDJFS accept[ed] federal funding from the United States Department of Agriculture and are therefore subject to the restrictions of Title VI." *Id.*

112. *Id.* at 800.

113. *Id.*

114. *Id.* at 801.

The ODJFS and LCDJFS argued that the Supreme Court in *Bakke* and *Sandoval* made it clear that in order to state a claim under Title VI, "a private individual must allege intentional discrimination, not disparate impact."[115] However, United States District Judge James G. Carr concluded that the plaintiffs' complaint successfully alleged the "essential elements of a Title VI claim" based on national origin.[116] Judge Carr found that "[t]he existence of the mandate [FSA and its regulations requiring bilingual services] and the defendants' alleged knowing and long-term noncompliance show[ed], arguably, an intent to treat Spanish-speaking recipients of food stamps differently than English-speaking recipients."[117] He concluded that "Spanish-speakers [did] not have the same access to food stamps as English-speakers [did]."[118] The judge also observed that "since *Sandoval*, there is no clear precedent as to what a plaintiff must allege to present a claim for intentional discrimination" under Title VI.[119]

Even without much case law after *Sandoval*, it remains that "[c]laims of intentional discrimination can be based on facially neutral laws or practices."[120] An assessment of whether

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115. *Id.* at 803 ("Section 601 prohibits only intentional discrimination." (citing Alexander v. Sandoval, 532 U.S. 275, 280–81 (2001))).

116. *Id.* Judge Carr referenced his response to the State's argument in their previous motion to dismiss that the plaintiffs must have alleged that the defendants intentionally treated similarly situated persons differently on the basis of national origin. *Id.* at 803. There, he stated that:

> Plaintiffs' complaint, however, allege[d] that they [were] being treated differently. Plaintiffs allege[d] that they [were] being discriminated against on the basis of their Spanish language—thus, their ethnic origin—due to the failure to implement programs mandated by federal law. The existence of the mandate and the defendants' alleged knowing and long-term noncompliance show[ed], arguably, an intent to treat Spanish-speaking recipients of food stamps differently than English-speaking recipients.

Id. at 803 (quoting Almendares v. Palmer, No. 3:00CV7524, 2002 WL 31730963, at *10 (N.D. Ohio Dec. 3, 2002)).

117. *Id.* at 804 (quoting *Almendares*, 2002 WL 31730963, at *10).

118. *Id.*

119. *Id.*

120. *Id.* at 805 ("As we made clear in *Washington v. Davis* . . . and *Arlington Heights v. Metro. Hous. Dev. Corp.* . . . even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S.

discrimination is intentional or unintentional may still begin with a close look at the "impact of the official action" as an "important starting point,"[121] since the impact of an official action or policy is often indicative of the reasons why an action or policy was first created.[122] In another post-*Sandoval* decision, the Third Circuit reversed a Pennsylvania district court decision, holding that a class of African-American student athletes sufficiently stated a claim for intentional discrimination because the National Collegiate Athletic Association (NCAA) "knew—via various studies and reports—that the heightened academic requirements" in the association's newly adopted scholarship and athletic eligibility criteria would "reduce the percentage of black athletes who could qualify for athletic scholarships."[123] The Third Circuit dismissed the plaintiffs' argument on their theory of "deliberate indifference," but found that the plaintiffs could potentially prove the NCAA's discrimination was intentional and remanded the matter for further proceedings.[124]

256, 272 (1979))). In *Feeney*, the Supreme Court held that in order to prove intentional discrimination by a facially neutral policy, a "plaintiff must show that the rule was promulgated or reaffirmed because of, not merely in spite of, its adverse impact on persons in the plaintiff's class." *Id.* (quoting *Feeney*, 442 U.S. at 279).

121. *Id.* (quoting *Arlington Heights*, 429 U.S. at 266). In *Arlington Heights*, the Supreme Court stated:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another,"—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

122. *See* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 487 (1997) ("[T]he impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions.").

