Resurrecting Environmental Justice: Enforcement of EPA's Disparate-Impact Regulations Through Clean Air Act Citizen Suits

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RESURRECTING ENVIRONMENTAL JUSTICE: ENFORCEMENT OF EPA’S DISPARATE-IMPACT REGULATIONS THROUGH CLEAN AIR ACT CITIZEN SUITS

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Abstract: The environmental justice movement aims to eradicate disparate siting of environmental hazards in minority and low-income communities. Prior to the Supreme Court’s decision in Alexander v. Sandoval, environmental justice advocates had focused their efforts on enforcement of EPA’s disparate-impact regulations. These regulations prohibit recipients of federal funding from administering any program that has the effect of racial discrimination. However, the Sandoval decision declared that no private right of action existed to enforce the regulations. Despite this significant setback, the regulations may still be enforceable in circumstances where an appropriate statutory handle exists. For example, section 110(a)(2)(E) of the Clean Air Act requires states to provide assurances that their plans comply with federal law. To the extent the disparate-impact regulations remain valid federal law, they may be enforced through actions to compel EPA to reject plans that do not include the requisite assurances. This Note explores the substantive and procedural issues surrounding such actions.

INTRODUCTION

At just over two decades old, the environmental justice movement is a relatively young movement.¹ Having arisen in response to

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the phenomenon known as “environmental racism,” the environmental justice movement merged two previously isolated social problems: environmental deterioration and racial injustice. The movement has gained considerable momentum as minority and low-income communities continue to bear a disproportionate burden of environmental hazards, as compared to more affluent, Caucasian communities. The disparity arose in large part because of NIMBYism, the “not-in-my-backyard” mentality most communities feel when faced with the siting of an environmental hazard. Because of the diminished resources and the disenfranchisement of minority and low-income communities, they are frequently subjected to a significantly greater proportion of environmental hazards.

Disproportionate environmental burdens generally manifest themselves in three distinct ways: (1) disparate siting and permitting of hazardous facilities; (2) disparate enforcement of environmental statutes and regulations; and (3) disparate remediation of contaminated sites. Not surprisingly, these communities also suffer from de-
teriorated health and increased mortality rates as a result of these “disparate impacts.”

Environmental justice attempts to resolve this disparity by incorporating social equity considerations into environmental decisionmaking and enforcement.

While early environmental justice litigation focused on claims brought under the Equal Protection Clause of the Fourteenth Amendment, a more recent trend has been to bring private actions under Title VI of the Civil Rights Act of 1964. Specifically, past suits have sought to enforce disparate-impact regulations promulgated by the Environmental Protection Agency (EPA) pursuant to EPA’s Title VI authority. Recent decisions by the Supreme Court and the Court of Appeals for the Third Circuit, however—both holding that Title VI regulations confer no implied right of action—have severely restricted, if not altogether eliminated, citizens’ ability to privately enforce these regulations.

Although these recent decisions have led many commentators to believe that achievement of environmental justice through private enforcement of disparate-impact regulations has been foreclosed, there is reason to believe that these disparate-impact regulations may still be privately enforceable in limited circumstances where Congress has provided an appropriate statutory “handle.” One such handle may be section 110(a)(2)(E) of the Clean Air Act (CAA), which requires each state to provide assurances, prior to EPA approval, that the state is not prohibited by federal law from carrying out its proposed state im-

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9 See, e.g., Gauna, supra note 1, at 30; Core, supra note 8, at 191–92.

10 Core, supra note 8, at 194 & n.16.


13 See Sandoval, 532 U.S. at 293; South Camden III, 274 F.3d at 790–91.

14 See, e.g., Seth Schofield, Achieving Environmental Justice Through Title VI: Is It a Dead End?, 26 VT. L. REV. 905, 925–26 (2002); Core, supra note 8, at 242; Suzanne Smith, Note, Current Treatment of Environmental Justice Claims: Plaintiffs Face a Dead End in the Courtroom, 12 B.U. PUB. INT. L.J. 223, 256 (2002).

15 See discussion infra Part II.

plementation plan (SIP). Assuming arguendo that EPA’s disparate-impact regulations constitute valid federal law, the provision prohibits EPA from approving portions of SIPs that would result in racial discrimination. Should such a SIP be approved, the CAA’s citizen suit provision could arguably provide a means of compelling the Administrator to reject SIPs found to violate section 110(a) (2)(E).

This Note will outline the structure and arguments of such a citizen suit. Part I.A briefly explores the history of the environmental justice movement, focusing on enforcement mechanisms. Part I.B examines the recent developments regarding implied rights of action, including the recent limitations imposed by decisions in the Supreme Court and the Third Circuit. Part II then suggests that while these recent decisions have led many to believe that EPA’s disparate-impact regulations are no longer privately enforceable, there may be a statutory avenue through which these regulations can still be privately enforced: section 110(a)(2)(E) and the citizen suit provision of the CAA. Finally, Part III explores the substantive and practical challenges that may be faced in enforcing these regulations via a CAA citizen suit. The Note ultimately concludes that there are strong legal arguments to be made that EPA must reject SIPs that fail to provide necessary assurances of their compliance with disparate-impact regulations, and that EPA can therefore be compelled to do so through citizen-initiated litigation.

I. History of Environmental Justice Advocacy

When the environmental justice movement began, advocates believed that the Equal Protection Clause of the Fourteenth Amendment, which provides that “no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws,” was plaintiffs’ best strategy for challenging environmentally discriminatory action. Such constitutionally based litigation, however, posed a unique obstacle due to the requirement that a
plaintiff prove discriminatory intent. In other words, a plaintiff was required to show that defendants acted with an explicit racially discriminatory purpose. Even where the effects of state action are discriminatory, however, it is nearly impossible to show that the state acted with the express intent of causing such discrimination—indeed, in many cases, states genuinely do not intend the discriminatory effects of their policies. Yet, regardless of whether the discriminatory distribution of environmental harm is intended or not, the effect is the same, and the need for a remedy just as pressing.

Given the difficulty of proving discriminatory intent, environmental justice plaintiffs shifted their focus to certain regulations promulgated under Title VI of the Civil Rights Act of 1964, which explicitly proscribed disparate impacts, regardless of intent. Title VI consists of two parts, both of instrumental value to environmental justice: section 601 prohibits agencies that receive any kind of federal financial assistance from discriminating against individuals based on race; section 602 states that agencies are “directed to effectuate the provisions of section [601] . . . by issuing rules, regulations, or orders of general applicability.” Pursuant to this authority, in 1973 EPA promulgated “disparate-impact” regulations that prohibited recipients of EPA funding from engaging in acts that had discriminatory effects.

23 Id. at 194–95.
24 Colopy, supra note 1, at 146.
25 Core, supra note 8, at 194–95; see also Eileen Gauna, An Essay on Environmental Justice: The Past, the Present, and Back to the Future, 42 Nat. Resources J. 701, 704 (2002) (noting that, in studies demonstrating the existence of environmental racism, “[f]or obvious reasons, direct evidence of racial targeting is nowhere to be found”).
28 42 U.S.C. § 2000d. “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.” Id.
29 Id. § 2000d-1.
30 Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 40 C.F.R. § 7.35(b) (2004). The regulation reads:

A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

Id.
Private litigation under EPA disparate-impact regulations appeared at one time to be a promising avenue for the environmental justice movement. The reduced burden meant that plaintiffs needed only to allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities. However, the strategy was short-lived. In 2001, the Supreme Court held in *Alexander v. Sandoval* that there was no implied private right of action to directly enforce agencies’ Title VI disparate-impact regulations. Efforts to privately enforce the regulations were further curtailed following a decision in the Third Circuit holding that EPA’s disparate-impact regulations are not enforceable under § 1983 either.

A. Avenues of Enforcement

1. Administrative Enforcement

While a private individual’s right to administrative adjudication has not been limited by the courts, there is some question as to the efficiency and effectiveness of the administrative process. In 1993, EPA created the Office of Civil Rights (OCR) at the urging of President William Jefferson Clinton, who shortly thereafter promulgated an Executive Order on environmental justice. Executive Order 12,898 directed agencies to make environmental justice a priority by instructing them to incorporate environmental justice aims into their missions and to specifically address their Title VI responsibilities. OCR was created with the intent that it would assist in securing compliance with EPA’s disparate-impact regulations.

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32 E.g., *Powell v. Ridge*, 189 F.3d 387, 393 (3d Cir. 1999) (“[A] plaintiff in a Title VI disparate impact suit bears the initial burden of establishing a prima facie case that a facially neutral practice has resulted in a racial disparity.”).
33 See *Core*, *supra* note 8, at 236, 242.
35 See *South Camden III*, 274 F.3d 771, 790–91 (3d Cir. 2001).
37 See *id.* at 647.
An individual who believes there has been a violation of EPA’s disparate-impact regulations may file a complaint with OCR.\textsuperscript{40} Following the filing of a compliant, OCR is required to respond within twenty days by accepting, rejecting, or forwarding the complaint to the appropriate federal agency.\textsuperscript{41} If accepted, OCR will notify the involved parties and give each an opportunity to respond in writing to the alleged violations.\textsuperscript{42} Once the parties have had a chance to respond to the complaint, informal resolution is attempted.\textsuperscript{43} If unsuccessful, OCR will notify the alleged violator of the preliminary finding of noncompliance, advise the party how voluntary compliance might be achieved, and inform the party of its right to engage in compliance negotiation.\textsuperscript{44} The alleged violator then has fifty days to either comply with OCR’s recommendations or challenge the preliminary finding of noncompliance.\textsuperscript{45} Should the recipient fail to meet this deadline, OCR sends the violator and the Assistant Attorney General for Civil Rights a formal determination of noncompliance.\textsuperscript{46} The party found to be noncompliant then has ten days from the receipt of OCR’s formal determination to voluntarily comply; otherwise, OCR may begin a proceeding to terminate the party’s EPA funding.\textsuperscript{47}

Among the advantages to administrative enforcement is that the process is relatively easy and inexpensive to commence.\textsuperscript{48} To initiate administrative review, all a complainant needs to do is send a letter to OCR alleging discrimination by a recipient of federal funding.\textsuperscript{49} EPA then conducts the investigation at its own expense.\textsuperscript{50} Though legal counsel may be helpful to a complainant, it is not necessary.\textsuperscript{51} There are, however, many significant drawbacks to relying on administrative

\textsuperscript{40} Id. § 7.120(a). The complaint must be filed within 180 days of the alleged discriminatory act. Id. § 7.120(b)(2).
\textsuperscript{41} Id. § 7.120(d)(1)(i).
\textsuperscript{42} Id. § 7.120(d)(1)(ii). The alleged violator has 30 days to submit a response. Id. § 7.120(d)(1)(iii).
\textsuperscript{43} Id. § 7.120(d)(2)(i).
\textsuperscript{44} Id. § 7.115(c)(1)(i)–(iii).
\textsuperscript{45} Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 40 C.F.R. § 7.115(d)(1)–(2) (2004).
\textsuperscript{46} Id. § 7.115(d)(2).
\textsuperscript{47} Id. §§ 7.115(e), 7.130(a)–(b).
\textsuperscript{49} Rechtschaffen & Gauna, supra note 48, at 353.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
enforcement. First and foremost, OCR has been criticized for its ineffectiveness and inefficiency in providing victims of Title VI discrimination adequate relief, and for the secrecy of its investigations.\(^{52}\) Between September 1993 and August 1998, OCR came to no conclusion on at least one in every four complaints filed.\(^{53}\) Furthermore, it did not find that a single complaint had established a violation of Title VI.\(^{54}\) As of 2002, 121 claims had been filed with OCR, but only one case had been decided on its merits after an investigation.\(^{55}\) Such inefficiency and ineffectiveness is likely the result of an overworked and under-resourced staff.\(^{56}\) OCR, like similar civil rights offices in other agencies, is responsible for addressing all civil rights claims, not just those arising under Title VI. The enactment of subsequent civil rights statutes has led to an increase in the number of complaints filed, an increase that has not been matched by agency staffing or congressional appropriation.\(^{57}\)

