THE LACK OF ACCESS TO COURTS AND EFFECTIVE REMEDIES TO ENFORCE CIVIL RIGHTS VIOLATIONS IN THE UNITED STATES OF AMERICA:

VIOLATIONS OF ARTICLES 1 AND 6 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

IN RESPONSE TO THE SECOND PERIODIC REPORT
OF THE UNITED STATES OF AMERICA

DECEMBER 2007

NATIONAL CAMPAIGN TO **RESTORE** CIVIL RIGHTS

Foreword and Acknowledgments

The National Campaign to Restore Civil Rights (Campaign) is a collection of over one hundred civil rights organizations and numerous individuals that came together to ensure that the courts protect and preserve justice, fairness, and opportunity for everyone. What happens in the courts affects the lives of every person in the United States. It affects whether we can keep our air and water clean, our basic opportunities in life, and whether we can enforce our fundamental protections against racial discrimination.

The founders of this nation recognized that while the judicial branch of government may be the least democratic of the three branches, it is a necessary predicate for a true democracy. The judiciary is the branch of government that is designed to safeguard individual rights and liberties, and to protect the minority from the majority's rule. The judiciary is often the last resort for people in the United States whose rights have been violated by the actions of government officials and private citizens.

But in the last thirty years, the federal benches have dangerously shifted to the political right. As a result, the courts are increasingly unavailable for the average person to enforce rights. In many areas, the judiciary is adopting narrow conceptions of rights, leaving victims all too often without a remedy. This civil rights rollback is especially profound in the area of racial discrimination.

This report focuses on three major areas where the United States has failed to meet its obligations under the CERD. First, Titles VI and VII of the Civil Rights Act of 1964, two critical laws designed to protect people against racial discrimination, have essentially been gutted by recent Supreme Court cases. Second, another vital civil rights law, 42 U.S.C. §1983, has equally been eroded by the Court. The result is that the doors to the courthouse are closed to thousands of people discriminated against based on their race. Third, while countless individuals may not vindicate their own civil rights, the federal government can step in and protect them from racial discrimination. But, it does not, thereby leaving people in the United States without adequate remedies to address rights violations.

The Campaign is working with our partners to reverse this rollback. We hope that the courts will once again serve their purpose: to protect and preserve equal justice, fairness, and opportunity for all people in the United States. We hope that the submission of this report—which does not necessarily reflect the views of the individual groups affiliated with the Campaign—marks an important step in that direction.

We acknowledge and thank Cynthia Soohoo, Sandra DelValle, and Rose Cuison Villazor for their contributions to this report. We also thank the signatories to this report, which are listed at page 20.

EXECUTIVE SUMMARY

A. The United States is in Violation of Article 1 of the CERD

- Article 1 and the General Recommendations define racial discrimination to include actions that have the "purpose or effect" of discriminating on the basis of race.
- In the United States, Title VI of the Civil Rights Act of 1964 and the regulations promulgated through it prohibit federally funded entities from discriminating on the basis of race, both intentionally and in effect.
- Despite the statute's prohibition of conduct that has the effect of discriminating on the basis of race, the Supreme Court has held that private individuals may only seek redress to prove *intentional* discrimination, leaving millions of individuals in the United States without a right to remedy violations under Title VI.
- The inability to redress actions that are discriminatory in effect constitutes a violation of Article 1.

B. The United States is in Violation of Article 6 of the CERD

- Article 6 of the CERD requires that each participating state afford: (1) effective protection and remedies, through competent tribunals, and (2) the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.
- In the United States, Title VII of the Civil Rights Act of 1964 prohibits racial discrimination—including wage discrimination—by an employer.
- In the United States, 42 U.S.C. §1983 is a statutory mechanism that allows individuals to remedy deprivations of rights secured by the U.S. Constitution and laws.
- Despite the prohibition on racial discrimination in employment, and despite the mechanism to remedy deprivations of rights, millions of individuals in the U.S. are denied access to competent tribunals because of recent U.S. Supreme Court decisions that have erected procedural barriers to courts and limited the means to obtain adequate remedies for discriminatory deprivations of rights.
- The inability to redress civil rights violations constitutes a violation of Article 6.

C. The Federal Government Does Not Adequately Enforce Anti-Discrimination Laws

- Offices for Civil Rights (OCRs) are governmental sub-agencies developed by federal agencies to protect civil rights.
- Despite their mandate, the OCRs lack the political will, power, and funding to protect individuals from racial discrimination.
- The inability of the OCRs to redress civil rights violations, coupled with the lack of mechanisms for private enforcement of rights, violates Article 6.

D. Recommendation

- We recommend that the CERD Committee require the U.S. to comply with its obligations under Articles 1 and 6 to ensure and protect the rights of individuals to an effective remedy. The Campaign's full recommendations may be found in Section III herein.

II. LACK OF EFFECTIVE REMEDIES TO ADDRESS RIGHTS VIOLATIONS

1. Article 1 of the Convention defines racial, ethnic, and national origin discrimination to include actions with the "*purpose or effect*" of negatively impacting a particular minority group.