123. Pryor v. NCAA, 288 F.3d 548, 564 (3d Cir. 2002).

124. *Id.* at 570. Judge Michel wrote: "[A]s Plaintiffs suggest, [Proposition 16] is void on its face provided Plaintiffs can establish that the NCAA adopted Proposition 16 (and, thus, the condition contained in the Plaintiffs' [National Letters of Intent]) for the purpose of intentionally discriminating on the basis of race." *Id.*

In *Pryor*, Circuit Judge Paul R. Michel accused the plaintiffs of attempting "to sidestep [*Sandoval*] by claiming that the NCAA was not just indifferent to Proposition 16's alleged disparate impact on black athletes" but that the defendant was "extremely indifferent to that impact even if it did not intend to discriminate."[125] Judge Michel saw "no meaningful difference between the proffered 'deliberate indifference' standard and the rule, well settled by the Supreme Court, that a [decision maker] will not commit purposeful discrimination if it adopts a facially neutral policy 'in spite of' its impact, not 'because of' that impact."[126] Judge Michel concluded that the plaintiffs' substitution of intentional discrimination for deliberate indifference would "eviscerate the Supreme Court's ruling in [*Sandoval*]."[127] Therefore, the district court rejected the plaintiffs' "deliberate indifference" standard as a theory of relief under Title VI.[128]

If decision makers' policies and procedures result in unintended discriminatory effects, then the recipient would likely take corrective steps once the discriminatory impact is apparent. Decision makers could either amend or replace the policies or choose to leave the policies intact and allow the discriminatory effects to continue. A deliberate choice to leave discriminatory policies intact despite their effects could not, by definition, be considered unintentional.[129] The discriminatory impact—which may have been unintentional initially—clearly becomes intentional upon the decision makers' choice to allow the discrimination to continue unmitigated. More than deliberate indifference, the decision makers' choice to allow discriminatory impacts to continue uncorrected is just as invidious as intentional discrimination. Similarly, if a recipient's policies and practices have discriminatory effects and those discriminatory effects are brought to the

125. *Id.* at 567.

126. *Id.* (citing *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

127. *Id.* at 568.

128. *Id.*

129. According to U.S. Legal, an omission becomes an intentional act when a person intentionally fails to take action and has knowledge of the action that could be taken. *See Intentional Omission*, U.S. LEGAL, https://definitions.uslegal.com/i/intentionalomission/#:~:text=An%20intentional%20omision%20 is%20the,the%20item%20being%20left%20out [https://perma.cc/KSM5-49ZW] (last visited Nov. 15, 2020).

recipient's attention—and the policies and practices remain in place due to a subsequent failure to mitigate—then the recipient has now engaged in intentional discrimination.

F. *A Minimum Threshold Rule for DMVs is a Win-Win for States and Their LEP Residents*

Although some states may have already developed language access policies,[130] the adoption of a minimum threshold rule would reduce states' administrative burdens and provide greater access and benefits to their LEP constituents. While the Supreme Court has held that individuals no longer have a private cause of action for disparate impact discrimination under Title VI, LEP persons who do not have meaningful access to DMV services offered only in English may still be able to allege intentional discrimination with the right kind of evidence.[131] Absent a clear set of factors from the Supreme Court, we glean insight from several lower courts and the DOJ to navigate a possible path forward for individuals to successfully allege intentional discrimination claims based on national origin. The next section of this Comment will highlight some factors plaintiffs have argued, with varying degrees of success, to prove intent in a post-*Sandoval* world.[132] A minimum threshold rule could moderate the effectiveness of these "intent" arguments advanced in lower courts.[133]

II. PROVING INTENT IN A POST-*SANDOVAL* WORLD

Imagine an LEP person goes to their state's DMV to apply for a driver's license and requests an examination in Spanish. Assuming that the DMV does not have driver's license examinations in any languages other than English, the DMV worker either offers the applicant an English-language exam or

130. *See, e.g.*, N.Y. Exec. Order No. 26 (Oct. 6, 2011); Mass. Exec. Order No. 526 (Feb. 17, 2011).

131. *See supra* Section I.D.

132. Factors include disparate impact, history of state action, and foreseeability and knowledge of discriminatory effect, among others. *Pryor*, 288 F.3d at 563; S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 497 (D.N.J. 2003); Almendares v. Palmer, 284 F. Supp. 2d 799, 806 (N.D. Ohio 2003).