Another drawback to administrative enforcement is that, aside from providing specific documentation and information at EPA’s request, a complainant has no right to participate in the agency’s investigation.\(^{58}\) Furthermore, there is also some question as to how vigorously EPA can be expected to pursue funding termination.\(^{59}\) Understandably, EPA is reluctant to remove federal funding that is used to reduce pollution.\(^{60}\) Ironically, termination of funding could adversely affect the very

\(^{52}\) Worsham, supra note 1, at 647–48.
\(^{53}\) Id. at 648. Of the 58 complaints filed in this period, no conclusion was reached in at least 15 of them. Id.
\(^{54}\) Id.
\(^{55}\) Rechtschaffen & Gauna, supra note 48, at 354. The one decision reached was in the Select Steel case, where EPA dismissed the Title VI claim, finding that no adverse discriminatory effect would accrue from a challenged facility otherwise in compliance with air quality standards. See Office of Civil Rights, EPA, File No. 5R-98-R5, Investigative Report for Title VI Administrative Complaint 42, http://www.epa.gov/civilrights/docs/ssdec_ir.pdf (last visited Apr. 19, 2005).
\(^{56}\) See Mank, supra note 27, at 27; Note, After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement, 116 Harv. L. Rev. 1774, 1778 (2003).
\(^{57}\) Note, supra note 56, at 1778.
\(^{58}\) Rechtschaffen & Gauna, supra note 48, at 353; Mank, supra note 48, at 22.
\(^{59}\) See Mank, supra note 48, at 17–18; Long, supra note 5, at 1171.
\(^{60}\) See Mank, supra note 48, at 17–18; Colopy, supra note 1, at 182 n.279; Long, supra note 5, at 1171. In fact, EPA at times has admitted as much. Colopy, supra note 1, at 182 n.279. In 1971, EPA Administrator William Ruckelshaus acknowledged that EPA’s reluctance to enforce compliance with Title VI stemmed from the agency’s belief that many regulated industries might view a termination of funding as a benefit and excuse not to comply with environmental regulations. Id. In Administrator Ruckelshaus’s words: “[T]here are circumstances that can arise where it would seem that our ability to achieve the purposes of the Civil Rights Act flies in the face of our mandate by Congress to insure that water quality standards are
minority groups OCR is charged with protecting, providing a further disincentive for EPA to enforce disparate-impact regulations to their fullest extent.61

Recently, there have been indications that EPA may have a renewed commitment to environmental justice,62 though many are still skeptical.63 In June 2000, EPA jointly published two Title VI guidance reports intended to assist funding recipients with their permitting programs and outlining procedures for investigating Title VI administrative complaints.64 Particularly encouraging was the guidance reports’ statement that, “[funding recipients] are required to operate [their] programs in compliance with the non-discrimination requirements of Title VI and EPA’s implementing regulations.”65 At least one court has taken notice of this requirement.66 Commentators, however, have criticized the guidance reports as creating, rather than diminishing, obstacles to Title VI enforcement by failing to account for resource disparities and favoring funding recipients at nearly every phase of the administrative process.67

As an alternative to administrative enforcement, many Title VI plaintiffs have sought judicial enforcement of EPA’s disparate-impact regulations through private litigation. While private litigation has been crucial to the environmental justice movement, and to Title VI enforcement in particular, in light of recent federal decisions, such litigation has been severely limited.68

61 See supra note 48, at 18.
62 See Kyle W. La Londe, Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval, 31 B.C. Envtl. Aff. L. Rev. 27, 38 n.76 (noting that in 2001, then-Administrator Christine Todd Whitman declared EPA to have “a firm commitment to the issue of environmental justice and its integration into all programs, policies, and activities, consistent with existing environmental laws”).
63 See infra note 67 and accompanying text.
64 Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650 (June 27, 2000).
65 Id. at 39,657.
67 See supra note 5, at 1213.
2. Judicial Enforcement

Judicial enforcement is often thought to better address the concerns of environmental justice complainants than administrative enforcement, but it is also not without its drawbacks. Among the advantages is that a litigant has far more rights than an administrative complainant, including the ability to direct one’s own investigation and potentially obtain equitable relief. A Title VI plaintiff is also entitled to reasonable attorney fees. Additionally, legal action may provoke political opposition to a particular project or siting decision in ways that administrative investigations cannot. The high cost of legal action, however, can act as a deterrent to the pursuit of court enforcement. Furthermore, given the courts’ somewhat “fractured” history of Title VI regulation, judicial enforcement presents significant risks. It would appear though, particularly given the criticism of administrative enforcement, that the benefits of seeking court enforcement far outweigh the burdens.

The first major Supreme Court treatment of Title VI with relevance to the disparate-impact regulation debate was Regents of the University of California v. Bakke. The Bakke decision is often thought to have declared that Title VI prohibits only intentional discrimination, for the Court stated that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” A year later the Court acknowl-
edged, in *Cannon v. University of Chicago*, that to the extent that Title VI regulations provided protection against discrimination, be it disparate-impact and/or intentional discrimination, they created a private right of action to enforce those protections.\(^{79}\) Despite these decisions, the scope of Title VI protections was hardly settled. In 1983, the Court revisited the *Bakke* debate in *Guardians Ass’n v. Civil Service Commission of New York*.\(^{80}\) The Court’s decision in *Guardians* lacked a majority opinion and instead consisted of five separate and overlapping opinions, each differing slightly on the scope of the Title VI regulations.\(^{81}\) In his concurring opinion, Justice Powell speculated that, “[o]ur opinions today will further confuse rather than guide.”\(^{82}\) What some commentators have taken from *Guardians* is that among the various opinions, five justices implicitly agreed that Title VI regulations could prohibit disparate-impact discrimination.\(^{83}\) However, since this was

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\(^{79}\) See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694, 696 (1979) (analogizing the Title IX issue before them to Title VI, the Court noted that “[i]n 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy”).

\(^{80}\) 463 U.S. 582 (1983).

\(^{81}\) *Id.* at 584–607 (White, J., for the Court); *id.* at 607–12 (Powell, J., concurring); *id.* at 612–15 (O’Connor, J., concurring); *id.* at 615–34 (Marshall, J., dissenting); *id.* at 635–45 (Stevens, J., dissenting).

\(^{82}\) *Id.* at 608 (Powell, J., concurring). Indicating just how convoluted the opinions in *Guardians* were, one commentator attempted to clarify the decision in the following manner:

> [T]wo justices in two opinions agreed that Title VI prohibited intentional and unintentional discrimination and seven justices in three opinions agreed that Title VI prohibited only intentional discrimination, but five justices in three opinions agreed that Title VI regulations could prohibit unintentional discrimination. Two justices in two opinions agreed that Title VI regulations could prohibit unintentional discrimination because Title VI prohibited unintentional discrimination, and three justices in one opinion agreed that Title VI regulations could prohibit unintentional discrimination even though Title VI itself prohibited only intentional discrimination.


\(^{83}\) See *Guardians*, 463 U.S. at 592–93 (White, J., for the Court); *id.* at 623 (Marshall, J., dissenting); *id.* at 643 (Stevens, J., dissenting, joined by Blackmun and Brennan, JJ.); see also *Mank*, *supra* note 48, at 33; Mattheisen, *supra* note 82, at 63; Smith, *supra* note 14, at 239.
not the holding of the Court, it has sustained little support in subsequent judicial decisions.\textsuperscript{84}

In contrast to the \textit{Guardians} decision, \textit{Alexander v. Choate} consisted of one unanimous opinion.\textsuperscript{85} The \textit{Choate} Court declared that \textit{Guardians} stood for two principles. First, “Title VI itself directly reached only instances of intentional discrimination.”\textsuperscript{86} Second, the Court stated that \textit{Guardians} also held that “actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.”\textsuperscript{87} \textit{Choate}, particularly its reading of \textit{Guardians}, would appear to be a unanimous endorsement of agencies’ ability to promulgate disparate-impact regulations, despite criticism that this reading of \textit{Guardians} relies on statements made in dicta.\textsuperscript{88} In any event, these cases set the groundwork for the next environmental justice task: determining whether disparate-impact regulations were privately enforceable.

**B. The Rise and Fall of the Implied Right of Action**

In determining whether an implied right of action exists to enforce a statute, the Supreme Court has employed a four-factor test adopted from the 1975 case \textit{Cort v. Ash}.\textsuperscript{89} First, the statute must have been enacted to benefit a class of which the plaintiff is a member; second, there must be implicit or explicit evidence that Congress intended to create the remedy; third, the judicial remedy must be consistent with the underlying purpose of the legislative scheme; and fourth, the federal right of action must not infringe on important state concerns.\textsuperscript{90} The \textit{Cort} analysis has also been used to imply private

\textsuperscript{86} \textit{Id.} at 293.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} Mattheisen, \textit{supra} note 82, at 64–66 (arguing that because \textit{Choate} involved section 504 of the Rehabilitation Act of 1973 and \textit{Guardians} was a case concerning Title VI, the analogy between the two statutes was made in dicta).
\textsuperscript{89} 422 U.S. 66, 78 (1975).
\textsuperscript{90} \textit{Id.}
rights of action to enforce rules and regulations promulgated by administrative agencies. Should a rule or regulation pass the *Cort* factors, an implied right of action will be found if “the agency rule is properly within the scope of the enabling statute, and . . . implying a private right of action will further the purpose of the enabling statute.” Using this analysis and the Supreme Court’s Title VI decisions, courts in recent years have been asked to find an implied private right of action under Title VI that would allow plaintiffs to enforce disparate-impact regulations.

1. Chester Residents: Implying a Private Right of Action

Chester Residents Concerned for Quality Living brought suit against the Pennsylvania Department of Environmental Protection (PADEP), alleging that the department’s issuance of a permit to a soil remediation facility in the city of Chester violated, among other things, EPA’s disparate-impact regulations. The city of Chester, located in Delaware County, Pennsylvania, had a population of 42,000 people, sixty-five percent of whom were African American. The remainder of the county had a population of 502,000, over ninety percent of whom were Caucasian, and only 6.2% of whom were African American. According to plaintiffs, PADEP had granted five waste facility permits for sites in Chester, while only granting two permits for sites in the rest of the County. Additionally, plaintiffs alleged that the city of Chester had a permit capacity of 2.1 million tons of waste per year, as compared to the 1400 tons per year at non-Chester facilities. In ruling in favor of Chester Residents, the Court of Appeals for the Third Circuit declined to find an implied private right of action embedded in either Supreme Court precedent or its own precedent, despite the plaintiffs’ conten-
tion that one existed. Instead, it conducted its own analysis to find that an implied cause of action did indeed exist to enforce EPA’s disparate-impact regulations. The court reasoned that: (1) EPA’s disparate-impact regulations were within the scope of Title VI; (2) the Supreme Court factors from Cort v. Ash properly permitted implication of a private right of action; and (3) implying a private right of action furthered the purpose of Title VI.