2. General Recommendation XIV states "[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether an action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin."[1]

3. The U.S. judiciary, however, has interpreted legally actionable discrimination to include only measures adopted with animus on the basis of race, ethnicity, or national origin. The courts have excluded those facially neutral measures with a disparate impact on racial, ethnic or national origin minorities from the scope of legally actionable discrimination.

4. The U.S. judiciary's limitations as to what constitutes a legally actionable discrimination claim violates Article 6 of the CERD treaty, which requires that each participating state afford "*effective protection and remedies*, through the competent national tribunals and other State institutions … as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."[2]

5. In asserting its compliance with Article 6, the U.S. claims in its report that "[f]ederal statutes . . . including most of the laws dealing with discrimination by governments and their officials, give individuals the right to sue in federal court to correct the alleged discrimination."[3] The U.S. further states that "[a] number of administrative procedures are also available."[4] On their face, many U.S. federal regulations and laws provide for judicial or quasi-judicial protection and remedies of civil rights. However, U.S. courts have eroded both access to and the efficacy of these remedies. And the administrative procedures that the U.S. references in its report wholly fail to provide adequate remedies to racial discrimination.

6. As Article 6 acknowledges, private enforcement of anti-discrimination laws is critical if discrimination is truly to be eradicated "root and branch."[5] Three recent Supreme Court cases have drastically limited the ability of private individuals in the U.S. to sue for discrimination. Importantly, the merits of the cases – that is, the issue of discrimination that gave rise to the cases – were not addressed in these cases. Rather, the

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[1] Committee on the Elimination of Racial Discrimination, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 68 (1994).
[2] Article 6.
[3] Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination, April 2007, ¶ 280.
[4] *Id.*, ¶ 283.
[5] *Green v. County School Bd. of New Kent*, 391 U.S. 430, 438 (1968).

Court disposed of otherwise meritorious claims on procedural grounds. In deciding whether the cases could be brought in court at all, the Court was presented with a deeper question—is the nation's judiciary serious about addressing racial discrimination? The decisions in *Alexander v. Sandoval, Gonzaga University v. Doe* and *Ledbetter v. Goodyear Tire & Rubber Co.*, and their progeny, answered that question with a resounding, "no."

A. The U.S. Judiciary Has Concluded That There Is No Private Cause Of Action For Individuals Whose Racial Equality Rights Have Been Violated

7. Federal courts have historically provided the primary mechanism for redress of racial discrimination in the United States. *Brown v. Board of Education*[6] is a famous example, but it is only one of the many cases that were brought before the federal courts in the beginning of the civil rights era to challenge state-sanctioned discrimination. Indeed, not only did *Brown* finally make clear that African-American school children were entitled to equal protection under the 5th and 14th Amendments to the U.S. Constitution, it also provided a legal catalyst for the burgeoning civil rights movement, which led to the passage of several laws that guaranteed equal protection and due process to people of color.[7] In recent years, however, the U.S. Supreme Court has curtailed the substantive rights acknowledged in its prior decisions, abrogating the legacy of *Brown* and of the civil rights era.[8] The Court has limited the ability of individuals to access the courts to challenge discriminatory policies and practices.[9]

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[6] *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that racial segregation in the public educational system constitutes a violation of the U.S. Constitution's 14th Amendment equal protection clause).

[7] Civil rights laws enacted post-*Brown* included the Civil Rights Act of 1964, which was intended to protect against discrimination on the basis of race, color, national origin, gender and age. Title VI of the Civil Rights Act of 1964 prohibits federally funded entities from discriminating based on race, color or national origin, including conduct with a discriminatory impact. *See infra* § 8. Title VII of the Civil Rights Act of 1964 prohibits discrimination—including discrimination in wages paid to employees—by covered employers on the basis of race, color, religion, sex or national origin. *See infra* § 13.

[8] In *Washington v. Davis*, the Supreme Court found that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U.S. 229, 240 (1976). Discrimination against a class, therefore, is determined based on whether a party can prove purposeful or intentional discrimination. According to U.S. jurisprudence, based on the decision in *Washington v. Davis*, the 14th Amendment to the U.S. Constitution prohibits discriminatory intent, but not actions that merely result in disparate effect. The Supreme Court's decision does not take into account the difficulties faced by plaintiffs trying to prove intent or unconscious discrimination, which may be manifested by disparate effect. While individual justices have acknowledged the existence of "bias, both conscious and unconscious, reflecting traditional and unexamined habits of thought, [that] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice," the courts have not addressed the reality of unconscious bias. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting). Instead, courts continue to limit their analysis to discriminatory intent, which requires evidence of motive and places a sometimes insurmountable burden on the party affected by the discrimination. The decision in *Washington v. Davis* has constrained the courts' ability to analyze and remedy discrimination.

