

109TH CONGRESS
2^D SESSION

S. 4009

To restore, reaffirm, and reconcile legal rights and remedies under civil rights statutes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 29, 2006

Mr. MENENDEZ introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To restore, reaffirm, and reconcile legal rights and remedies under civil rights statutes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Environmental Justice
5 Enforcement Act of 2006”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) This Act is made necessary by a decision of
9 the Supreme Court in *Alexander v. Sandoval*, 532
10 U.S. 275 (2001) that significantly impairs statutory

1 protections against discrimination that Congress has
2 erected over a period of almost 4 decades. The
3 Sandoval decision undermines these statutory pro-
4 tections by stripping victims of discrimination (de-
5 fined under regulations that Congress required Fed-
6 eral departments and agencies to promulgate to im-
7 plement title VI of the Civil Rights Act of 1964 (42
8 U.S.C. 2000d et seq.)) of the right to bring action
9 in Federal court to redress the discrimination and
10 by casting doubt on the validity of the regulations
11 themselves.

12 (2) The Sandoval decision attacks settled expect-
13 ations created by title VI of the Civil Rights Act of
14 1964. In 1964 Congress adopted title VI of the Civil
15 Rights Act of 1964 to ensure that Federal dollars
16 would not be used to subsidize or support programs
17 or activities that discriminated on racial, color, or
18 national origin grounds.

19 (3) From the outset, Congress and the execu-
20 tive branch made clear that the regulatory process
21 would be used to ensure broad protections for bene-
22 ficiaries of the law. The first regulations promul-
23 gated by the Department of Justice under title VI
24 of the Civil Rights Act of 1964 forbade the use of
25 “criteria or methods of administration which have

1 the effect of subjecting individuals to discrimination
2 . . .” (section 80.3 of title 45, Code of Federal Regu-
3 lations) and prohibited retaliation against persons
4 participating in litigation or administrative resolu-
5 tion of charges of discrimination brought under the
6 Act. These regulations were drafted by the same ex-
7 ecutive branch officials who played a central role in
8 drafting title VI of the Civil Rights Act of 1964.

9 (4) These regulations have never been invali-
10 dated. In 1966, Congress considered and rejected a
11 proposal to invalidate the disparate impact regula-
12 tions promulgated pursuant to title VI of the Civil
13 Rights Act of 1964. The Supreme Court has recog-
14 nized that Congress’s failure to disapprove regula-
15 tions implies that the regulations accurately reflect
16 congressional intent. *North Haven Bd. of Educ. v.*
17 *Bell*, 456 U.S. 512, 533–34 (1982).

18 (5) Title VI of the Civil Rights Act of 1964 was
19 designed to confer a benefit on persons who were
20 discriminated against. Title VI of such Act relied
21 heavily on private attorneys general for effective en-
22 forcement. Congress acknowledged that it could not
23 secure compliance solely through enforcement ac-
24 tions initiated by the Attorney General. *Newman v.*

1 Piggie Park Enterprises, 390 U.S. 400 (1968) (per
2 curiam).

3 (6) The Supreme Court has made it clear that
4 individuals suffering discrimination in violation of
5 title VI of the Civil Rights Act of 1964 have a pri-
6 vate right of action in the Federal courts, and that
7 this is necessary for effective protection of the law,
8 although Congress did not make such a right of ac-
9 tion explicit in the statute. *Cannon v. University of*
10 *Chicago*, 441 U.S. 677 (1979).

11 (7) Notwithstanding the decision of the Su-
12 preme Court in *Cort v. Ash*, 422 U.S. 66 (1975) to
13 abandon prior precedent and require explicit statu-
14 tory statements of a right of action, Congress and
15 the Courts both before and after *Cort* have recog-
16 nized an implied right of action under title VI of the
17 Civil Rights Act of 1964. For example, Congress has
18 consistently provided the means for enforcing the
19 statutes. In 1972, Congress established a right to
20 attorney's fees in private actions brought under title
21 VI of the Civil Rights Act of 1964.

22 (8) The Supreme Court had no basis in law or
23 in legislative history in *Sandoval* for denying a right
24 of action under regulations promulgated pursuant to
25 title VI of the Civil Rights Act of 1964 while permit-

1 ting it under the statute. The regulations were con-
2 gressionally mandated and their promulgation was
3 specifically directed by Congress under section 602
4 of that Act (42 U.S.C. 2000d-1) “to effectuate” the
5 antidiscrimination provisions of the statute. Title VI
6 of the Civil Rights Act of 1964 stressed the impor-
7 tance of the regulations by requiring them to be
8 “approved by the President”.