Unfortunately, the Supreme Court never had the chance to address the issue. While on certiorari to the Court, Pennsylvania withdrew the challenged permits, leading the Court to dismiss the case as moot and vacate the Third Circuit’s decision. Though the Chester Residents decision was vacated and dismissed, it remains a significant case for environmental justice, as it was the first time any circuit addressed the issue of implied private rights of action to enforce EPA’s disparate-impact regulations. Furthermore, its analysis has been revived in subsequent decisions in the Third Circuit, such as Powell v. Ridge, where the court reiterated its conclusion in Chester Residents that an implied right of action exists under EPA’s disparate-impact regulations.

2. South Camden I: Continued Support for an Implied Right of Action

Three years after the decision in Chester Residents, the question of whether an implied right of action could be found to enforce EPA’s disparate-impact regulations was to be litigated once again. Plaintiffs in South Camden Citizens in Action v. New Jersey Dep’t of Environmental Protection (South Camden I) alleged that in granting a Clean Air Act permit to the St. Lawrence Cement Company (SLC) to operate a pollutant-emitting plant in the Waterfront South neighborhood of Camden, New Jersey, the New Jersey Department of Environmental Protection (NJDEP) violated EPA’s disparate-impact regulations. At the time suit was filed, ninety-one percent of Waterfront South’s residents

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99 Id. at 931–33.
100 Chester Residents, 132 F.3d at 933–36.
101 Id. at 933–36.
103 See Core, supra note 8, at 206.
104 Seif, 524 U.S. at 974.
105 Core, supra note 8, at 206.
106 See 189 F.3d 387, 397–400 (3d Cir. 1999); see also Core, supra note 8, at 206.
108 Id. at 451.
belonged to racial minorities.\footnote{Id. Of Waterfront South’s 2132 residents, 63% were African American, 28% were Hispanic, and 9% were Caucasian. Camden County, in which Waterfront South was located, was over 75% Caucasian. \textit{Id.} at 451, 459.} Not only was Waterfront South a minority community, it was also a low-income community: more than half the residents lived at or below the federal poverty level.\footnote{\textit{Id.} at 459. The median income in Waterfront South was $15,082, a mere 38% of the county’s overall median income of $40,027. \textit{Id.}} Additionally, the neighborhood—which covered an area of less than one square mile\footnote{Steve Strunsky, \textit{Air Is Heavy with Pollution, and Resentment}, N.Y. Times, May 28, 2001, at B5.}—was already home to three county-run industrial sites, including a sewage plant and a trash-to-steam plant, two Superfund sites, four sites under investigation for the release of hazardous substances, and fifteen other sites identified by the NJDEP as contaminated.\footnote{\textit{South Camden I}, 145 F. Supp. 2d at 451.} Despite these pre-existing hazards and the demonstrably poor health of Waterfront South’s residents,\footnote{Included in the court’s findings of fact is a detailed account of the alarmingly poor health of the residents of Waterfront South. \textit{Id.} at 460–68. Uncontested expert testimony showed that African American residents of Camden County suffered a higher cancer rate than the rest of the state. \textit{Id.} at 461. Additionally, residents of Waterfront South reported an asthma rate twice that of the rate reported by residents in the rest of the city of Camden. \textit{Id.}} SLC was granted a permit that would have allowed its plant to emit particulate matter, mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulfur oxide, volatile organic compounds, and radioactive material.\footnote{\textit{Id.} at 454, 469.}

The court, in finding a violation of EPA’s Title VI regulations, issued a preliminary injunction vacating the permit granted to SLC, despite the fact that the facility was otherwise in compliance with EPA’s emissions limitations.\footnote{\textit{Id.} at 468–69, 496, 505.} This holding was predicated on two findings: (1) in addition to compliance with environmental standards, NJDEP had an obligation under Title VI to consider the racially discriminatory disparate impacts of issuing a permit to SLC;\footnote{\textit{Id.} at 474.} and (2) plaintiffs had established a prima facie case of disparate-impact discrimination based on race.\footnote{\textit{Id.} at 493. The court further found that NJDEP had failed to meet its rebuttal burden of showing that it had a substantial legitimate justification or a legitimate nondiscriminatory reason for its practice. \textit{Id.} at 495–97.} The court’s decision relied heavily on precedents such as \textit{Chester Residents} and \textit{Powell} in declaring that an implied private right of
action existed to enforce EPA’s disparate-impact regulations. Though short-lived, the *South Camden I* decision, particularly its declaration that there exists a privately enforceable right to compel permitting agencies to consider the disparate impacts of their actions, was a tremendous victory for environmental justice advocates.


Just five days after the *South Camden I* ruling, the Supreme Court handed down its decision in *Alexander v. Sandoval*, finding that no implied private right of action exists to enforce disparate-impact regulations promulgated under section 602 of Title VI. Though not an environmental justice case, the Court’s decision in *Sandoval* had sweeping consequences for private enforcement of all Title VI disparate-impact regulations.

Martha Sandoval challenged the Alabama Department of Public Safety’s decision to administer the state driver’s license test only in English, alleging that such a policy had the effect of discriminating based on national origin in violation of Title VI. The Court addressed only the issue of whether a private cause of action can be found to enforce section 602 disparate-impact regulations. In the 5 to 4 decision, Justice Scalia, writing for the majority, acknowledged that “private individuals may sue to enforce § 601 of Title VI and ob-

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118 See *South Camden I*, 145 F. Supp. 2d at 473–74. This decision was not reached in a vacuum, however. The court took special notice of a pending Supreme Court case, which it acknowledged could overturn its ruling should the Supreme Court decide the issue differently. *Id.* Absent a decision from the Supreme Court, however, the *South Camden I* court was bound by Third Circuit precedent and ruled accordingly, despite SLC’s insistence that the Supreme Court would soon find that Title VI disparate-impact regulations do not give rise to implied rights of action. *Id.* at 474.


120 La Londe, *supra* note 62, at 27 (“On April 24, 2001, the Supreme Court dealt a major blow to the environmental justice movement. Its decision in *Alexander v. Sandoval* changed the landscape of the environmental justice movement, overturning thirty years of precedent and forcing environmental justice advocates to search for new mechanisms to pursue their goals.” (footnote omitted)). See generally Core, *supra* note 8 (explaining the environmental justice consequences of *Sandoval*).

121 *Sandoval*, 532 U.S. at 278–79. Alabama’s Department of Public Safety received federal funding from the United States Department of Justice and Department of Transportation, thereby subjecting itself to the provisions of Title VI. *Id.* at 278.

122 *Id.* at 279.
tain both injunctive relief and damages.” However, the Court stated that section 601 prohibited only intentional discrimination, not disparate impacts. Quoting Regents of University of California v. Bakke, the Court noted that “§ 601 proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” Therefore, the Court reasoned, the right to enforce disparate-impact regulations could not come from section 601, since such regulations prohibit conduct that is permitted under section 601. Instead, if a private right of action were to be found, it would need to be found in section 602 itself.

Turning its attention to an analysis of section 602, the Court found that, unlike section 601, section 602 lacked any “rights-creating language” indicative of a congressional intent to create a private right of action. Additionally, the Court determined that the language of section 602 did not appear to provide any congressionally intended private remedies. Absent any indication that Congress intended to create a private right of action or remedy under section 602, regulations promulgated under that section cannot create them, and therefore, the Court determined that no private right of action existed to enforce disparate-impact regulations.

The Court further implicitly criticized the application of the Cort factors to regulations, declaring that agency regulations can merely invoke a private right of action that Congress has created in the text of the enabling statute, but they may not create a right where Congress has not, irrespective of the outcome of a Cort analysis. To use

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123 Id. (citing Cannon v. Univ. of Chi., 441 U.S. 677 (1979), which, in finding a private right of action under Title IX, analogized the statute to Title VI of the Civil Rights Act of 1964).
124 Id. at 280–81.
125 Id. (alteration in original) (internal quotation marks omitted). The Court also relied on Guardians and Alexander v. Choate as affirmation of this principle.
126 Id. at 285.
127 Sandoval, 532 U.S. at 286. The right to enforce disparate-impact regulations, in Justice Scalia’s own words, “must come, if at all, from the independent force of § 602.” Id. (emphasis added). Justice Scalia’s language throughout the opinion hinted that perhaps administrative agencies lacked the authority to promulgate disparate-impact regulations under section 602, but as this issue was not raised by the parties, it was not discussed by the Court. See infra text accompanying notes 135–38.
128 Sandoval, 532 U.S. at 288–89.
129 Id. at 289–90.
130 Id. at 291, 293.
131 See id. at 291.
Justice Scalia’s analogy, “[a]gencies may play the sorcerer’s apprentice but not the sorcerer himself.”

In his dissent, Justice Stevens suggested that, despite the Court’s decision, plaintiffs seeking to enforce disparate-impact regulations, “in all likelihood must only reference § 1983 to obtain relief.” There is some question as to the validity of this statement, however, as some commentators have suggested that perhaps Sandoval eliminated the ability of plaintiffs to enforce disparate-impact regulations through § 1983 as well.

What is most striking about the Sandoval decision is Justice Scalia’s thinly veiled suggestion that agencies may lack the authority to promulgate disparate-impact regulations under section 602 of Title VI altogether. Even though the Court assumed, without deciding, that such regulations were in fact valid federal law, the majority displayed some concerns with this assumption. Wrote Justice Scalia:

[W]e must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601. Though no opinion of this Court has held that, five Justices in Guardians voiced that view of the law . . . . These statements are in considerable tension with the rule of Bakke and Guardians that § 601 forbids only intentional discrimination, but petitioners have not challenged the regulations here. We therefore assume for the purposes of deciding this

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132 Id.
133 Id. at 300. Enforcing disparate-impact regulations through § 1983 was an idea that Justice Stevens had suggested in previous opinions. See Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 638 (1983) (Stevens, J., dissenting); Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 n.21 (1979); see also Core, supra note 8, at 218–19. Section 1983 states:

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


134 See Core, supra note 8, at 224–36.


136 See Sandoval, 532 U.S. at 281–82.
case that [Title VI] regulations proscribing activities that have a disparate impact on the basis of race are valid.\textsuperscript{137}

Language throughout the opinion suggested that Justice Scalia did not believe this assumption was well grounded.\textsuperscript{138}

The implications of this decision are extensive, affecting everything from the environmental justice movement\textsuperscript{139} to broader civil rights concerns.\textsuperscript{140} Given the importance of judicial enforcement of environmental justice, the loss of a private right of action to enforce EPA’s disparate-impact regulations was a crushing blow.\textsuperscript{141} Therefore, environmental justice plaintiffs, no longer able to directly enforce disparate-impact regulations, took Justice Stevens’s suggestion, and focused their efforts on § 1983 actions as a means of private enforcement.\textsuperscript{142} While this strategy enjoyed some initial success, it too was short-lived.\textsuperscript{143}

4. \textit{South Camden II} and \textit{III}: Further Restricting Enforcement of Disparate-Impact Regulations

Following the Court’s decision in Sandoval, which implicitly overruled the district court’s finding in \textit{South Camden I}, the parties to the \textit{South Camden I} litigation, were asked by District Judge Stephen Orlof-

\textsuperscript{137} \textit{Id.} (citations omitted). Absent a challenge to this assumption, the Court was unable to address its validity. One commentator has argued that, while perhaps an “unofficial holding” of the case, the Court in Sandoval implicitly invalidated disparate-impact regulations on the ground that such regulations exceeded agencies’ authority under the enabling statute—Title VI of the Civil Rights Act of 1964. \textit{See} Laufer, \textit{supra} note 135, at 1627–35.