[9] This report only touches on some of the ways access to courts has been curtailed in recent years. For example, *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275 (2002), specifically affects

No Private Right of Action Under Title VI to Challenge Conduct That Has a Discriminatory Impact

8. Title VI of the Civil Rights Act of 1964 prohibits federally funded entities from discriminating based on race, color or national origin. The regulations implementing Title VI make clear that discrimination includes conduct with a discriminatory impact.[10] Title VI has played a crucial role in ensuring that government programs and programs funded with federal money do not discriminate in any way on the basis of race. Federal agencies that administer these funds have promulgated regulations prohibiting conduct that has a discriminatory impact.[11] Before *Alexander v. Sandoval*, federal courts allowed individuals to sue for violations of Title VI and its regulations by implying a right of action[12], requiring only that the plaintiffs show that the action had an unjustified disparate impact. The *Sandoval* decision has dramatically limited the enforceability of a myriad of civil rights in the United States.

9. In *Sandoval*, Martha Sandoval was able to drive and read road signs, but was not a fluent English speaker. Alabama, where she lived, passed a law mandating that all drivers' license tests be given in English only. She was not allowed to take any part of her driving test in Spanish. Ms. Sandoval sued Alabama under Title VI and its implementing regulations for discrimination based on her national origin. Title VI had been previously interpreted to ensure that persons with limited English proficiency were entitled to equal access to services regardless of their ability to speak English.[13]

10. Relying on years of precedent, the lower courts allowed Ms. Sandoval's suit to go forward, focusing only on whether she had proven that the English only law had a negative and disparate impact on her and other Latino/as on the basis of their national origin and that this impact was unjustified. When the case went to the Supreme

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undocumented migrant workers who are primarily people of color. In *Hoffman*, the U.S. Supreme Court held that undocumented migrant workers who are wrongfully terminated for protected union activities are nonetheless not entitled to back pay, which is the only remedy available under the National Labor Relations Act (NLRA). Immediately following *Hoffman*, the Equal Employment Opportunity Commission determined that undocumented migrants do not have a right to back pay under the federal employment discrimination laws it enforces, including Title VII. The *Hoffman* decision has been expanded by courts to other statutes and has resulted in migrant plaintiffs being denied access to courts because their immigration status is often used against them in the course of litigation. *See Escobar v. Spartan Security Serv.*, 281 F. Supp. 2d 895, 896-98 (S.D. Tex. 2003) (plaintiff, who sued his former employer alleging workplace sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964, was not entitled to back pay because he was an undocumented migrant at the time of the events, even though he had obtained his legl work status prior to trial); *Crespo v. Evergo Corporation*, 841 A.2d 471 (N.J. Super. Feb. 9, 2004) (undocumented worker precluded from economic and non-economic damages under state discrimination statute.).

[10] Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d-7.

[11] *See infra* Part B.

[12] *See Alexander v. Sandoval*, 532 U.S. 275, 294-96, 295 n.1 (2001). *See also Sandoval*, 532 U.S. at 294-96 (Stevens, J., dissenting) (discussing sharp departure from thirty years of precedent established under Title VI of the Civil Rights Act of 1964, which had allowed a private right of action under Title VI under a disparate impact theory); *Lau v. Nichols*, 414 U.S. 563, 566-69 (1974) (allowing private right of action to enforce rights guaranteed by Title VI under a disparate impact theory).

[13] *See* 42 U.S.C. § 2000d.

Court, the Court ignored the issue of discrimination and dismissed the suit, holding that private individuals could not use Title VI to pursue disparate impact claims. The Court held that only acts of *intentional* discrimination could be the basis of a private suit.[14] In this decision, the Supreme Court overturned long-established civil rights precedent and made it immeasurably more difficult, if not impossible, for victims of discrimination to access courts to challenge discriminatory government programs under Title VI.[15]

11. By requiring victims of discrimination to prove discriminatory intent, rather than discriminatory effect, the United States imposes an impermissible burden on racial and ethnic minorities seeking to assert their civil rights—a burden of proof that far exceeds Article 1's "purpose *or effect"* definition of racial discrimination. Requiring a victim of discrimination to establish intent fails to acknowledge the problems of systemic discrimination or other non-obvious forms of discrimination that Title VI was designed to address. Indeed, it is often nearly impossible to prove discriminatory intent, particularly as discriminatory actors have become more sophisticated in hiding their motives or in some instances are unaware of their motives.[16]

12. The disparate impact cause of action enabled victims of discrimination to correct and remedy discriminatory programs in cases where they were unable to meet the higher burden of proving intent. *Sandoval* has eliminated this means of redress. This result has a devastating effect on racial, ethnic, and linguistic minorities in the U.S., many of whom seek equal access to innumerable programs and services that receive federal funding, including health care programs, education, environmental, and transportation services. As a result, federal government money subsidizes programs and activities with racially disparate impacts, with no check. Under *Sandoval*, individuals can no longer seek redress by the courts for discriminatory conduct that results in unjustified disparate impact on the basis of race or ethnicity.[17] To date, the U.S. Congress has failed to correct the *Sandoval* ruling.