9 (9) Regulations that prohibit practices that
10 have the effect of discrimination are consistent with
11 prohibitions of disparate treatment that require a
12 showing of intent, as the Supreme Court has ac-
13 knowledged in the following decisions:

14 (A) A disparate impact standard allows a
15 court to reach discrimination that could actu-
16 ally exist under the guise of compliance with
17 the law. *Griggs v. Duke Power Co.*, 401 U.S.
18 424 (1971).

19 (B) Evidence of a disproportionate burden
20 will often be the starting point in any analysis
21 of unlawful discrimination. *Village of Arlington*
22 *Heights v. Metropolitan Hous. Dev. Corp.*, 429
23 U.S. 252 (1977).

24 (C) An invidious purpose may often be in-
25 ferred from the totality of the relevant facts, in-

1 including, where true, that the practice bears
2 more heavily on one race than another. Wash-
3 ington v. Davis, 426 U.S. 229 (1976).

4 (D) The disparate impact method of proof
5 is critical to ferreting out stereotypes under-
6 lying intentional discrimination. Watson v. Fort
7 Worth Bank & Trust, 487 U.S. 977 (1988).

8 (10) The interpretation of title VI of the Civil
9 Rights Act of 1964 (42 U.S.C. 2000d et seq.) as
10 prohibiting practices that have disparate impact and
11 that are not justified as necessary to achieve the
12 goals of the programs or activities supported by the
13 Federal financial assistance is powerfully reinforced
14 by the use of such a standard in enforcing title VII
15 of the Civil Rights Act of 1964 (42 U.S.C. 2000e et
16 seq.). When the Supreme Court wavered on the ap-
17 plication of a disparate impact standard under title
18 VII, Congress specifically reinstated it as law in the
19 Civil Rights Act of 1991 (Public Law 102–166; 105
20 Stat. 1071).

21 (11) By reinstating a private right of action
22 under title VI of the Civil Rights Act of 1964, Con-
23 gress is not acting in a manner that would expose
24 entities subject to that title to unfair findings of dis-
25 crimination. The legal standard for a disparate im-

1 pact claim has never been structured so that a find-
2 ing of discrimination could be based on numerical
3 imbalance alone.

4 (12) In contrast, a failure to reinstate or con-
5 firm a private right of action would leave vindication
6 of the rights to equality of opportunity solely to Fed-
7 eral agencies, which may fail to take necessary and
8 appropriate action because of administrative over-
9 burden or other reasons. Action by Congress to
10 specify a private right of action is necessary to en-
11 sure that persons will have a remedy if they are de-
12 nied equal access to education, housing, health, envi-
13 ronmental protection, transportation, and many
14 other programs and services by practices of entities
15 subject to title VI of the Civil Rights Act of 1964
16 that result in discrimination.

17 (13) As a result of the Supreme Court's deci-
18 sion in *Sandoval*, courts have dismissed numerous
19 claims brought under the regulations promulgated
20 pursuant to title VI of the Civil Rights Act of 1964
21 that challenged actions with an unjustified discrimi-
22 natory effect.

23 (14) The right to maintain a private right of
24 action under a provision added under this Act to
25 title VI of the Civil Rights Act of 1964 will be effec-

1 tuated by a waiver of sovereign immunity in the
2 same manner as sovereign immunity is waived under
3 the remaining provisions of that title.

4 **SEC. 3. PROHIBITED DISCRIMINATION.**

5 Section 601 of the Civil Rights Act of 1964 (42
6 U.S.C. 2000d) is amended—

7 (1) by striking “No” and inserting “(a) No”;

8 and

9 (2) by adding at the end the following:

10 “(b)(1)(A) Discrimination (including exclusion from
11 participation and denial of benefits) based on disparate
12 impact is established under this title only if—

13 “(i) a person aggrieved by discrimination on the
14 basis of race, color, or national origin (referred to in
15 this title as an ‘aggrieved person’) demonstrates that
16 an entity subject to this title (referred to in this title
17 as a ‘covered entity’) has a policy or practice that
18 causes a disparate impact on the basis of race, color,
19 or national origin and the covered entity fails to
20 demonstrate that the challenged policy or practice is
21 related to and necessary to achieve the nondiscrim-
22 inatory goals of the program or activity alleged to
23 have been operated in a discriminatory manner; or

24 “(ii) the aggrieved person demonstrates (con-
25 sistent with the demonstration required under title

1 VII with respect to an ‘alternative employment prac-
2 tice’) that a less discriminatory alternative policy or
3 practice exists, and the covered entity refuses to
4 adopt such alternative policy or practice.