\textsuperscript{138} \textit{See Sandoval}, 532 U.S. at 285 (“It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.”); id. at 286 (“[The right to enforce Title VI regulations] must come, if at all, from the independent force of § 602.”).

\textsuperscript{139} \textit{See generally} Core, \textit{supra} note 8.

\textsuperscript{140} \textit{See} Linda Greenhouse, \textit{In Year of Florida Vote, Supreme Court Also Did Much Other Work}, N.Y. Times, July 2, 2001, at A12 (noting that the Sandoval decision “substantially limited the effectiveness of one of the most important civil rights laws, Title VI of the Civil Rights Act of 1964”).

\textsuperscript{141} \textit{See} Core, \textit{supra} note 8, at 239–42. Core argues that in denying an implied private right of action to enforce disparate-impact regulations, the Sandoval decision essentially eliminated the possibility of using § 1983 to enforce the regulations as well. \textit{Id.} In other words, the Court’s decision “clos[ed] the courtroom door to Title VI disparate impact plaintiffs.” \textit{Id.} at 224.

\textsuperscript{142} S. Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot., 145 F. Supp. 2d 505, 509 (D.N.J. 2001) [\textit{South Camden II}].

\textsuperscript{143} \textit{South Camden III}, 274 F.3d 771, 790–91 (3d Cir. 2001).
sky to submit briefs regarding the effect of the Sandoval ruling on the South Camden I decision. Specifically, the parties were asked to address whether Title VI disparate-impact regulations may still be enforced through § 1983, thereby entitling plaintiffs to injunctive relief. Having concluded that the Sandoval decision had not precluded plaintiffs from asserting a § 1983 claim, the District Court analyzed whether Title VI regulations created a federal right under which plaintiffs could assert a § 1983 violation. The court used the standards established by the Supreme Court in Blessing v. Freestone to determine whether disparate-impact regulations created federal rights. First, the court, relying on the Supreme Court decision Wright v. City of Roanoke, determined that agencies were capable of creating rights through their rulemaking authority, which had the “force and effect of law.” Then, applying the Blessing standard, the court concluded that EPA’s Title VI regulations created a right to be

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144 South Camden II, 145 F. Supp. 2d at 509.
145 Id.
146 Id. at 518. The court, expressly heeding Justice Scalia’s admonition that courts are “bound by holdings, not language,” id. at 513, carefully parsed the Sandoval decision and concluded that the Supreme Court had not specifically addressed the § 1983 question. Id. at 513–18.
147 Id. at 518–19.
148 520 U.S. 329 (1997). The Blessing standard, as quoted by the court in South Camden II, requires:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precautionary, terms.

Id. at 340–41.
149 The South Camden II court distinguished its analysis from the analyses courts generally have applied when determining the presence of an implied right of action. An implied right of action analysis, the court noted, is conducted using the four Cort factors, including the presence of a congressionally intended remedy, so as to alleviate any concern that courts, rather than Congress, might be creating remedies for violations of statutes. When determining whether a right exists sufficient for a § 1983 claim, however, courts are less concerned with the existence of a congressionally intended remedy, since a private cause of action is already provided for in § 1983. Therefore, given this distinction, a court could find that a statute that does not create an implied right of action nonetheless contains rights that are enforceable under § 1983. South Camden II, 145 F. Supp. 2d at 520–24.
150 Id. at 526–29 (citing Wright v. City of Roanoke, 479 U.S. 418 (1987) and Chrysler Corp. v. Brown, 441 U.S. 281 (1979)).
free from disparate impacts of environmental regulation, and that this right could be enforced through § 1983.\textsuperscript{151}

While this victory might have temporarily revitalized the environmental justice movement, it did not last.\textsuperscript{152} On appeal, the Court of Appeals for the Third Circuit reversed, finding that \textit{Sandoval} had implicitly foreclosed a § 1983 claim to enforce EPA’s disparate-impact regulations.\textsuperscript{153}

The Third Circuit’s reversal in \textit{South Camden III} criticized the district court’s reading and reliance on \textit{Wright v. City of Roanoke}.\textsuperscript{154} According to the court of appeals, \textit{Wright} concerned a regulation that defined a right already provided by Congress in the authorizing statute.\textsuperscript{155} The same could not be said for section 602 regulations, the court reasoned, since, as \textit{Sandoval} had explicitly stated, Title VI protections extend to intentional discrimination only; the statute, therefore, does not provide a right against disparate-impact discrimination.\textsuperscript{156}

Given this distinction, the court determined that the district court’s application of the \textit{Blessing} standard was erroneous.\textsuperscript{157} The question of whether a regulation creates a right enforceable under § 1983, the court reasoned, turns on whether that right was created by the statute authorizing the regulation, not any independent analysis of the regulation itself.\textsuperscript{158} Therefore, to the extent that \textit{Sandoval} found Title VI to proscribe only intentional discrimination, disparate-impact regulations could not be privately enforced under § 1983.\textsuperscript{159} The court thus reversed the district court’s decision.\textsuperscript{160} A few months later, the Supreme Court denied certiorari.\textsuperscript{161}

The \textit{South Camden III} decision confirmed what many had suspected: \textit{Alexander v. Sandoval} not only eliminated an implied private right of action to enforce disparate-impact regulations, it also foreclosed the possibility of using § 1983 as an enforcement mecha-

\begin{footnotesize}
\textsuperscript{151} \textit{Id.} at 542, 549.
\textsuperscript{152} \textit{See generally South Camden III, 274 F.3d 771 (3d Cir. 2001)}.
\textsuperscript{153} \textit{See id.} at 774.
\textsuperscript{154} \textit{Id.} at 782–83.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.} at 788–89 (citing \textit{Alexander v. Sandoval}, 532 U.S. 275, 288–90 (2001)).
\textsuperscript{157} \textit{See id.} at 782–83.
\textsuperscript{158} \textit{See South Camden III, 274 F.3d at 783, 790. “[I]f there is to be a private enforceable right under Title VI to be free from disparate impact discrimination, Congress, and not an administrative agency or a court, must create this right.” Id. at 790}.
\textsuperscript{159} \textit{Id.} at 790–91.
\textsuperscript{160} \textit{Id.} at 791.
\textsuperscript{161} \textit{S. Camden Citizens in Action v. N.J. Dep’t of Envlt. Prot., 536 U.S. 939 (2002).}
\end{footnotesize}
Following the Third Circuit’s decision and others like it, the momentum gained by the environmental justice movement following victories in Chester Residents and South Camden I and II quickly vanished.

II. THE VIABILITY OF DISPARATE-ImpACT SUITS AFTER SANDOVAL

In light of the Supreme Court’s finding that no private right of action exists to enforce Title VI disparate-impact regulations, along with the Third Circuit’s finding that these regulations are not enforceable under § 1983, as well as the Sandoval majority’s suggestion that agencies may lack the authority to pass such regulations altogether, the environmental justice movement has encountered a considerable roadblock. While environmental justice has stalled in the wake of Sandoval and South Camden III, commentators may have signaled its death a bit prematurely. Disparate-impact regulations, if proven to still be valid exercises of administrative discretion under Title VI, and despite Sandoval’s assertions to the contrary, can still be enforced by private parties in certain, albeit narrow, circumstances.

A. EPA’s Title VI Disparate-ImpACT Regulations Remain Valid Federal Law

Contrary to the Sandoval Court’s assertion, Bakke did not hold that there was clear congressional intent to limit the scope of Title VI to intentional discrimination—rather, the Bakke Court’s Title VI analysis was, as the Bakke Court acknowledged, discussed in dicta. As Justice Scalia

162 See, e.g., Core, supra note 8, at 242.
163 See id. at 236 (noting that all the federal Courts of Appeals except one—the Court of Appeals for the Sixth Circuit—have found that purely regulatory rights cannot be enforced through § 1983).
164 See, e.g., Schofield, supra note 14, at 925–26 (concluding that short of an intentional discrimination suit, environmental justice plaintiffs are left to rely purely on administrative enforcement of Title VI regulations); Core, supra note 8, at 242 (noting that administrative enforcement is unlikely to fill the void left by the courts’ elimination of private actions under Title VI, and therefore concluding that activism and public awareness may be the best option); Smith, supra note 14, at 256 (concluding that the environmental justice plaintiff’s only viable option post-Sandoval is administrative enforcement).
165 See Galalis, supra note 7, at 86–100 (arguing that Bakke does not indicate congressional intent to limit Title VI to a prohibition of intentional discrimination, as suggested by Sandoval, but that rather, EPA’s disparate-impact regulations are valid exercises of administrative discretion according to the familiar Chevron test); see also discussion infra Part II.A.
166 See discussion supra Part I.B.3.
167 See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 281 (1978) (“In this Court the parties neither briefed nor argued applicability of Title VI . . . . Rather . . . they focused
noted in his majority opinion in Sandoval, courts are “bound by holdings, not language.” Therefore, since the Bakke Court’s Title VI discussion is dicta, it is neither the holding of the Court, nor binding upon other courts. Additionally, the plain language of Title VI indicates that Congress expressed no clear or unambiguous intent to limit the scope of “discrimination” to intentional discrimination. The legislative history of Title VI indicates that, due to disagreement among members of Congress as to the definition and scope of the term “discrimination,” Congress deliberately left the question unresolved, opting instead to defer the issue to agency discretion.

In the absence of clear congressional intent to limit the scope of Title VI, the validity of agencies’ disparate-impact regulations must be evaluated under the analysis set forth by the Supreme Court in Chevron, U.S.A. v. Natural Resources Defense Council, Inc. Under the Chevron analysis, a court must defer to a permissible agency interpretation of an ambiguous statute. Therefore, given the lack of clear congressional

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169 See Galalis, supra note 7, at 89–91.
171 Galalis, supra note 7, at 95–97. Galalis further concludes that neither the underlying purpose of Title VI, nor subsequent legislative action, is any more helpful in identifying a clear, unambiguous congressional intent to limit the scope of Title VI to intentional discrimination. Id. at 97–100. Quite the contrary, subsequent legislative action may indeed indicate congressional ratification of Title VI disparate-impact regulations. Id. at 99–100.
173 Id. at 842–43. Chevron, which stands for the principle of judicial deference to agencies’ reasonable interpretations of statutory ambiguities, articulated a two-step analysis. First, a court must determine “whether Congress has directly spoken to the precise question at issue.” Id. at 842. If so, and the intent of Congress is clear, the analysis is finished and the agency must defer to the unambiguously expressed intent of Congress. Id. at 842–43. If not, however, the court may not simply impose its own construction of the statute; rather, it must engage in the second step of the analysis, which requires a determination of whether the agency has permissibly construed the statute. Id. at 843. If the agency’s construction is a permissible one—that is, if it is reasonable—the court must defer to it, even if the court believes it is not the only, or even best, construction the agency could have adopted. See id. at 843–44 & n.11. Should a regulation pass the first step of the Chevron analysis, it is nearly universally accepted that the agency will prevail on the second. Stephen G. Breyer et al., Administrative Law and Regulatory Policy 290 (5th ed.
intent to restrict Title VI to intentional discrimination, and the fact that disparate-impact regulations are a permissible—that is, reasonable—construction of Title VI, EPA’s disparate-impact regulations are valid federal law post-\textit{Sandoval}.