133. *See Pryor*, 288 F.3d at 569; *see also Almendares*, 284 F. Supp. 2d at 805.

does not offer one at all. As a result, the LEP applicant is unable to successfully complete an application for a driver's license in their state of residence and is effectively denied meaningful access to this important service because of the applicant's national origin based on language.[134] The LEP patron at the DMV is "excluded from participation" in the driver's license program, "denied the benefits of" the DMV's services while similarly situated English-speaking customers are not, and the LEP patron is subjected to national origin discrimination because they are being treated worse than English-speaking patrons solely because the LEP patron requires services in a language other than English.[135]

Presumably, the DMV in this example would approach all requests for non-English-language examinations similarly and deny all LEP persons the meaningful access required by law. Each applicant denied access could lodge a Title VI complaint with the federal government, and in each case the state would have to take affirmative steps toward providing meaningful access for LEP applicants in order to avoid a possible loss of funding.[136] In essence, the DMV's decision to deny a driver's license examination to one LEP person leads to a presumption that all LEP persons would be denied meaningful access in much the same way. Ultimately, the state would waste valuable time, energy, and resources dealing with each instance of intentional discrimination when providing language access to all LEP persons would be less costly and reduce the number of future Title VI complaints. However, under *Sandoval*, because the discrimination the applicant experienced

134. In this scenario, the applicant experienced the same kind of intentional discrimination proscribed by Title VI under *Sandoval*. *See generally* Alexander v. Sandoval, 532 U.S. 275 (2001). While a state may provide an LEP person with an interpreter, this is not the most cost-effective measure. For example, if an interpreter charges twenty dollars per hour (maximum) and five LEP persons visit a DMV each day for two hours a piece, the DMV would incur $70,000 in interpreter fees in a single year (assuming the DMV is closed fifteen days per year for holidays, etc.). Interpreters for less common languages might charge substantially higher rates for their services. A state might consider these expenses to be an undue burden—and resist providing interpreters—or pass these costs on to LEP customers. *See* Siddharth Khanijou, Comment, *Rebalancing Healthcare Inequities: Language Service Reimbursement May Ensure Meaningful Access to Care for LEP Patients*, 9 DEPAUL J. HEALTH CARE L. 855, 873 (2005).

135. 42 U.S.C. § 2000d (1964).

136. *See id.* § 2000d(1).

was not outwardly intentional, but rather due to the DMV's policy of providing driver's license examinations only in English, the result is a disparate impact on non-English-speaking customers.[137] The LEP applicant in the example likely would not have any direct evidence that the DMV engaged in intentional discrimination forbidden under Section 601.[138] Even if the DMV gave assurances that it would not engage in disparate impact discrimination pursuant to regulations promulgated under Section 602, the applicant would not have a cause of action.[139]

To contend with *Sandoval*, each state should enhance protections for LEP persons seeking DMV services through the adoption of a minimum threshold rule that would: (1) guarantee LEP persons consistent meaningful access to DMV services as the state is the primary provider of these important services; (2) help states foresee DMV service disruptions to LEP communities and take proactive measures to prevent such disruptions before they happen; (3) reduce administrative and budgetary burdens through improved planning and a reduction in interpreter and litigation expenses; and (4) provide greater certainty as to which DMV services are readily available in languages other than English for LEP customers.[140]

The rule would require state DMVs to provide all services and materials for language groups whose percentage of the state's overall population meets the minimum threshold. Each state would enforce the rule and it would provide LEP persons with a private cause of action in state courts. States serious about codifying prohibitions against disparate impact discrimination in these circumstances could go one step further and declare that if the DMV violates the minimum threshold rule then that violation could serve as proof of intent for a private cause of action for intentional discrimination under Title VI. LEP persons subjected to discrimination would then be able to file a formal complaint with the federal government and possibly litigate a claim for intentional discrimination based on national origin.

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137. *See Sandoval*, 532 U.S. at 275.
138. *See* § 2000d(4).
139. *Sandoval*, 532 U.S. at 282.
140. *See, e.g.*, HAW. REV. STAT. § 321C-3.

A. *Adoption of a Minimum Threshold Rule Would Guarantee Consistent Meaningful Access to DMV Services for a Vast Majority of LEP Persons*

Meaningful access does not exist for LEP persons when DMVs do not provide services in languages other than English across all service channels.[141] The DOJ's guidance for implementation of EO 13166—which mandates recipients of federal financial assistance develop and implement affirmative measures to provide meaningful access to LEP persons—suggests recipients consider the "number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee."[142] For example, supplying interpreters may provide LEP persons with meaningful access in the moment, but this measure may fail to provide the same level of access for LEP persons seeking services online, over the phone, or through the mail.