Title VII Challenges to Discrimination in Pay

13. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment—including discrimination in wages paid to employees—on the basis of race, color, religion, sex or national origin.[18] Those who wish to challenge an employer's

[14] *See Sandoval*, 532 U.S. at 1524 (Stevens, J., dissent).
[15] *See Sandoval*, 532 U.S. at 1524 (Stevens, J., dissent).
[16] *See* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reclaiming with Unconscious Racism* 39 STANFORD LAW REVIEW 317 (1987): 317-880; Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 538-39 (1994) (providing a hierarchy for environmental justice litigation strategies); *See generally Terry Props., Inc. v. Standard Oil Co.*, 799 F.2d 1523 (11th Cir. 1986); *R.I.S.E.*, 768 F. Supp. 1144; *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Com'n*, 706 F. Supp. 880 (M.D. Ga. 1989); *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979).
[17] The lower courts are following suit. *See also South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771, 779 (3d Cir. 2001) (following *Sandoval*, held no private right of action against a state agency that continued to issue permits to waste facilities despite discriminatory effects on communicates of color).
[18] 42 U.S.C. § 2000e-2.

practice under Title VII must file a complaint with the Equal Employment Opportunity Commission (EEOC) within a statutorily prescribed period of time, either 180 or 300 days, depending upon the state, "after the alleged unlawful employment practice occurred."[19] The EEOC interprets Title VII to allow challenges based on discriminatory pay *each* time a paycheck is received.[20]

14. In *Ledbetter v. Goodyear Tire & Rubber Co.*,[21] the Supreme Court rejected the EEOC's interpretation of the statutory period. The plaintiff, Lily Ledbetter, was a supervisor at Goodyear Tire & Rubber Company for almost twenty years. Over time, a significant pay disparity developed between Ms. Ledbetter and her male counterparts. After receiving an anonymous note describing the pay disparities, Ms. Ledbetter filed a charge of discrimination with the EEOC alleging unlawful discrimination against her based on her sex in violation of Title VII.

15. The Supreme Court dismissed Ms. Ledbetter's case because she filed her complaint with the EEOC too late. The Court refused to adopt the EEOC's interpretation, that each paycheck and discriminatory pay level for which she was paid less than her male counterparts constituted a discriminatory act. Instead, the Court strictly construed the time period to bring pay discrimination claims under Title VII, holding that the complaint should have been filed as soon as the discriminatory pay decision was actualized—when Ms. Ledbetter received her first pay check, even though she neither knew of nor had reason to know of the pay disparity. Neither was the fact that Ms. Ledbetter continued to suffer from the ongoing discriminatory effect of past discrimination sufficient for her to establish a claim within the statutorily prescribed period. The Court's decision ignores the reality of pay discrimination, which is incremental, subtle and typically hidden due to the silence surrounding salary information in the United States.[22] It effectively "immunize[s] forever discriminatory pay differentials unchallenged within 180 days of their adoption."[23]

16. The outcome in *Ledbetter* is fundamentally unfair to victims of pay discrimination who try to seek a remedy under Title VII. By immunizing employers from liability for their discriminatory conduct after the statutory time limit has passed, the Court ignores the continuing discriminatory impact resulting from the initial unlawful act and takes away victims' recourse against continuing discrimination.[24] Although *Ledbetter* directly concerns gender discrimination, the decision will have a significant impact on the ability of victims of racial or ethnic discrimination to seek redress for discrimination in pay. Indeed, as with any other right under Title VII, a victim of racial

[19] *Id.* at § 2000e-2(a)(1).
[20] EEOC Compliance Manual § 2-IV-C(1)(a).
[21] *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007).
[22] *See id.* at 2178 (Ginsburg, J. dissent).
[23] *Id.*
[24] Attempting to rectify the Supreme Court's decision in *Ledbetter*, in a close vote of 225 to 199, the U.S. House of Representatives passed the Lilly Ledbetter Fair Pay Act of 2007. President Bush has promised to veto the bill. While passage of the Ledbetter Act is an important first step in restoring Title VII to its original intention regarding remedies for pay discrimination, there are currently not enough votes to override a threatened veto, and the House still has much work to do to eliminate the systemic pay discrimination faced by racial and ethnic minorities.

discrimination will be forever barred from bringing a cause of action for racial or ethnic discrimination if they fail to file a complaint within the proscribed time period after the first instance of discrimination. This limitation applies regardless of whether the victim has knowledge of the discrimination or continues to suffer from the discriminatory effects of past discrimination. This violates Articles 1 and 6 of the Convention. The real world effect of this holding is to foreclose victims of discrimination under Title VII from seeking redress in the courts.

Restricted Causes of Action Under 42 U.S.C. § 1983

17. Not only are plaintiffs facing difficulties when challenging discrimination under Titles VI and VII of the Civil Rights Act, but U.S. courts have also curtailed their ability to challenge discriminatory actions under 42 U.S.C. § 1983.