\textbf{B. Section 110 of the CAA Allows for Enforcement of EPA’s Title VI Disparate-Impact Regulations}

The fact that EPA’s disparate-impact regulations continue to constitute valid federal law is significant in that it allows enforcement of the regulations despite the loss of a private right of action. Necessary to such enforcement is the type of statutory handle found in section 110 of the Clean Air Act (CAA), which governs submission and approval of state implementation plans (SIPs).

As a means of achieving the National Ambient Air Quality Standards (NAAQS) promulgated under the CAA, Congress established a “cooperative federalism” scheme of regulation. Paramount to this scheme are the state implementation plans—indeed, SIPs are the principal component of EPA’s pollution control efforts. They must be created by each state and must outline the specific means by which that state will achieve the NAAQS. By statutory command, each SIP must provide, among other things: (1) enforceable emission limitations for individual sources and a timetable for compliance of those

\footnotesize{\textsuperscript{2002} (noting that no Supreme Court decision has ever invalidated an agency decision under step two of the analysis).

\textsuperscript{174} \textit{See} \textit{Galalis, supra} note 7, at 92–100 (arguing that the 88th Congress, at the very least, did not speak to whether Title VI concerned intentional or disparate-impact discrimination—that is, its intent was ambiguous—and at the most, explicitly intended Title VI to embrace both an intent and effects standard).

\textsuperscript{175} \textit{See} \textit{Smiley v. Citibank,} 517 U.S. 735, 744–45 (1996); \textit{BCCA Appeal Group v. EPA,} 355 F.3d 817, 825 (5th Cir. 2003).

\textsuperscript{176} \textit{See} Note, \textit{supra} note 56, at 1783–85.

\textsuperscript{177} \textit{See} \textit{Galalis, supra note} 7, at 101.

\textsuperscript{178} \textit{Clean Air Act,} 42 U.S.C. §§ 7401–7671q (2000).

\textsuperscript{179} \textit{42. U.S.C. § 7410} (2000). Section 7410(a)(1) reads in pertinent part:

\textit{Each State shall . . . adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance, and enforcement of [any promulgated] primary standard . . . . In addition, such State shall adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance, and enforcement of [any promulgated] secondary standard . . . .}

\textit{Id. § 7410(a)(1)}.

\textsuperscript{180} \textit{See} \textit{Mark S. Squillace & David R. Wooley, Air Pollution} 93 (3d ed. 1999).

\textsuperscript{181} \textit{William H. Rodgers, Jr., Environmental Law} § 3.6, at 197 (2d ed. 1994).}
sources; (2) procedures to review new sources; (3) procedures to monitor and analyze air quality; (4) assurances that the state has adequate personnel and funding to execute the implementation plan; and (5) assurances that the SIP will not operate in violation of any federal law.\textsuperscript{182} Once submitted and approved by EPA, a SIP becomes a federal regulation with the force and effect of law,\textsuperscript{183} and is binding upon the submitting state.\textsuperscript{184}

Of particular interest to environmental justice plaintiffs is the requirement that SIPs provide assurances of their compliance with federal law.\textsuperscript{185} Embodied in section 110(a)(2)(E) of the CAA, the provision states that “[e]ach [state implementation] plan shall ... provide ... necessary assurances that the State ... is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof.”\textsuperscript{186} To the extent that EPA’s disparate-impact regulations constitute a “provision of Federal ... law,” section 110(a)(2)(E) provides EPA with the authority—indeed, the nondiscretionary duty—to ensure that a submitted SIP will not result in environmental discrimination in violation of these regulations.\textsuperscript{187}

Specifically, this “statutory handle” works as follows: section 110(a)(2)(E) of the Clean Air Act mandates that a state provide necessary assurances that its implementation plan will not operate in viola-

\textsuperscript{182} 42 U.S.C. § 7410(a)(1)–(2). Included among “federal law” is, of course, EPA’s disparate-impact regulations. See Galalis, supra note 7, at 100–01; discussion supra Part II.A.


\textsuperscript{184} 42 U.S.C. § 7410(a)(2); see, e.g., Am. Lung Ass’n v. Kean, 871 F.2d 319, 322 (3d Cir. 1989) (“SIPs are not merely advisory; once EPA approves a SIP the state is obligated to comply with it.); Friends of the Earth v. Carey, 535 F.2d 165, 169 (2d Cir. 1976) (“[A SIP], once adopted by a state and approved by the EPA, becomes controlling and must be carried out by the state. ... [F]ull compliance with the plan is mandated.”).


\textsuperscript{186} Id.; see also Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 40 C.F.R. § 7.80(a)(1) (2004). Section 7.80(a)(1) states: “Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this Part.” Included in Part 7 is § 7.35(b), EPA’s disparate-impact regulations.

\textsuperscript{187} The possibility of using section 110(a)(2)(E) to address disparate environmental harms was first raised in the literature by Professor Richard Lazarus and Stephanie Tai, though the practicality of this approach has yet to be explored. See Richard J. Lazarus & Stephanie Tai, Integrating Environmental Justice into EPA Permitting Authority, 26 Ecology L.Q. 617, 633; see also Hays & Wetzler, supra note 183, at 126–27; Galalis, supra note 7, at 77 n.132.
tion of any federal law.\textsuperscript{188} Since EPA’s Title VI disparate-impact regulations constitute a provision of federal law,\textsuperscript{189} a state is therefore required under the CAA to provide necessary assurances that its plan will not operate in violation of these disparate-impact regulations. While EPA has never explicitly stated what the “necessary assurances” clause requires of states, courts have determined that, at a minimum, this clause imposes an affirmative duty on states to provide a detailed demonstration upon which EPA can base a reasoned judgment as to the state’s compliance or noncompliance with the statute.\textsuperscript{190} The Court of Appeals for the First Circuit has stated that an “assurance” is an “\textit{act} . . . that inspires or tends to inspire confidence,”\textsuperscript{191} dispelling any notion that the “shall” language of the clause might not place an affirmative duty on states. The Court of Appeals for the Second Circuit has found that, once fulfilled, a state’s duty to provide necessary assurances requires the Administrator to then make a “reasoned judgment” on the matter and provide a “detailed statement of his rationale.”\textsuperscript{192}

The nexus of the courts’ decisions makes clear that a state cannot sit idly by and hope to satisfy the necessary assurances required by section 110(a)(2)(E) of the CAA, nor can EPA fully approve a plan that fails to provide such assurances or provides inadequate assurances.\textsuperscript{193} In the Title VI context, states must demonstrate how their plans will operate in conformity with EPA’s disparate-impact regulations. The precise breadth of this requirement is unclear, but it is not unreasonable to expect states to provide scientific and demographic support for their assurances just as they would when demonstrating compliance with any other provision of the CAA. Such support might include emissions documentation, projected health and safety consequences, census

\textsuperscript{188} 42 U.S.C. § 7410(a)(2)(E).
\textsuperscript{189} See discussion supra Part II.A.
\textsuperscript{190} See Friends of the Earth v. EPA, 499 F.2d 1118, 1126 (2d Cir. 1974); NRDC v. EPA, 478 F.2d 875, 884 (1st Cir. 1973); see Rodgers, supra note 181, § 3.6, at 197.
\textsuperscript{191} NRDC, 478 F.2d at 883 (emphasis added).
\textsuperscript{192} Friends of the Earth, 499 F.2d at 1126 (finding that “[necessary assurances] call[] for the Administrator’s \textit{reasoned judgment} . . . and direct[] the Administrator to provide a \textit{detailed statement} of his rationale”) (emphasis added); see also NRDC, 478 F.2d at 884 (“The ‘necessary assurances’ clause seems to us to call less for rhetoric than for the Administrator’s \textit{reasoned judgment} . . . .”).
\textsuperscript{193} See Friends of the Earth, 499 F.2d at 1126; NRDC, 478 F.2d at 883–84; see also 42 U.S.C. § 7410(k)(3) (granting Administrator authority for full and partial approval and disapproval of SIPs). \textit{But cf. The Clean Air Act Handbook} 36 (Robert J. Martineau, Jr. & David P. Novello eds., 1997) (noting that, in recognition of the fact that SIPs often start out generally and are later modified, EPA has determined that SIPs may be deemed “complete” if they are in at least 80% regulatory form).
data, and an analysis of where existing facilities lie in relation to minority populations. The totality of data would have to demonstrate an equal distribution of adverse environmental affects. Once a state has made such a demonstration, EPA must make a reasoned judgment, based on the facts provided by the state, as to whether the SIP will operate in conformity with the agency’s disparate-impact regulations.\(^{194}\) No such judgment can be made where there is an utter lack of assurances by the state, where the assurances provided are inadequate, or where there is any indication that a SIP might operate in violation of the disparate-impact regulations. In such a case, EPA would have no facts upon which to base a judgment, and therefore any judgment offered by EPA could not be considered “reasoned.”

If advocates could find a way to privately enforce 110(a)(2)(E), this provision could potentially resurrect the environmental justice movement.\(^{195}\) The practical issues involved in challenging EPA approval of a SIP that violates section 110(a)(2)(E) are discussed in the following section.

III. ENFORCING DISPARATE-IMPACT REGULATIONS THROUGH THE CAA

Exactly what section 110(a)(2)(E) means for states submitting SIPs and EPA’s SIP approval process is unclear, as the issue has yet to be litigated.\(^{196}\) Whether a plaintiff in such a suit would prevail is anything but certain. However, given the theoretical support for this type of challenge and the strong policy arguments advocating citizen involvement, there is reason to believe that at the very least, a citizen suit would help invigorate the environmental justice movement, perhaps even if the suit itself were unsuccessful.

What is certain is that a plaintiff challenging EPA approval of a SIP on the grounds that it violates section 110(a)(2)(E) can expect to encounter many obstacles familiar to environmental justice advocates, including the burden of having to establish both a statutory right to


\(^{195}\) See Lazarus & Tai, supra note 187, at 633; see also Hays & Wetzler, supra note 183, at 126–27; Galalis, supra note 7, at 77 n.132.

sue and constitutional standing to sue. Should these threshold obstacles be overcome, a plaintiff next would be faced with the Herculean task of prevailing on the merits, despite narrow standards of review and heavy burdens of proof.

A. Establishing a Statutory Right to Sue

Any attempt to privately enforce the CAA begins with the Act’s citizen suit provisions found in section 304.\(^{197}\) Recognizing that EPA may not be able to effectively monitor and prosecute every violation of the CAA, Congress enacted section 304 with the intention that citizen involvement would complement the administrative process.\(^{198}\)

Section 304 was intended to serve at least two distinct purposes: (1) strengthen enforcement of the CAA through citizen participation; and (2) motivate government agencies to be more vigilant in enforcing the Act’s provisions.\(^{199}\) To these ends, section 304 permits “any person” to commence legal action against anyone “alleged to have violated . . . an emission standard or limitation,”\(^{200}\) as well as against the EPA Administrator for failure to perform any nondiscretionary act or duty.\(^{201}\)

The courts have recognized Congress’s intent in enacting this provision.\(^{202}\) As the Court of Appeals for the Second Circuit noted:

Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as wel-

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\(^{200}\) 42 U.S.C. § 7604(a)(1). While section 304(a)(1) may be the more commonly utilized citizen suit provision of the CAA, it is probably of little help to the plaintiff seeking to challenge a SIP alleged to be in violation of EPA’s disparate-impact regulations. Although “emission standard or limitation” is broadly defined in section 304(f), 42 U.S.C. § 7604(f), and has been further broadened by the courts, it still is generally limited to “a state threshold or limit on emissions that is . . . aimed at attaining or maintaining air quality standards.” Greenbaum & Peterson, supra note 198, at 87. Therefore, it is unlikely that enforcement of a SIP’s assurance of compliance with disparate-impact regulations would be encompassed by this definition.