EO 13166 states that if a recipient fails to implement a language access policy, then it could be found in violation of Title VI's disparate impact regulations and might put the recipient's federal funding at risk of being revoked.[143] The "number or proportion of LEP persons eligible to be served or likely to be encountered"[144] by a state's DMV is almost one-hundred percent because a driver's license or state ID is often required in many aspects of daily life, such as banking, employment, transportation, travel, and more.[145] In fact, since driver's licenses and state IDs

141. Here, "all service channels" includes oral, print, and digital instructions, information, and services. Under the proposed rule, DMVs would also be required to provide interpreters for the road test portion of all LEP persons' driver's license examinations.

142. Faith Action for Cmty. Equity v. Hawaii, No. 13-00450, 2015 U.S. Dist. LEXIS 21136, at *2 (D. Haw. Feb. 23, 2015) (quoting Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,459 (June 18, 2002)).

143. § 2000d(1).

144. Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. at 41,459.

145. Minor children may not need any DMV services, but they will certainly need DMV services once they reach the minimum age required for a driver's

expire, many LEP persons will require DMV services more than once in their lifetimes. However, when application materials, official communications, and employee assistance are provided only in English, LEP persons are effectively denied the benefits of a driver's license or state ID and excluded from being able to participate equally in DMV programs.[146]

Foreseeability and knowledge of the disproportionate burden placed on LEP persons compared to their English-speaking neighbors are also factors in whether a recipient is providing meaningful access to its programs and activities.[147] In *South Camden Citizens in Action*, the plaintiffs based their Title VI claim, in part, on the "knowledge of the impact of a facially neutral policy."[148] The district court denied the New Jersey Department of Environmental Protection's motion to dismiss, finding that the plaintiffs' alleged facts, if proven true, showed "that the [defendant] was well-aware of the potential disproportionate and discriminatory burden placed upon that community and failed to take measures to assuage that burden."[149] The district court found the Supreme Court and Third Circuit's precedents clearly stated "that a case of intentional discrimination is often based upon the type of circumstantial evidence which the SCCIA[150] Plaintiffs allege[d] . . . namely, disparate impact, history of the state action, and foreseeability and knowledge of the discriminatory onus placed upon the complainants."[151]

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license. Almost every LEP person will need DMV services at some point in their life.

146. *See* Almendares v. Palmer, 284 F. Supp. 2d 799, 800–01 (N.D. Ohio 2003).

147. *Id.* at 806; S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 497 (D.N.J. 2003).

148. *Almendares*, 284 F. Supp. 2d at 806; *see S. Camden Citizens in Action*, 254 F. Supp. 2d at 489. In this case, the residents of a mostly minority community sued to enjoin construction of a cement grinding facility, which, plaintiffs claimed, would have a disparate impact on the residents of their community in violation of Title VI. *S. Camden Citizens in Action*, 254 F. Supp. 2d at 489.

149. *Id.* at 497.

150. The district court used this initialism for "South Camden Citizens in Action." *Id.* at 489.

151. *Id.* at 497 (citing Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977); Pryor v. NCAA, 288 F.3d 548, 563 (3d Cir. 2002)).

Without question, meaningful access to services for LEP persons is severely limited when DMVs provide materials, applications, and services only in English. Therefore, it is likely that LEP customers will lodge complaints—whether formally or informally—and put offending DMVs across the country on notice that their conduct has a disproportionate effect on LEP customers.[152] It is feasible, then, that a court may find a DMV's decision not to provide services in other languages in the absence of formal complaints is mere pretext for willful and intentional discrimination based on national origin.[153] "The Supreme Court . . . has recognized that 'disproportionate impact is not the sole touchstone of invidious discrimination,'" but disproportionate impact "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions."[154]

States might argue that it would be difficult to provide meaningful access to each DMV service in every language spoken within a state's borders because of cost or other seemingly practical reasons. To mitigate states' concerns here, a minimum threshold rule would require that a language minority must reach a specific threshold percentage of a state's overall population before the state is required to provide all DMV materials and services in a given language.[155] This threshold could be as low as one-tenth of one percent and still only encompass a small number of languages other than English. For example, in its Title VI Program report submitted in 2018, the Rhode Island Public Transit Authority identified only seven languages other than English that were spoken by more than one-tenth of one percent of the state's

152. *See* Faith Action for Cmty. Equity v. Hawaii, No. 13-00450, 2015 U.S. Dist. LEXIS 21136, at *19 (D. Haw. Feb. 23, 2015) (despite no formal complaints filed, defendant knew complaints had been threatened and requests were made to take driver's license examinations in other languages).