18. Section 1983 protects victims of discrimination against any person who abridges any of their "rights, privileges, or immunities secured by the U.S. Constitution and laws of the United States."[25] The statute creates a cause of action for any individual who can claim that their federal rights, constitutional or statutory, were abridged by anyone acting "under color of law", that is, anyone who was clothed with the authority of state law when they committed the deprivation.

19. Section 1983 also allows people to challenge any discriminatory enforcement of many important federal programs, such as Medicaid, the national healthcare program for people with low-income. Medicaid, and many other important federal programs, are enacted pursuant to the authority granted to Congress by the Spending Clause of the U.S. Constitution.[26] These programs are structured as cooperative ventures between the states and the national government with the national government providing funding and setting the standards and regulations for the states' non-discriminatory administration of the programs.[27] The non-discriminatory requirements of these programs generally have been enforced through § 1983 by citizens acting as "private attorneys general" to protect their rights by ensuring that the state entities live up to the commitments they made when they accepted federal funds.[28] As such, the availability of § 1983 is vital to ensuring the non-discriminatory administration of federally-funded programs.

20. In theory, as the United States points out in its report, § 1983 allows its citizens to remedy the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States.[29] Section 1983 theoretically allows

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[25] 42 USC § 1983.
[26] *See* U.S. Const. art. I, 8 cl. 1 (giving Congress the power to pay for the "common Defense and general Welfare").
[27] *See* Sasha Samberg-Champion, *Note: How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838 (2003).
[28] *Id.*
[29] "Federal statutes derived from the Civil Rights Act of 1866, including most of the laws dealing with discrimination by governments and their officials, give individuals the right to sue in federal court to correct the alleged discrimination. (citation omitted) Individuals wishing to bring suits under these provisions are sometimes assisted by non-governmental organizations that promote civil rights." Period

plaintiffs to bring an action against anyone acting under color of state law who deprives them of their federal rights. Unfortunately, the courts' interpretations of the interplay between § 1983 and disparate impact regulations promulgated by federal agencies have eviscerated the ability of U.S. residents to use that statute as an effective means to obtain adequate remedies for discriminatory deprivation of rights and have left in its place a wholly inadequate remedial scheme that does not comply with the CERD treaty.[30]

21. In *Gonzaga v. Doe*, discussed below, the U.S. Supreme Court erected barriers for those seeking to use § 1983 to enforce their rights. By requiring plaintiffs to meet a new narrow test, the Court has made it almost impossible for plaintiffs to enforce statutes and administrative regulations that are supposed to remedy actions with an unjustified disparate impact.[31]

a. *Gonzaga University v. Doe*

22. In 2002, the Supreme Court severely limited the ability of private individuals to enforce statutes enacted pursuant to Congress' spending power. In *Gonzaga University v. Doe*, the Supreme Court pronounced that legislation enacted pursuant to the spending power of Congress does not generally allow a private right of action as a remedy.[32] Instead, the Court concluded that the appropriate remedy for failure to adhere to legislation enacted pursuant to the spending power of Congress is the termination of funding, not a redress of any persons' harm.

23. *Gonzaga* involved a student challenging the release of his educational information without the requisite consent as required by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which in return for funding placed limitations on a school's release of personal information.[33] The Supreme Court found that the express language of the statute under which the student brought suit did not contain any "rights-creating" language, since the FERPA was not drafted in terms that manifested Congress' intent to create benefits to a specific class of people.[34] The Court concluded that the focus of the statute was the recipients of the funding; therefore, the appropriate penalty for failure to follow the requirements of the law should be an elimination of funding and

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Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention of the Elimination of All Forms of Racial Discrimination (April 2007) ("U.S. 2007 Report") ¶ 280.

[30] *See S. Camden Citizens*, 274 3d 771 (3d Cir 2001), *cert. denied*, 153 L. Ed. 2d 804, 122 S. Ct. 2621, 2002 U.S. Lexis 4706 (2002) (challenge to discriminatory siting of cement plant in low-income community of color not allowed to proceed pursuant 42 U.S.C. § 1983).

[31] *See* Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 KAN. L. REV. 321, 333 (2001).

[32] *Gonzaga University v. Doe*, 536 U.S. 273, 280 (2002); *see also Suter v. Artist M.*, 503 U.S. 347 (1992). The spending power is a constitutional grant of authority allowing Congress to enact statutes that provide federal funding to governmental agencies. The statutes provide funding on the condition that the agency does not engage in discriminatory action, and, *in theory*, if the agency does discriminate the federal government may stop funding the organization.

[33] *Gonzaga*, 536 U.S. at 277.

[34] *Id*. at 287-9.

not a private right of action by someone who, in the Court's view, was not the intended beneficiary of the statute.[35]

24. Until *Gonzaga*, the Court had allowed suits by plaintiffs who could show, that the statute was directed to the benefit of the plaintiffs, that the terms were binding, and that the rights at issue were not "vague or amorphous."[36] Although this standard was rigorous, it retained a focus on enforcing the purpose of the statute both for whom and for what it was intended to protect.