\(^{201}\) 42 U.S.C. § 7604(a)(2) (“[A]ny person may commence a civil action on his own behalf—against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionay with the Administrator . . . .”); see also discussion infra Part III.C.3.

comed participants in the vindication of environmental interests. Fearing that administrative enforcement might falter or stall, “the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the [Clean Air] Act would be implemented and enforced.”

While courts generally have embraced the jurisdiction granted to citizens by Congress, they also have been careful to note that “Congress did not fling the courts’ door wide open,” but rather, limited access to “clear-cut violations by polluters or defaults by the Administrator.”

Section 304 remains the most direct route to the courts for private plaintiffs seeking to enforce CAA provisions, though it certainly is not the only one. Section 307(b)(1) provides that a “petition for review” of any “final action” by the Administrator, including approval of implementation plans, may be filed in the United States court of appeals for the appropriate circuit within sixty days of the action or approval in question. Additionally, under the judicial review provisions of the Administrative Procedure Act (APA), an individual may challenge SIP approval once administrative remedies have been exhausted.

Therefore, a plaintiff challenging approval of a SIP for failure to provide necessary assurances of compliance with EPA’s disparate-impact regulations has three means of establishing a right to sue:

1. bringing action under the CAA’s citizen suit provision, section 304(a)(2);
2. filing a petition for review with the court of appeals in the appropriate circuit under 307(b)(1) of the CAA; or
3. petitioning for review in the United States court of appeals for the appropriate circuit within sixty days of the action or approval in question.

These three approaches are discussed in greater detail in Part III.C.

203 Carey, 535 F.2d at 172 (quoting Train, 510 F.2d at 700). Additionally, the Court of Appeals for the D.C. Circuit noted:

[Section 304] reflects Congress’s recognition that “[c]itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.” It was designed to provide a procedure permitting any citizen to bring an action directly against polluters violating the performance standards and emission restrictions imposed under the law or against the Administrator . . . .

Train, 510 F.2d at 699–700 (alteration in original) (footnote omitted).

204 Train, 510 F.2d at 700.


208 Id. §§ 553(e), 701–706; Squillace & Wooley, supra note 180, at 464.

209 These three approaches are discussed in greater detail in Part III.C.


211 Id. § 7607(b)(1).
tioning EPA directly to repeal the approval, and if unsuccessful, seeking judicial review under the APA.\textsuperscript{212} Whichever method a plaintiff chooses as a means of getting into court, such an environmental justice suit will surely be challenged for lack of standing once there.

\textbf{B. Establishing Constitutional Standing to Sue}

Issues of standing address “[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.”\textsuperscript{213} While standing was once a highly liberal requirement, broadly interpreted by the courts, it recently has become a much more formidable obstacle for plaintiffs, in large part due to the Court’s decision in \textit{Lujan v. Defenders of Wildlife}.

The standing obstacle is particularly burdensome in environmental cases where the harms are often abstract, and therefore not easily quantifiable.\textsuperscript{215} To establish standing, four elements must be met:\textsuperscript{216} (1) the plaintiff must have suffered an “injury in fact”; (2) there must be some “fairly traceable” causation between the plaintiff’s injury and the defendant’s action; (3) there must be a likelihood of redressability, should the court find in favor of the plaintiff; and (4) the plaintiff must satisfy the prudential requirements, including third-party standing, generalized grievances, and the zone-of-interests requirement, which states that the plaintiff’s injury must be within the “zone of interests” protected by the statute.\textsuperscript{217} The Supreme Court has further held that the plaintiff has the burden of demonstrating each of these elements.\textsuperscript{218}

\begin{itemize}
\item \textsuperscript{212} 5 U.S.C. §§ 553(e), 706.
\item \textsuperscript{213} Sierra Club v. Morton, 405 U.S. 727, 731 (1972).
\item \textsuperscript{214} 504 U.S. 555 (1992).
\item \textsuperscript{215} See, e.g., Jon Owens, \textit{Comparative Law and Standing to Sue: A Petition for Redress for the Environment, 7 Envtl. Law. 321, 326, 331 (2001).}
\item \textsuperscript{216} The first three elements are constitutional requirements derived from the “Cases [and] Controversies” provisions of Article III of the U.S. Constitution. U.S. CONST. art. III, § 2; see \textit{Lujan}, 504 U.S. at 560–61. The fourth requirement consists of judicially imposed prudential restraints that may be modified or abrogated by Congress. See Bennett v. Spear, 520 U.S. 154, 162 (1997).
\item \textsuperscript{218} \textit{Lujan}, 504 U.S. at 561 (“The party invoking federal jurisdiction bears the burden of establishing these elements.”); see also Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 104 (1998); \textit{Bennett}, 520 U.S. at 167–68.
\end{itemize}
1. Injury in Fact

The first element of standing requires that the plaintiff demonstrate an “injury in fact” that is both “concrete and particularized . . . and . . . actual or imminent,” as opposed to merely “conjectural or hypothetical.” This strict injury-in-fact requirement, as articulated in *Lujan*, has been tempered somewhat by the Court’s decision in *Friends of the Earth v. Laidlaw Environmental Services*, in which the Court established that injury in fact could be satisfied by a showing that “aesthetic and recreational values . . . will be lessened by the challenged activity.”

Generally, the harms suffered by environmental justice plaintiffs—often including heightened safety risks, deteriorated health, and increased mortality rates—are not as abstract or unquantifiable as those of other environmental plaintiffs. Therefore, a plaintiff challenging SIP approval could likely satisfy injury in fact with a showing that approval of the SIP allows for siting and permitting that create imminent health risks, environmental harms, or aesthetic harms.

2. Causation

Causation requires a showing that there exists “a causal connection between the injury and the conduct complained of.” In other words, the injury has to be “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” The “fairly traceable” standard does not require proof to a scientific certainty; rather, according to at least one circuit, “circumstantial evidence such as proximity to polluting sources, predictions of discharge influence, and past pollution . . . prove both injury in fact and [causation].” As noted by the Court in

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219 *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

220 528 U.S. 167, 183 (2000) (internal quotation marks omitted). In *Laidlaw*, plaintiffs, who lived anywhere from within one-quarter mile to twenty miles of the defendant’s facility were found to have suffered injury in fact because they felt that due to the defendant’s discharges in the water, they could no longer use the North Tyger River for recreational purposes, such as fishing, boating, birdwatching, hiking, and picnicking. Id. at 181–83.

221 *Compare South Camden I*, 145 F. Supp. 2d 446, 460–68 (D.N.J. 2001) (detailing the alarming adverse health effects that disproportionate siting and permitting of environmental hazards has had, and is projected to have, on the residents of Waterfront South), with *Lujan*, 504 U.S. at 563–64 (alleging injury in fact based on an intent to visit the affected ecosystem at some unspecified future date).

222 *Lujan*, 504 U.S. at 560.

223 Id. (internal quotation marks and alterations omitted).

224 *Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d 149, 163 (4th Cir. 2000).
Lujan, satisfying causation can be difficult where the plaintiff is not the object of the government’s action, but rather suffers injury as a result of “the government’s allegedly unlawful regulation (or lack of regulation) of someone else.”

Causation could prove to be a difficult obstacle for a plaintiff challenging EPA approval of an allegedly invalid SIP, since the harm might be construed to be caused, not by EPA, but by a third party not before the court, that is, the actual polluter. Properly framed, however, the “conduct complained of,” or the “challenged action,” is approval of a SIP that has failed to provide the necessary assurances against disproportionate siting and permitting. The harm then—the adverse effects of disproportionate siting and permitting as allowed by the SIP—is fairly, if not directly, traceable to EPA’s approval decision.

3. Redressability

To satisfy the redressability component of standing, a plaintiff must demonstrate that it is likely—as opposed to merely speculative—that the plaintiff’s injury can be redressed by a favorable decision. Like causation, redressability can be a more difficult burden to satisfy where the plaintiff is not the object of government regulation. Indeed, where the parties directly responsible for plaintiffs’ harms are not affected by a court’s ruling, redressability may be impossible to satisfy, as was the case in Lujan.

EPA, however, would be bound by a court’s ruling. Likewise, states are bound by the approval decisions of EPA. Therefore, a favorable decision to a challenge of SIP approval would be likely to redress a plaintiff’s complaint, thereby negating the concerns of the Lujan Court.

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225 Lujan, 504 U.S. at 561–62.
226 Id. at 561.
227 Id. at 561–62.
228 The primary reason the plaintiffs in Lujan failed the redressability requirement was that the third parties that funded the projects to which plaintiffs objected were not necessarily bound by any decree of the Secretary of the Interior, Manuel Lujan, Jr., whom the plaintiffs were suing. Therefore, any order of the Court imposed upon the Secretary would be unlikely to alter the third parties’ conduct, and would therefore, not redress the plaintiffs’ complaint. See id. at 568.
229 See supra note 184 and accompanying text.
4. Prudential Requirements

A plaintiff who satisfies the three constitutional standing requirements will not be significantly burdened by the prudential requirements. The limitations on third-party standing and generalized grievances will generally not affect plaintiffs residing in low-income and minority communities who challenge the disparate-impacts of a SIP, since the alleged harms in such cases are neither suffered solely by third parties nor by a large class of citizens.

The burden of satisfying the courts' prudential requirements is further diminished—if not totally eliminated—for plaintiffs bringing action under section 304(a)(2) of the CAA. The Supreme Court has held that citizen suit provisions authorizing “any person” to commence legal action, such as section 304(a)(2), are indicative of Congress’s intent to establish the broadest possible zone of interests, limited only by the constitutional requirements of standing. Accordingly, citizen suit provisions negate the prudential requirements altogether. Therefore, establishing constitutional standing would be sufficient for the environmental justice plaintiff.

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230 The limitations on third-party standing require that plaintiffs assert only their own rights and interests and not the rights and interests of others. Warth v. Seldin, 422 U.S. 490, 499 (1975).

231 The prohibition against generalized grievances precludes standing where the asserted harm is “shared in substantially equal measure by all or a large class of citizens.” Id.

232 The harms alleged in the South Camden cases, for example, were limited to residents of the Waterfront South neighborhood, a community of 2132 individuals. South Camden I, 145 F. Supp. 2d 446, 451 (D.N.J. 2001). Given this relatively small number, and the fact that the suit was brought by the residents themselves and not by a third party, there were no problems with generalized grievances or third-party standing. See generally South Camden III, 274 F.3d 771 (3d Cir. 2001) (reaching a decision on the merits in each case, which necessarily required a finding that the threshold requirements of standing, both constitutional and prudential, had been satisfied); South Camden II, 145 F. Supp. 2d 505 (D.N.J. 2001); South Camden I, 145 F. Supp. 2d at 446.