153. *See id.*

154. *S. Camden Citizens in Action*, 254 F. Supp. 2d at 495–96 (citing *Pryor*, 288 F.3d at 563); *see Faith Action for Cmty. Equity*, 2015 U.S. Dist. LEXIS 21136, at *17.

155. In *Faith Action for Community Equity*, Hawaii used U.S. Census Bureau data from 2006 to identify the percentage of the state's population that did not speak English well or at all in order to determine into which languages the state should translate its driver's license examinations. 2015 LEXIS 21136, at *7.

population.[156] Setting a threshold percentage would ensure that DMVs provide the requisite meaningful access to a vast majority of their LEP patrons. The rule would still provide meaningful access on an as-needed basis for languages that fall below the minimum threshold.

B. *Adoption of a Minimum Threshold Rule Would Encourage States to Take Proactive Measures to Avoid Foreseeable Service Disruptions for LEP Persons*

In its EO 13166 guidance, the DOJ indicates recipients should also consider the "frequency with which LEP individuals come into contact with" their services when recipients develop policies to ensure meaningful access for LEP persons.[157] When LEP persons consistently require a recipient's services and are repeatedly denied meaningful access, there is a history of discriminatory state action not merely "in spite of," but rather "because of" non-English-speaking individuals' membership in a protected class.[158] The Supreme Court has said that disparate impact "is not irrelevant"[159] and that when there is no plausible, neutral explanation for a statute's discriminatory impact, the "impact itself would signal that the real classification made by the law was in fact not neutral."[160]

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156. R.I. PUB. TRANSIT AUTH., RIPTA TITLE VI PROGRAM 7 2018-2021 (2018), https://www.ripta.com/wp-content/uploads/2020/06/title_vi_program_2018_2021_final.pdf [https://perma.cc/A9CW-VGA4]. Rhode Island's total LEP population is approximately 84,295 out of a state population of just over one million (8.4%). *Id*. The language breakdown of the total LEP population was as follows: Spanish (57.6%); Portuguese (14.1%); French (7.3%); Mandarin Chinese (3.6%); Cambodian (2.3%); Laotian (2%); Italian (1.6%); and Other (11.5%). *Id*.

157. Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,459 (June 18, 2002).

158. *Pryor*, 288 at 567-68. *See also Faith Action for Cmty. Equity*, 2015 U.S. Dist. LEXIS 21136, at *14. The Ninth Circuit Court of Appeals has stated that "violations of equal protection and Title VI require similar proofs—plaintiffs must show that actions of the defendants had a discriminatory impact, and that defendants acted with intent or purpose to discriminate based upon plaintiffs' membership in a protected class." *Id.* (quoting Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 702–03 (9th Cir. 2009)).

159. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

160. *Faith Action for Cmty. Equity*, 2015 U.S. Dist. LEXIS 21136, at *16.

Taking the Supreme Court's reasoning one step further, it is reasonable to conclude that if the discriminatory impact of a DMV's policies on LEP persons cannot be plausibly explained on neutral grounds, then the policies' impact would indicate that the real reason they were created was not neutral. Such evidence creates a history of state action not of mere indifference, but of purposeful discrimination.

In *FACE*, Hawaii Chief District Court Judge Susan Oki Mollway explained that "[p]urposeful discrimination 'implies more than . . . intent as awareness of consequences.'"[161] "'It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.'"[162] The plaintiffs in that case showed that the Hawaii Department of Transportation (HDOT) "knew it had administered [four thousand] exams in various languages in 2007 in the City and County of Honolulu alone," and that HDOT "knew that translating [the driver's license exam] would have involved minimal time and resources."[163] Judge Mollway concluded that under these circumstances, a jury could "reasonably infer from the delay between 2008 and 2014 that the state intended to discriminate against various national origins, foreseeing the disparate impact" on LEP persons.[164] Similarly, courts in other states could infer that when a DMV is aware of the discriminatory impact of its policies—and could easily course correct without any undue burden but declines to do so—the DMV's discrimination may in fact be intentional.[165]

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161. *Id.* at *15 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

162. *Id.* at *15–16 (quoting *Feeney*, 442 U.S. at 279 (1979)). In fact, the court could consider several factors to determine whether the HDOT engaged in intentional discrimination based on national origin, including:

> (1) statistics demonstrating a "clear pattern unexplainable on grounds other than" discriminatory ones, (2) "[t]he historical background of the decision," (3) "[t]he specific sequence of events leading up to the challenged decision," (4) the defendant's departures from its normal procedures or substantive conclusions, and (5) relevant "legislative or administrative history."