25. In *Gonzaga*, the Court re-focused the judicial inquiry, assessing whether the statute's language reflected an intention to create a new federal right. This inquiry is far removed from both the substance of the legislation itself and the real societal issues that the legislation was attempting to address. It places a greater burden on plaintiffs to show that Congress demonstrated an intent to create a new right in "clear and unambiguous terms," a standard that all but precludes finding that *regulations* adopted to implement the statue will be enforceable through 42 U.S.C. § 1983. Even though *Gonzaga* did not involve racial discrimination claims, the Court's reasoning is illustrative of the issues that parties face when seeking to challenge actions with discriminatory effects that are explicitly prohibited pursuant to regulations.

26. The combined effects of the Supreme Court's analyses in *Sandoval* and *Gonzaga* are far-reaching and directly impact the ability of citizens to enforce disparate impact regulations, the importance of which cannot be understated. The regulations help to overcome the hurdle placed on plaintiffs of proving intentional discrimination where there is a facially-neutral explanation. The language of the statutory prohibitions in Title VI, for example, do not specify whether proof of intent is required or plaintiffs can prevail by demonstrating that actions will have unjustified discriminatory effects. Court interpretations limiting the statutory prohibition to cases of intentional discrimination, together with these limitations on the enforceability of regulations, which explicitly prohibit actions with disparate effects, undermines civil rights enforcement. Indeed, an agency's determination that the regulations are required, in some instances, may reflect the agency's assessment that "substantial intentional discrimination pervades the industry it is charged with regulating but that such discrimination is difficult to prove directly." [37] The *Sandoval* and *Gonzaga* decisions leave the insurmountable hurdle in place and ignore the relevant determinations of the agencies with the industry expertise.

b. Transportation Discrimination: *Save Our Valley v. Sound Transit*

27. In 2003, a federal court in Washington State relied on *Gonzaga* and *Sandoval* in ruling that the Department of Transportation's ("DOT") regulations did not create individual rights challengeable through § 1983.

[35] *Id*. at 290.
[36] *See Blessing v. Freestone*, 520 U.S. 329 340-341 (1997).
[37] *Sandoval*, 532 U.S. at 307 n.13. (Stevens, J. dissenting).

28. In *Save Our Valley v. Sound Transit*[38], an advocacy group filed an action alleging that the plan to build a light-rail line through a minority neighborhood would have the effect of discriminating against residents on the basis of race because DOT regulations prohibit disparate impact discrimination.

29. The Sound Transit Authority planned to construct a twenty-one mile light rail route that would pass through several neighborhoods. For a majority of the neighborhoods the rails would be elevated or underground. The portion of the line that ran through a predominately minority neighborhood, however, was to be constructed on street level and would disproportionately impact minority residents, including expropriating commercial and residential properties and creating safety issues.

30. The residents argued that the plan violated the DOT's "disparate impact" regulations, and challenged the plan. Relying on the *Sandoval* and *Gonzaga* decisions, the court opined that federal rights are created by Congress through statutes only, and not by agencies through regulations.[39] Thus, agency regulations cannot independently create rights enforceable through § 1983.[40] The court's decision stripped citizens of the ability to seek redress for the disparate impact resulting from the decisions of the Sound Transit Authority. The court reasoned that since Title VI itself does not prohibit disparate impact discrimination, under *Sandoval*, the regulations cannot create a new avenue of prohibited conduct.

c. Environmental Discrimination: *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*

31. As part of its effort to ensure that noxious environmental burdens are equitably distributed, the United States Environmental Protection Agency ("EPA") seeks the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implantation, and enforcement of environmental laws, regulations and polices."[41] The reasoning in *Sandoval* has, however, foreclosed the ability of citizens to ensure that the EPA attains this goal by preventing these citizens from using § 1983 to enforce the EPA's disparate impact regulations.

32. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*[42] arose when the New Jersey Department of Environmental Protection's (NJDEP) decided to grant a permit to a company to operate a cement plant in South Camden, a predominantly minority and desperately poor neighborhood in Camden, New Jersey.[43] South Camden was already a popular neighborhood for industrial

[38] *Save Our Valley*, 335 F.3d 932 (9th Cir. 2003).
[39] *Save Our Valley*, 335 F.3d at 933-34.
[40] *Save Our Valley*, 335 F.3d at 939.
[41] http://www.epa.gov/compliance/environmentaljustice/ (last visited on Oct. 24, 2007).
[42] *S. Camden Citizens*, 274 F.3d 771 (3d Cir. 2001).
[43] 63% African-American, 28.3% Hispanic, and 9% white residents. *S. Camden Citizens in Action*, 274 F.3d at 775, n.1 (3d Cir. 2001).

facilities. Though it was one of Camden's twenty-three neighborhoods, South Camden hosted twenty percent of the city's contaminated sites.[44] Specifically, it is home to two Superfund sites, four sites suspected of releasing hazardous substances, and fifteen other contaminated sites as identified by the NJDEP. Facilities operating in the neighborhood included chemical companies, waste facilities, food processing companies, automotive shops, and a petroleum coke transfer station. NJDEP had also granted permits for operation of a regional sewage treatment plant, a trash-to-steam incinerator and a co-generation power plant in the neighborhood.[45] Not surprisingly, the collective (comparative) health of the residents in South Camden was terrible.[46]