234 See Raines, 521 U.S. at 820 n.3 (“We acknowledge . . . that Congress’ decision to grant a particular plaintiff the right to challenge an Act’s constitutionality . . . eliminates any prudential standing limitations . . . “); see also Akins, 524 U.S. at 20; Bennett, 520 U.S. at 164.
C. Burdens of Proof and Standards of Review in a 110(a)(2)(E) Challenge

The precise scope of citizens’ role and EPA’s duty in ensuring that SIPs are properly approved and enforced is not clearly defined in the statute. Without question, EPA is “required to approve each State’s plan . . . if it satisfy[s] . . . conditions set forth in § 110(a)(2).” EPA’s duty is less clear, however, where a state’s plan does not totally satisfy the conditions of section 110(a)(2). EPA has the authority, for example, to approve only certain portions of a SIP, or to condition approval on further legislative action by the state.

Given this broad discretion and lack of clear standards, a citizen plaintiff’s job is a difficult one. Success undoubtedly will turn on how the arguments are framed. One must argue that SIP compliance with section 110(a)(2)(E) is as essential as any other provision of the CAA, including emission limitations. A plaintiff must convince a court that failure to provide necessary assurances of compliance with disparate-impact regulations is not within the scope of technical or scientific issues to which EPA retains discretionary decisionmaking power. Rather, because these necessary assurances are required by section 110(a)(2), such a failure prohibits EPA from approving a SIP in its entirety. Any alternative “interpretation of the Clean Air Act . . .

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236 Train v. NRDC, 421 U.S. 60, 65 (1975).
237 Some commentators have suggested that the Administrator has a nondiscretionary duty to disapprove SIPs that are not in compliance with section 110(a)(2). See Edward P. Murphy, Note, McCarthy v. Thomas: Are States Bound When Approval of an SIP Is Merely Conditional?, 25 Golden Gate U. L. Rev. 249, 257 n.60 (1995) (suggesting that “a citizen suit may be brought against the EPA for improperly approving a SIP”). Courts, however, have granted EPA considerable leeway in deciding whether to approve or disapprove SIPs. See, e.g., Conn. Fund for the Env’t, Inc. v. EPA, 696 F.2d 169, 173 (2d Cir. 1982) (noting that EPA has “considerable discretion in deciding whether to approve a SIP or SIP revision”).
238 42 U.S.C. § 7410(k)(3) (“If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part.”).
239 Id. § 7410(k)(4) (“The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision.”).
240 Indeed, the task of challenging SIP approval for failure to comply with section 110(a)(2)(E) should not be underestimated. To date, EPA has never found a violation of Title VI regulations where a facility is otherwise in compliance with the CAA. E-mail from Robert R. Kuehn, Professor of Law, University of Alabama School of Law, to the author (Feb. 25, 2004, 17:05:41 EST) (on file with author). Perhaps the fact that SIP approval has never been tested on these grounds is evidence of just how difficult the task is perceived to be. However, even if unsuccessful, there may be tremendous value in bringing an action. Even a losing suit would, at the very least, breathe much-needed life into the environmental justice debate.
is contrary to the structure of the Act as a whole, and . . . if accepted, it would vitiate the public policy underlying the enactment . . . as set forth in the Act and in its legislative history.”

A plaintiff’s job is made more difficult still by the burdens the court places on plaintiffs challenging SIP approval. Should a plaintiff choose to bring a civil action under either the judicial review provisions of the APA, or the CAA’s petition for review of final agency action provision, the agency’s decision will be reviewed under an “arbitrary or capricious” standard. Should the suit be brought under the citizen suit provision of the CAA, the plaintiff will have only a slightly more enviable task of demonstrating that EPA’s approval violated a nondiscretionary duty of the Administrator. The burdens and standards of review applicable to each are discussed in the following sections.

1. Judicial Review Provisions of the APA

Under section 706(2)(A) of the APA, a reviewing court may overturn agency action in certain circumstances including, and of particular relevance to an environmental justice plaintiff, when such action is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Unfortunately, the case law is not very clear as to exactly what this standard means or how it is to be applied. What is certain, however, is that while the standard of review is narrow, it is not one of total deference.

The Supreme Court has interpreted the “arbitrary or capricious” standard to require setting aside agency action where “the agency has

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241 NRDC v. Train, 545 F.2d 320, 324 (2d Cir. 1976).
244 See 5 U.S.C. § 706(2)(A); BCCA Appeal Group v. EPA, 355 F.3d 817, 824 (5th Cir. 2003); Sierra Club v. EPA, 314 F.3d 735, 739 (5th Cir. 2002).
246 See infra note 274 and accompanying text.
... entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.”

When framed in this manner, the standard could be tremendously favorable to an environmental justice plaintiff. In light of EPA and OCR’s renewed commitment to environmental justice, and Executive Order 12,898, which has instructed agencies to be more mindful of their section 602 duties, environmental justice is clearly intended to be an “important aspect” of facility siting and permitting. Therefore, when EPA approves a SIP that does not provide necessary assurances of compliance with EPA’s disparate-impact regulations, the action is arguably arbitrary and capricious and must be set aside for “failure to consider an important aspect of the problem.” Likewise, where there is any indication that a SIP would potentially operate in violation of the disparate-impact regulations, an approval could be thought to “run counter to the evidence before the agency.”

The APA’s judicial review provisions, however, contain several pitfalls. First, a plaintiff generally may only obtain judicial review of an agency decision once administrative remedies have been exhausted. This would require petitioning EPA directly to repeal or amend the approval prior to seeking review by a court. Additionally, the availability of judicial review may be limited by section 701(a)(2), which states that review is not afforded to action that is “committed to agency discretion by law.” The courts’ recent trend toward committing more action to agency discretion, thereby eroding the presumption of reviewability, makes this exception a significant concern for the environmental justice plaintiff. Finally, courts tend to defer to agency action, especially when a decision involves an “evaluation of complex scientific data within [the agency’s] technical expertise.” It could accordingly be

250 State Farm, 463 U.S. at 43.
252 State Farm, 463 U.S. at 43.
253 Id.
254 RECHTSCHAFFEN & GAUNA, supra note 48, at 278–79.
255 See supra note 212 and accompanying text.
257 See 3 DAVIS & PIERCE, supra note 248, § 17.7. There is, however, reason to believe that even action committed to agency discretion is reviewable, since section 706(2)(A) permits a court to set aside agency action where such action is found to be “an abuse of discretion.” 5 U.S.C. § 706(2)(A) (2000); see also 3 DAVIS & PIERCE, supra note 248, § 17.6, at 131.
258 See BCCA Appeal Group v. EPA, 355 F.3d 817, 824 (5th Cir. 2003).
argued that the dispersion of adverse impacts permitted by a particular SIP fall within this realm of agency expertise.

2. Petition for Review of Final Agency Action: Section 307(b)(1) of the CAA

The “arbitrary or capricious” standard used to evaluate challenges to agency action brought under the APA is the same standard courts use in evaluating petitions for review of final agency action brought under section 307(b)(1) of the CAA. Therefore, in order to prevail on the merits, a plaintiff would need to make the same arguments as those discussed in the previous section, namely, that EPA has acted arbitrarily or capriciously by approving a SIP that fails to provide necessary assurances of the plan’s compliance with Title VI disparate-impact regulations.

Like the judicial review provisions of the APA, section 307(b)(1) contains rigid procedural requirements. The major procedural limitation is that a plaintiff must file a petition for review with the court of appeals in the appropriate circuit within sixty days of SIP approval. While the express grant of jurisdiction to the court of appeals may attract some plaintiffs, for others, the inflexibility of the sixty-day requirement may be a deterrent, if not an outright prohibition. Such plaintiffs would be better served by challenging SIP approval under the more flexible citizen suit provisions of the CAA.

3. Citizen Suit Provision of the CAA

Section 304(a)(2) of the CAA provides plaintiffs the greatest flexibility in challenging SIP approval, though the outcome of such a suit is far from certain. A significant advantage to section 304(a)(2) is that, unlike section 307(b)(1), there is no prescribed time limit within which action must commence. A potential drawback, however, is that primary jurisdiction for section 304 actions is specifically granted to the federal district courts, whereas primary jurisdiction for section

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259 42 U.S.C. § 7607(b)(1) (2000); e.g., BCCA Appeal Group, 355 F.3d at 824; Sierra Club v. EPA, 314 F.3d 735, 739 (5th Cir. 2002); see Squillace & Wooley, supra note 180, at 465.
261 Indeed, section 307(b)(1) has proved to be a popular route for plaintiffs. See, e.g., Kamp v. Hernandez, 752 F.2d 1444, 1449 (9th Cir. 1985); Conn. Fund for the Env’t, Inc. v. EPA, 696 F.2d 169, 171 (2d Cir. 1982); Friends of the Earth v. EPA, 499 F.2d 1118, 1120 (2d Cir. 1974).
263 Compare 42 U.S.C. § 7604, with id. § 7607(b)(1).
307 actions is specifically granted to the local circuit court of appeals.\footnote{Compare 42 U.S.C. § 7604(a), with id. § 7607(b)(1).} Therefore, when available, a plaintiff challenging SIP approval may often be best served by challenging approval on both grounds, as the courts have found that the circuit courts of appeals have exclusive jurisdiction over such actions.\footnote{See, e.g., NRDC v. EPA, 797 F. Supp. 194, 196 (E.D.N.Y. 1992) (finding that the Administrator has a “mandatory, nondiscretionary duty . . . to issue the required motor vehicle inspection and maintenance guidance by [the specified deadline].”).}

A second advantage to section 304(a)(2) actions is that the standard of review is not the onerous “arbitrary or capricious” standard, as is the case with actions brought under section 307(b)(1) of the CAA and the judicial review provisions of the APA.\footnote{See discussion supra Part III.C.1–2.} Instead, a plaintiff will have to demonstrate that by approving the challenged SIP, the EPA Administrator failed to perform a nondiscretionary duty—specifically, disapproving SIPs or portions thereof that fail to comply with the CAA.