Id. at *17–18 (quoting Pac. Shores Props., L.L.C. v. City of Newport Beach, 730 F.3d 1142, 1158–59 (9th Cir. 2013)).

163. *Id.* at *19.

164. *Id.*

165. *See generally id.*

Similarly, the plaintiffs in *Almendares* alleged that Ohio and Lucas County purposefully discriminated against LEP persons when the defendants "chose to continue a policy of failing to ensure bilingual services and knowing that Spanish-speaking applicants and recipients of food stamps were being harmed as the consequence."[166] The plaintiffs alleged they were "harmed—either by benefits being delayed or changed—because they could not understand the English-language materials."[167] The district court reasoned that if the plaintiffs' claims were true, "one could logically infer that the policy was implemented and [was] being continued 'because of' its impact on national origin."[168]

The defendants in *FACE* and *Almendares* engaged in informed decision-making that purposely denied meaningful access to LEP persons similarly situated to their English-speaking peers on the basis of national origin.[169] In the same way a DMV knows its customers (the residents of the state), it knows or can easily find out the percentage of the population that does not speak English well or at all, and interacts with LEP persons on a regular basis. Adoption of a minimum threshold rule would benefit states because it would provide a clear benchmark for when DMVs are required to provide permanent access across all service channels in specific languages.

C. *Adoption of a Minimum Threshold Rule Would Ensure States, as the Primary Providers of Critical DMV Services, Provide Equal Access for LEP Persons*

DMVs provide undeniably important services.[170] In its EO 13166 guidance, the DOJ identified "the nature and importance of the program, activity, or service provided by the program to people's lives" as a key factor for recipients' consideration as they develop and put in place "a system by which LEP persons can meaningfully

166. Almendares v. Palmer, 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003).

167. *Id*. at 807.

168. *Id.* at 808.

169. *See Faith Action for Cmty. Equity*, 2015 U.S. Dist. LEXIS 21136, at *16–18; *Almendares*, 284 F. Supp. 2d at 808.

170. *See* Sandoval v. Hagan, 197 F.3d 484, 508 (11th Cir. 1999) (finding a lack of driver's licenses adversely impacts individuals via lost economic opportunities, social services, and overall quality of life), *rev'd on other grounds*, Alexander v. Sandoval, 532 U.S. 275, 275 (2001).

access those services."[171] This will ensure the "programs and activities [the DMV] normally provide[s] in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of [T]itle VI of the Civil Rights Act of 1964, as amended, and its implementing regulations."[172]

The U.S. Department of Transportation's Title VI regulations state that "[d]ecisions by a Federal, state, or local entity to make an activity compulsory, such as requiring a driver to have a license, can serve as strong evidence of the importance of the program or activity."[173] Thus, each state should be obligated to provide materials, communications, and services in a variety of languages. A driver's license is often essential for transportation. Without one, an LEP person may be unable to get to work, making it that much more difficult to put food on the table and provide for their family. A driver's license or state ID is necessary to complete employment forms.[174] A valid government-issued photo ID is required to get on an airplane for both domestic and international travel. A person may be required to show ID to purchase beer or wine at a liquor store or buy a pack of cigarettes at a gas station. Some of these reasons may be more serious than others, but LEP persons would be denied the benefits and enjoyment of each of these liberties if they do not have meaningful access to the means of exercising these freedoms.

LEP persons ought to be able to go to a state's DMV, complete an application, and receive services in a language that they understand. LEP patrons should be able to visit a DMV's website and navigate its offerings in the comfort of their own home without the use of a translator. An LEP person's driver's license should not expire because the notice they received in the mail was in a language they did not understand. The failure to provide services in languages other than English—when DMVs are fully aware that

171. Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,459 (June 18, 2002).

172. Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

173. Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74,087, 74,092 (Dec. 14, 2005).

174. One could also use a U.S. passport, but it would likely be extremely difficult, if not impossible, to apply for one without first obtaining a valid state-issued form of identification.

thousands of LEP customers walk through their doors each year—purposefully denies LEP persons the benefits of important services necessary to live in the United States. It is intentional discrimination based on national origin in direct violation of Title VI.[175] As the primary provider of DMV services, implementation of a minimum threshold rule would ensure that states are able to meet the needs of a vast majority of LEP constituents.