33. It was in this already environmentally-devastated neighborhood that the NJDEP granted a permit to allow a plant that would emit particulate matter (dust), mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulfur oxides and volatile organic compounds.[47] But the group's challenge was fruitless. Relying on the decision in *Sandoval*, the Third Circuit observed that Title VI, which prohibited disparate impact discrimination, did not grant a private right of action to the group. The Third Circuit further found that, pursuant to the ruling in *Gonzaga*, the group's rights could not be enforced under 42 U.S.C. §1983.[48] Minority neighborhoods in the U.S. bear almost all of the environmental burden for the industrialization of the country.[49] Once again, a vulnerable segment of the population was stripped of the ability to seek a remedy for the state's discriminatory, and potentially life-threatening, actions.

d. Social Welfare Programs: *Lechuga v. Crosley*

34. The courts' interpretation regarding the applicability of § 1983 to the disparate impact regulations also have an effect on the social welfare programs in the United States. In *Lechuga v. Crosley*,[50] residents in Oregon attempted to challenge the disparate impact of the procedures for applying for unemployment insurance benefits with the state employment agency. The Spanish-speaking residents alleged that the administration of the federally funded unemployment insurance program had a disparate impact on the basis of race, color, and/or national origin.[51] Specifically, the residents alleged that the Oregon Employment Department failed to provide adequate translation and interpretation services and to adequately investigate the claims of non-English speaking applicants.[52] The Oregon court analyzed whether the regulations adopted by the Department of Labor pursuant to Title VI created federal rights for individuals that were enforceable under § 1983. Applying *Sandoval* and *Gonzaga*, the court held that

[44] *S. Camden Citizens*, 274 F.3d at 775.
[45] *Id.*
[46] The undisputed report submitted in the litigation reflected disproportionately higher incidences of asthma, chest tightness, and other respiratory ailments in comparison with other parts of the city. *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 145 F. Supp. 2d 446 (D.N.J. 2001).
[47] *S. Camden Citizens*, 145 F. Supp. 2d at 450.
[48] *S. Camden Citizens*, 274 F. 3d at 788.
[49] *See, e.g.*, Jill E. Evans, *Challenging The Racism in Environmental Racism: Redefining The Concept of Intent*, 40 ARIZ. L. REV. 1219 (1998).
[50] *Lechuga v. Crosley*, 228 F. Supp. 2d 1150 (D. Or. 2001).
[51] *Lechuga*, 228 F. Supp. 2d at 1151.
[52] *Id.*

"[t]he regulation was not specifically intended to benefit individuals and, therefore, did not create a federal right enforceable by individuals.[53] Concluding that the plaintiffs had no federal right on which to base their § 1983 claim, the court dismissed the case.[54]

35. As evidence of its compliance with the provisions of Article 6, the United States points to the ability of its citizens to use § 1983 to challenge discrimination. However, *Gonzaga* and its progeny have severely curtailed the ability of people to seek redress under § 1983 for violations of federal regulations protecting against discrimination in many different areas of day-to-day life. The judiciary's continuing refusal to view regulations of an agency as creating rights has foreclosed yet another avenue by which people can challenge actions with an unjustified discriminatory impact and effectively implement the provisions of the treaty. Even though the law is available in theory, as a result of the interpretation by the U.S. courts, there are insurmountable hurdles for those citizens who seek to enforce the rights and protections provided by the federal regulations and statutes prohibiting discrimination.

B. Offices for Civil Rights Do Not Provide Adequate Administrative Remedies For Racial Discrimination

36. The administrative enforcement procedures for Title VI vest federal agencies with considerable discretion to design, implement, and evaluate civil rights enforcement standards and procedures. Offices for Civil Rights ("OCR") are sub-agencies developed by federal agencies to protect civil rights. OCR duties include issuing standards for achieving compliance under the law, promulgating applicable rules of conduct, investigating specific incidents and sanctioning violators.[55] Now that *Sandoval* and *Gonzaga* have stripped victims of racial discrimination of their right to seek redress in court, these federal agencies remain the last bastions to enforce prohibitions against actions with discriminatory effects.[56] But these agencies are weak and inattentive, leaving victims without any true recourse at all.