5 “(B)(i) With respect to demonstrating that a par-
6 ticular policy or practice causes a disparate impact as de-
7 scribed in subparagraph (A)(i), the aggrieved person shall
8 demonstrate that each particular challenged policy or
9 practice causes a disparate impact, except that if the ag-
10 grieved person demonstrates to the court that the elements
11 of a covered entity’s decisionmaking process are not capa-
12 ble of separation for analysis, the decisionmaking process
13 may be analyzed as one policy or practice.

14 “(ii) If the covered entity demonstrates that a specific
15 policy or practice does not cause the disparate impact, the
16 covered entity shall not be required to demonstrate that
17 such policy or practice is necessary to achieve the goals
18 of its program or activity.

19 “(2) A demonstration that a policy or practice is nec-
20 essary to achieve the goals of a program or activity may
21 not be used as a defense against a claim of intentional
22 discrimination under this title.

23 “(3) In this subsection, the term ‘demonstrates’
24 means meets the burdens of production and persuasion.

1 “(c) No person in the United States shall be sub-
 2 jected to discrimination, including retaliation, because
 3 such person opposed any policy or practice prohibited by
 4 this title, or because such person made a charge, testified,
 5 assisted, or participated in any manner in an investiga-
 6 tion, proceeding, or hearing under this title.”.

7 **SEC. 4. RIGHTS OF ACTION.**

8 Section 602 of the Civil Rights Act of 1964 (42
 9 U.S.C. 2000d–1) is amended—

10 (1) by inserting “(a)” before “Each Federal de-
 11 partment and agency which is empowered”; and

12 (2) by adding at the end the following:

13 “(b) Any person aggrieved by the failure of a covered
 14 entity to comply with this title, including any regulation
 15 promulgated pursuant to this title, may bring a civil action
 16 in any Federal or State court of competent jurisdiction
 17 to enforce such person’s rights.”.

18 **SEC. 5. RIGHT OF RECOVERY.**

19 Title VI of the Civil Rights Act of 1964 (42 U.S.C.
 20 2000d et seq.) is amended by inserting after section 602
 21 the following:

22 **“SEC. 602A. ACTIONS BROUGHT BY AGGRIEVED PERSONS.**

23 “(a) CLAIMS BASED ON PROOF OF INTENTIONAL
 24 DISCRIMINATION.—In an action brought by an aggrieved
 25 person under this title against a covered entity who has

1 engaged in unlawful intentional discrimination (not a
2 practice that is unlawful because of its disparate impact)
3 prohibited under this title (including its implementing reg-
4 ulations), the aggrieved person may recover equitable and
5 legal relief (including compensatory and punitive dam-
6 ages), attorney’s fees (including expert fees), and costs,
7 except that punitive damages are not available against a
8 government, government agency, or political subdivision.

9 “(b) CLAIMS BASED ON THE DISPARATE IMPACT
10 STANDARD OF PROOF.—In an action brought by an ag-
11 grievied person under this title against a covered entity
12 who has engaged in unlawful discrimination based on dis-
13 parate impact prohibited under this title (including its im-
14 plementing regulations), the aggrieved person may recover
15 equitable relief, attorney’s fees (including expert fees), and
16 costs.”.

17 **SEC. 6. EFFECTIVE DATE.**

18 (a) IN GENERAL.—This Act, and the amendments
19 made by this Act, are retroactive to April 24, 2001, and
20 effective as of that date.

21 (b) APPLICATION.—This Act, and the amendments
22 made by this Act, apply to all actions or proceedings pend-
23 ing on or after April 24, 2001, except as to an action
24 against a State on a claim brought under the disparate

- 1 impact standard, as to which the effective date is the date
- 2 of enactment of this Act.

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