D. *A Minimum Threshold Rule Will Reduce Administrative Cost Burdens and Provide Greater Certainty for States and their LEP Residents*

After the federal government, state governments are in the best position and have the most resources available to develop and implement policies and practices that would provide LEP persons meaningful access to DMV services. EO 13166 encourages recipients to "develop and implement a system" to improve access to services for LEP persons but "without undu[e] burden[ ]."[176] In other words, when effectuating the EO's goals, the strain on a recipient's available resources matters only if its LEP improvement plan places too great a burden on the recipient's "fundamental mission."[177] States might argue additional costs are a sufficient burden to warrant noncompliance. However, recipients risk making this argument in bad faith because of the relatively inexpensive costs of making meaningful improvements.

In *FACE*, HDOT did not offer driver's license examinations in languages other than English between 2008 and 2013.[178] Because the State of Hawaii was a recipient of federal financial assistance, HDOT was required to provide meaningful access to services for LEP persons.[179] After conducting surveys and meeting with community members, HDOT requested funding to translate its most recent driver's license examination into twelve languages

175. *See* discussion *supra* Section I.E.

176. Exec. Order No. 13,166, 65 Fed. Reg. at 50,121.

177. *Id.*

178. Faith Action for Cmty. Equity v. Hawaii, No. 13-00450, 2015 U.S. Dist. LEXIS 21136, at *2–10 (D. Haw. Feb. 23, 2015).

179. *Id.* at *6.

besides English.[180] HDOT's request noted the approximate cost of translating the examination was six hundred dollars per language.[181] States might argue that six hundred dollars per language is burdensome on tight administrative budgets. However, the DOJ's guidance mentions undue burdens on "small businesses, *small local governments*, [and] small nonprofits."[182] State governments clearly do not fall within any of the categories mentioned by the DOJ.

Six hundred dollars likely represents a significant cost savings for states compared to costs they would incur for interpreters for each LEP person's visit to the DMV. The translations are also more affordable than litigating potentially countless intentional discrimination claims each year and risking future federal funding entirely simply because the DMV did not have exams in languages other than English. Using data from the annual American Community Survey, DMVs can forecast which language minority groups would reach the state's established threshold percentage requirement for DMV services and budget for those changes in advance which would provide states with some budgetary certainty.[183]

In addition, a minimum threshold rule will create more certainty for LEP persons because they would know in advance whether services will be available in their language. Conversely, language minority groups whose percentage of a state's overall population falls below the established minimum threshold would know in advance that services in their language are not readily available and arrangements with the DMV must be made in advance. However, under a minimum threshold rule most LEP persons would be assured that their state's DMV provides services

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180. *Id*. at *10. Beginning on March 17, 2014, Hawaii's driver's license examination was offered in Chinese, Chuukese, English, Hawaiian, Ilocano, Japanese, Korean, Marshallese, Samoan, Spanish, Tagalog, Tongan, and Vietnamese. *Id.*

181. *Id*.

182. Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,458 (June 18, 2002) (emphasis added).

183. U.S. CENSUS BUREAU, AM. CMTY. SURVEY, https://www.census.gov/history/www/programs/demographic/american_community_survey.html [https://perma.cc/QH22-W3QJ] (last visited Dec. 21, 2020).

in their native language.[184] This would not represent an undue burden on states and such a rule is faithful to the DOJ's guidance and Title VI.

E. *Envisioning a State-Level Minimum Threshold Rule in Action*

Assume that a state provides its DMV administrators with reliable state-level data from the U.S. Census Bureau that shows that in 2020, eight percent (8%) of the population "does not speak English very well."[185] Let us say the eight percent (8%) breaks down as follows: three percent (3%) speak Spanish, two percent (2%) speak Haitian Creole, one percent (1%) speak Arabic, two-thirds of one percent (0.66%) speak Vietnamese, two-fifths of one percent (0.4%) speak Portuguese, one-third of one percent (0.34%) speak Mandarin, three-tenths of one percent (0.3%) speak Italian, two-tenths of one percent (0.2%) speak Norwegian, and one-tenth of one percent (0.1%) speak Somali. Suppose the DMV currently provides services only in English. Assume further that LEP persons have visited the DMV previously and have requested services in their native languages but have effectively been denied services because the DMV has not translated anything into languages other than English.