Given the broad discretion courts have traditionally granted agency decisionmaking and SIP approval in particular, this is by no means an easy task. While courts have offered support for the idea that EPA does not have discretion to approve invalid SIPs, the precise scope of the Administrator’s nondiscretionary duty is not well-defined, which has led to conflicting notions of what is required of the Administrator when deciding whether to approve a submitted SIP.\footnote{Compare Squillace & Wooley, supra note 180, at 472 (“[W]here the Administrator approves a SIP which violates the law one can say that the Administrator failed to perform his nondiscretionary duty to disapprove a SIP which violates the law.”), and Murphy, supra note 237, at 257 n.60 (suggesting that “a citizen suit may be brought against the EPA for improperly approving a SIP”), with Rodgers, supra note 181, § 3.4, at 185–88 (excluding disapproval of an invalid SIP from a list of recognized nondiscretionary duties, and noting the broad discretion granted by the courts to EPA regarding SIP approval decisions).}

The nondiscretionary duty doctrine is most often applied to time-sensitive decisions of the Administrator.\footnote{See Rodgers, supra note 181, § 3.4, at 185–86.} For example, the Administrator has a nondiscretionary duty to publish reports and regulations by specified deadlines,\footnote{See, e.g., Citizens for a Better Env’t v. Costle, 515 F. Supp. 264, 271 (N.D. Ill. 1981).} and to make approval decisions on SIPs in a timely fashion.\footnote{E.g., Virginia v. United States, 74 F.3d 517, 524 (4th Cir. 1996).} The Administrator also has a nondiscretionary duty...
to either approve or disapprove SIPs according to the plan’s compliance with the requirements of section 110(a)(2).\textsuperscript{272} As to whether the requirements of section 110(a)(2) have actually been met, however, the Administrator retains considerable discretion.\textsuperscript{273} Therefore, while the Administrator’s decision as to compliance with section 110(a)(2) requirements can only be challenged as arbitrary or capricious,\textsuperscript{274} once a finding of 110(a)(2) compliance or noncompliance has been made, the Administrator then has a nondiscretionary duty to approve or disapprove the SIP accordingly.\textsuperscript{275} A failure to approve or disapprove in accordance with the Administrator’s section 110(a)(2) determination can thus be challenged under section 304(a)(2).\textsuperscript{276}

The Court of Appeals for the Ninth Circuit was one of the first courts to analyze the distinction between the Administrator’s nondiscretionary SIP approval duties and the substantive discretion exercised therein.\textsuperscript{277} In \textit{Kennecott Copper Corp. v. Costle}, the court acknowledged that “[t]he Administrator . . . retains a good deal of discretion as to the content of [a SIP approval] decision.”\textsuperscript{278} Specifically, the court noted that “the Administrator’s duty to approve a [SIP] revision depends . . . on whether it satisfies the other general requirements of section 110(a)(2).”\textsuperscript{279} In the \textit{Kennecott} case, the “other general re-


\textsuperscript{273} See \textit{Kennecott Copper Corp.}, 572 F.2d at 1354.

\textsuperscript{274} See 5 U.S.C. § 706(2)(A) (2000). Given the discretionary nature of this decision, a challenge to the substance of the Administrator’s decision would therefore best be brought under section 307(b)(1). See discussion supra Part III.C.2.

\textsuperscript{275} \textit{Kennecott Copper Corp.}, 572 F.2d at 1355.


\textsuperscript{277} \textit{Kennecott Copper Corp.}, 572 F.2d at 1349.

\textsuperscript{278} \textit{Id.} at 1354 (emphasis added). Even such a discretionary decision, however, is not entirely exempt from judicial review, as the APA authorizes courts to overturn any agency action, including discretionary action, if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); discussion supra Part III.C.1; see also \textit{Kennecott Copper Corp.}, 572 F.2d at 1354–55.

\textsuperscript{279} \textit{Kennecott Copper Corp.}, 572 F.2d at 1354 (internal quotation marks omitted). Included among these “other general requirements” is of course a state’s section 110(a)(2)(E) duty to provide assurances that their plan will not operate in violation of valid federal law, such as EPA’s disparate-impact regulations. See supra Part II.A–B.
requirement” at issue was the mandatory inclusion of “emission limitations” as required by section 110(a)(2)(B). In determining whether the emission limitations requirement was met, the court found that the Administrator was authorized to make a determination of “feasibility.” Once that determination of feasibility was made, however, the court held that the Administrator then had a nondiscretionary duty to approve or disapprove the SIP accordingly.

The process outlined in Kennecott consists of two steps: first, the Administrator must determine, within the Administrator’s discretion, whether the plan complies with the requirements of section 110(a)(2). Then, the Administrator must either approve or disapprove the SIP in accordance with this determination. In Kennecott, the Administrator properly exercised this discretion in determining that the plaintiff had not satisfied the “emission limitations” requirement articulated in section 110(a)(2). Following this determination, however, EPA no longer had discretion to approve or disapprove this portion of the SIP, but rather, had to act in accordance with the Administrator’s decision. Implicitly, the Administrator also, therefore, did not have discretion to approve a SIP that did not include any emission controls, because such an omission would have been a per se violation of the “other general requirements of section 110(a)(2).”

Similarly, one might argue that, with respect to section 110(a)(2)(E), the Administrator’s discretion is limited to a determin-
nation of whether a state’s “necessary assurances” will effectuate EPA’s Title VI disparate-impact regulations. Therefore, where the Administrator has found inadequate assurances of compliance with EPA’s Title VI regulations, the Administrator has a nondiscretionary duty to disapprove the SIP. Likewise, where such necessary assurances are absent altogether, the Administrator may not approve the SIP, because such an omission would be a per se violation of section 110(a)(2)(E).

D. Policy Arguments in Support of Allowing 110(a)(2)(E) Challenges

In addition to the substantive arguments in support of allowing challenges to SIPs that fail to provide necessary assurances of compliance with EPA’s disparate-impact regulations, there are strong policy arguments to be made as well. Allowing private enforcement of section 110(a)(2)(E) preserves Congress’s intent to supplement the enforcement process through citizen participation, and it encourages increased vigilance by government agencies charged with enforcing CAA provisions.

Of course, this policy argument leads to the counterargument that Congress restricted jurisdiction to challenges of the Administrator’s nondiscretionary duty as a means of insulating EPA from an excess of citizen challenges and to prevent an overburdened judiciary. It can, and should be argued, however, that there is a particularly compelling interest for allowing challenges to SIPs that fail to provide necessary assurances of their compliance with disparate-impact regulations.

First, in light of the Sandoval decision eliminating the private right of action to enforce the regulations and implicitly eliminating the use of § 1983 statutory handles such as section 110(a)(2)(E)

286 The obvious counterargument to this is that, while section 110(a)(2) explicitly requires that SIPs include emission control measures, there is no such explicit requirement for disparate-impact compliance. Rather, the requirement is only implied, as EPA’s disparate-impact regulations are merely among the “valid federal law[s]” with which SIPs must comply under section 110(a)(2)(E). See 42 U.S.C. § 7410 (2000).


288 See Kennecott Copper Corp., 572 F.2d at 1353. “[T]he non-discretionary duty requirement imposed by § 304 must be read in light of the Congressional intent to use this phrase to limit the number of citizen suits which could be brought against the Administrator and to lessen the disruption of the Act’s complex administrative process.” Id. (noting also the legislative history of the CAA citizen suit provision).

289 See supra note 130 and accompanying text.

290 See supra notes 134, 162 and accompanying text.
may very well be the only means of enforcing EPA’s disparate-impact regulations. However, while this policy argument may prevail among the lower courts, the fact that the Supreme Court has strongly hinted at the invalidity of disparate-impact regulations\(^\text{291}\) makes this argument a tough sell in front of the \textit{Sandoval} majority.

Second, to the extent that disparate-impact regulations further environmental justice, enforcement of the regulations should be of great concern to the executive branch of the government. Executive Order 12,898 instructed every federal agency to “make achieving environmental justice part of its mission.”\(^\text{292}\) In the accompanying memorandum, President Clinton instructed EPA to ensure that, in reviewing proposed actions, the involved agency “has fully analyzed environmental effects on minority communities and low-income communities, including human health, social, and economic effects.”\(^\text{293}\) Additionally, in 2001, then-Administrator Christine Todd Whitman affirmed EPA’s strong commitment to environmental justice and the need to integrate its objectives into current programs and policies.\(^\text{294}\) Clearly, if environmental justice is of such great concern to the federal government, then citizen suits brought in its interest can hardly be lumped together with the frivolous challenges Congress sought to block when enacting the nondiscretionary duty provision.\(^\text{295}\)

\section*{Conclusion}

The environmental justice movement, predicated on the notion that environmental harms should not be suffered disproportionately by low-income and minority communities, generated much of its initial momentum through citizen action and litigation. With the growth of the movement came increased environmental justice regulation, including EPA’s disparate-impact regulations. Those regulations, enacted pursuant to Title VI of the Civil Rights Act of 1964, proscribe recipients of federal funding from engaging in actions that create ra-

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\item \(\text{291}\) See supra text accompanying notes 135–38.
\item \(\text{293}\) \textit{Rechtschaffen \& Gauna, supra} note 48, at 397.
\item \(\text{294}\) See \textit{La Londe, supra} note 62, at 38 n.76.
\item \(\text{295}\) It should be noted, however, that one administration’s commitment to its own executive order cannot necessarily be implied to the next administration. Indeed, in light of the terrorist attacks of September 11, it could be difficult to persuade a court that Executive Order 12,898 continues to speak for the current administration’s priorities. Former Administrator Whitman’s comments are perhaps more persuasive, as she was an appointee of the current administration.
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cially discriminatory effects. Courts, such as the Court of Appeals for the Third Circuit and the District Court for the District of New Jersey, were in turn asked to find an implied private right of action to enforce these disparate-impact regulations.

While early success suggested a promising future for the movement, environmental justice has stalled in recent years due to judicial decisions severely limiting individuals’ ability to commence private actions. The Supreme Court’s decision in *Alexander v. Sandoval* implicitly overruled those lower court decisions by finding that no implied right of action exists to privately enforce EPA’s disparate-impact regulations. Shortly thereafter, the Court of Appeals for the Third Circuit determined that the *Sandoval* decision had implicitly foreclosed enforcement of the regulations through § 1983 as well.

These decisions, coupled with the *Sandoval* majority’s suggestions that disparate-impact regulations may be invalid altogether, led many to believe that there no longer existed a potential for private environmental justice litigation. Instead, the frequently inefficient, and almost always ineffective, administrative enforcement procedures were presumed to be complainants’ sole recourse.

However, this simply is not the case. Although *Sandoval* eliminated the private right of action for enforcement of EPA’s disparate-impact regulations, these regulations still remain valid federal law, despite the *Sandoval* Court’s ill-founded assertions to the contrary. Therefore, private enforcement of EPA’s disparate-impact regulations is still possible through the application of novel legal arguments.

One of the clearest statutory handles for enforcement of EPA’s disparate-impact regulations can be found in section 110(a)(2)(E) of the Clean Air Act. Its requirement that states provide necessary assurances that their SIPs will not operate in violation of any provision of federal law means that, as a condition of approval, states must affirmatively demonstrate how their plans comply with EPA’s disparate-impact regulations. Where states provide no such assurances, inadequate assurances, or where there is indication that the plan will violate EPA’s disparate-impact regulations, the Administrator has a nondiscretionary duty to reject the plan to the extent it violates these regulations.

Complex practical issues are involved in challenging approval of SIPs that have not provided these requisite assurances. Although a plaintiff has at least three avenues to challenge approval, the best choice would likely be to attempt as many as possible. Joining a section 304(a)(2) claim with a 307(b)(1) claim, for example, would give a plaintiff the benefit of a direct path to a court of appeals as well as a more forgiving standard of review. Although defeating a standing
challenge may be easier for an environmental justice plaintiff than for traditional environmental plaintiffs, success on the merits of the suit will likely be more difficult. The necessary arguments essentially reduce to the claim that, because the Administrator has a nondiscretionary duty to disapprove SIP proposals which do not provide necessary assurances of their compliance with EPA’s disparate-impact regulations—thereby violating the provisions of section 110(a)(2)—EPA has acted either in violation of its nondiscretionary duty or arbitrarily and capriciously in approving such SIPs. More specifically, where a state cannot or chooses not to provide a detailed demonstration that its plan will not create racially discriminatory effects, EPA cannot make a reasoned judgment as to the plan’s compliance with the CAA. Therefore, should EPA approve such a plan, a plaintiff would have grounds to challenge the decision based on the SIP’s failure to comply with the CAA. Despite the clear obstacles to challenging SIP approval under section 110(a)(2)(E), a plaintiff should not be discouraged from doing so, for there are ample statutory provisions, precedent, and policy waiting for someone to leverage them in pursuit of environmental justice.