

110TH CONGRESS
2D SESSION

S. 2918

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

IN THE SENATE OF THE UNITED STATES

APRIL 24, 2008

Mr. MENENDEZ (for himself, Mrs. CLINTON, Mr. DURBIN, and Mr. LAUTENBERG) 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 2008”.

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), which established a new precedent

1 for the interpretation of statutory protections
2 against discrimination that Congress has erected
3 over a period of almost 4 decades. The Sandoval de-
4 cision limits the statutory protections by stripping
5 victims of discrimination (defined under regulations
6 that Congress required Federal departments and
7 agencies to promulgate to implement title VI of the
8 Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.))
9 of the right to bring action in Federal court to re-
10 dress the discrimination and by casting doubt on the
11 validity of the regulations themselves.

12 (2) The Sandoval decision established a new
13 precedent for the interpretation of title VI of the
14 Civil Rights Act of 1964. In 1964 Congress adopted
15 title VI of the Civil Rights Act of 1964 to ensure
16 that Federal dollars would not be used to subsidize
17 or support programs or activities that discriminated
18 on racial, color, or 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 right of action regulations promulgated
23 pursuant to title VI of the Civil Rights Act of 1964
24 were congressionally mandated and their promulga-
25 tion was specifically directed by Congress under sec-

1 tion 602 of that Act (42 U.S.C. 2000d-1) “to effec-
2 tuate” the antidiscrimination provisions of the stat-
3 ute. Title VI of the Civil Rights Act of 1964 stressed
4 the importance of the regulations by requiring them
5 to be “approved by the President”.

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

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

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

21 (C) An invidious purpose may often be in-
22 ferred from the totality of the relevant facts, in-
23 cluding, where true, that the practice bears
24 more heavily on one race than another. *Wash-*
25 *ington v. Davis*, 426 U.S. 229 (1976).

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

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

18 (11) By reinstating a private right of action
19 under title VI of the Civil Rights Act of 1964, Con-
20 gress is not acting in a manner that would expose
21 entities subject to that title to unfair findings of dis-
22 crimination. The legal standard for a disparate im-
23 pact claim has never been structured so that a find-
24 ing of discrimination could be based on numerical
25 imbalance alone.

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

14 (13) Following the Supreme Court's decision in
15 Sandoval, courts have dismissed numerous claims
16 brought under the regulations promulgated pursuant
17 to title VI of the Civil Rights Act of 1964 that chal-
18 lenged actions with an unjustified discriminatory ef-
19 fect.

20 (14) The right to maintain a private right of
21 action under a provision added under this Act to
22 title VI of the Civil Rights Act of 1964 will be effec-
23 tuated by a waiver of sovereign immunity in the
24 same manner as sovereign immunity is waived under
25 the remaining provisions of that title.

1 **SEC. 3. PROHIBITED DISCRIMINATION.**

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

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

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

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

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

21 “(ii) the aggrieved person demonstrates (con-
22 sistent with the demonstration required under title
23 VII with respect to an ‘alternative employment prac-
24 tice’) that a less discriminatory alternative policy or
25 practice exists, and the covered entity refuses to
26 adopt such alternative policy or practice.

1 “(B)(i) With respect to demonstrating that a par-
2 ticular policy or practice causes a disparate impact as de-
3 scribed in subparagraph (A)(i), the aggrieved person shall
4 demonstrate that each particular challenged policy or
5 practice causes a disparate impact, except that if the ag-
6 grieved person demonstrates to the court that the elements
7 of a covered entity’s decisionmaking process are not capa-
8 ble of separation for analysis, the decisionmaking process
9 may be analyzed as 1 policy or practice.

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

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

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

21 “(c) No person in the United States shall be sub-
22 jected to discrimination, including retaliation, because
23 such person opposed any policy or practice prohibited by
24 this title, or because such person made a charge, testified,

1 assisted, or participated in any manner in an investiga-
 2 tion, proceeding, or hearing under this title.”.

3 **SEC. 4. RIGHTS OF ACTION.**

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

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

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

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

14 **SEC. 5. RIGHT OF RECOVERY.**

15 Title VI of the Civil Rights Act of 1964 (42 U.S.C.
 16 2000d et seq.) is amended by inserting after section 602
 17 the following:

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

19 “(a) CLAIMS BASED ON PROOF OF INTENTIONAL
 20 DISCRIMINATION.—In an action brought by an aggrieved
 21 person under this title against a covered entity who has
 22 engaged in unlawful intentional discrimination (not a
 23 practice that is unlawful because of its disparate impact)
 24 prohibited under this title (including its implementing reg-
 25 ulations), the aggrieved person may recover equitable and

1 legal relief (including compensatory and punitive dam-
2 ages), attorney’s fees (including expert fees), and costs,
3 except that punitive damages are not available against a
4 government, government agency, or political subdivision.

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

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