Upon learning that LEP communities make up the above proportions of the state's population, the DMV continues to provide driver's license examinations only in English, which denies LEP communities the same degree of meaningful access enjoyed by English-speaking patrons. Here, the DMV has made an intentional decision not to provide translated examinations, this discriminates against LEP persons because the DMV has continued its practices knowing full well the discriminatory consequences of its conduct.

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184. In Rhode Island, for example, 86,168 residents aged five years and over speak English less than very well. U.S. CENSUS BUREAU, DETAILED LANGUAGES SPOKEN AT HOME AND ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER: 2009-2013 (2015). Spanish (including Spanish Creole) (50,073), Portuguese (including Portuguese Creole) (13,063), Chinese (2,720), (French Creole (2,367), French (including Patois, Cajun) (2,029), and Italian (1,762) account for 72,014 or almost eighty-four percent of LEP persons in Rhode Island. *Id.*

185. *People that Speak English Less Than "Very Well" in the United States,* U.S. CENSUS BUREAU (Apr. 8, 2020), https://www.census.gov/library/visualizations/interactive/people-that-speak-english-less-than-very-well.html [https://perma.cc/N774-HGMA].

This is not mere "deliberate indifference" and represents intentional discrimination because there is no plausible explanation on neutral grounds for the DMV's continuation of its discriminatory practices.[186]

In order to avoid complaints of intentional discrimination, and possible litigation, the state should adopt a rule that when an LEP community's population rises above an established minimum threshold percentage of the state's overall population, the DMV must automatically translate driver's license and state ID applications, provide on-call, real-time interpreting services, full website translations, and all other services in the necessary language. States would be granted a one-year grace period to make these accommodations for languages that qualify under the rule.[187] During this grace period, however, DMVs would be required to cover the costs of interpreters and translators as needed in order to incentivize timely compliance with the rule. In this example, imagine the state adopts a threshold percentage of one-third of one percent (0.33%), or two-thousand individuals, whichever is less. Here the DMV must make the above-mentioned language access improvements for Spanish, Haitian Creole, Arabic, Vietnamese, Portuguese, and Mandarin-speaking LEP patrons because these language groups comprise more than the state-established threshold.

Presumably the DMV would be less likely to encounter someone who speaks Italian, Norwegian, or Somali than someone who speaks Spanish or Arabic. Under the proposed rule, the DMV would not be obligated to make all of the same improvements for language minority groups that fall below the established threshold percentage. Therefore, Italian, Norwegian, and Somali speakers would have to make arrangements for language accommodations in advance (the DMV is still obligated to provide meaningful access under Title VI).[188] These language accommodations would differ in that the DMV would be required to translate materials and provide interpreter services only for the specific purpose of the LEP person's

186. Faith Action for Cmty. Equity, No. 13-00450 2015 U.S. Dist. WL 751134 at *6 (D. Haw. Feb. 23, 2015).

187. Using data from the most recent American Community Survey, DMVs would be able to anticipate whether a specific language group is likely to reach (or fall below) the state's qualifying threshold in the coming year or two.

188. This is based on the assumption that none of these language groups consist of more than two-thousand individuals.

visit. However, this minimum threshold rule would cover a large majority of states' LEP persons while also being mindful of limited resources. If a language minority's population reaches the established threshold in subsequent years, the DMV could request or earmark resources in anticipation of the need to make the requisite language access improvements within the one-year grace period.

CONCLUSION

In a post-*Sandoval* landscape, it is without question that LEP persons currently do not have a private cause of action for disparate impact discrimination based on race, color, or national origin against recipients of federal financial assistance under Title VI.[189] What remains unclear is what evidence a plaintiff must show to prove the discriminatory effects of a recipient's conduct are intentional and not merely the result of "deliberate indifference."[190] Absent clear guidance from the Supreme Court or Congress—and for the reasons set forth above—each state should adopt a proposed minimum threshold rule as a meaningful step towards codifying prohibitions on disparate impact discrimination on a state level and to prevent taxpayer dollars from funding the kind of invidious discrimination that spurred passage of the Civil Rights Act of 1964.

189. *See generally* Alexander v. Sandoval, 532 U.S. 275 (2001); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

190. Pryor v. NCAA, 288 F.3d 548, 567–68 (3d Cir. 2002).