37. OCRs are plagued with numerous problems, including: lack of effective complaint investigation processes, inability to conduct disparate impact analyses, and

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[53] *Id.* at 1155.
[54] *Id*.
[55] *See* Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of* Alexander v. Sandoval, YALE J. HEALTH POL'Y & ETHICS 215, 225 (2003) [hereinafter Rosenbaum].
[56] An individual who chooses to administratively enforce his rights under Title VI begins the process by filing an administrative complaint, usually with the Office for Civil Rights (OCR) of the appropriate federal agency. 28 C.F.R. § 42.107(b) (2007). Each agency is granted the authority to investigate violations of civil rights law. Federal rules provide that an agency "will make a prompt investigation whenever a . . . complaint . . . indicates a possible failure to comply with [Title VI requirements]." 28 C.F.R. § 42.107(c) (2007). If an official investigation indicates a failure to comply, "the responsible Department official . . . will so inform the recipient and the matter will be resolved by informal means whenever possible." 28 C.F.R. § 42.107(d)(1) (2007). If the agency determines that the matter cannot be resolved informally, then judicial action "will be taken." 28 C.F.R. § 42.107(d)(1) (2007). On the other hand, if the official investigation concludes that no action is warranted, the agency must inform the complainant and recipient of this result. 28 C.F.R. § 42.107(d)(2) (2007).

insufficient policy and standards guidance.[57] Perhaps most undermining to OCR authority, however, is its unwillingness and inability to withhold federal funding from civil rights violators.[58] Without the will to hold programs and activities receiving government funding accountable and the ultimate "power of the purse," OCR enforcement is weak and ineffectual. These problems are pervasive throughout the federal OCRs. A brief summary of three OCRs follows below.

Department of Transportation (DOT): Lack of Agency Enforcement of Title VI in the Transportation Context

38. Transportation racism is "just as real as the racism found in the housing industry, educational institutions, employment arena, and judicial system … [It] combines with public policies and industry practices to provide benefits for whites while shifting costs to people of color."[59] Indeed, disparities in transportation choice and funding have fallen along racial and economic lines. As a result, low-income and minority households continue to be underserved by existing transportation systems.

39. Administrative enforcement of Title VI in the transportation context has been historically ineffective. The Department of Transportation has a highly disorganized structure for civil rights enforcement, which contributes to its inability to provide adequate remedies for victims of racial discrimination. For example, the lines of authority within the DOT are not conducive to effective Title VI enforcement.[60] Although the Departmental Office of Civil Rights (DOCR) is charged with providing overall policy guidance and coordination on civil rights issues, it has no direct authority over the DOT's various sub-agencies, such as the Federal Aviation Administration, the Federal Highway Administration, etc. Instead, each sub-agency has its own Office of Civil Rights (OCR), which is charged with enforcing Title VI. Most directors of sub-agency OCRs do not report directly to the DOCR. Even within a sub-agency, regionalized OCRs do not communicate with each other. This leads to a disjointed and ultimately ineffective approach to Title VI enforcement.[61]

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[57] *See* Rosenbaum, *supra* note 55, at 231-34.

[58] Although each agency's OCR derives its power to enforce Title VI from the Spending Clause of the United Stated Constitution, it is usually not the sub-agency responsible for administering federal funding programs. This results in an enormous paradox, whereby the responsibility for enforcing civil rights laws applicable to federal spending is assigned to a sub-agency that has no power to set the standards for federal spending. *See id*. at 233-38.

[59] Patrick Moulding, *Fare or Unfair? The Importance of Mass Transit for America's Poor,* 12 GEO. J. ON POVERTY L. & POL'Y 155, 164 (2005) (quoting Henry Holmes, *Just and Sustainable Communities, Just Transportation: Dismantling Race and Class Barriers to Mobility* (Robert D. Ballard & Glenn S. Johnson, eds., 1997)).

[60] U.S. Commission on Civil Rights, *Ten Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Vol. II: An Evaluation of the Departments of Justice, Labor, and Transportation*, p.51 (Sept. 2002).

[61] Legal services to the sub-agencies are decentralized as well. The Director of DOCR obtains advice from the General Counsel; the sub-agencies obtain advice from their chief counsel; and the regional staff consult with their regional counsel. A DOT report found that the criteria for seeking legal advice are "ill-defined" and the circumstances vary widely. U.S. Dept. of Transportation, *Review of Civil Rights Consolidation*

40. Civil Rights Enforcement at DOT also suffers from a lack of resources, evidencing the low priority civil rights enforcement is given. For example, funding and staffing for its OCR offices remain a serious problem.[62] And although the DOCR budget shows a general upward trend, the offices have not kept up with inflation.[63] The DOCR also appears to place little emphasis on data collection and analysis in its Title VI enforcement efforts.[64] The DOCR's complaint information system, XTRAK, is difficult to use and access for information and data. Therefore, it is not clear how many Title VI complaints have been processed and how they have been resolved.

Environmental Protection Agency (EPA): Lack of Agency Enforcement of Title VI in the Environmental Context

41. Evidence of a correlation between environmental hazards and race is widely acknowledged to exist.[65] The agency responsible for addressing Title VI environmental complaints and enforcement issues is the Environmental Protection Agency (EPA) Office for Civil Rights ("EPA OCR"). Like other federal OCR offices, the EPA OCR is charged with reviewing and investigating allegations of racial discrimination.[66]

42. To ensure that their funding recipients were in compliance with Title VI, in 1973, the EPA issued regulations prohibiting disparate impact discrimination.[67] Despite creating these comprehensive regulations, however, the EPA did not begin enforcing its Title VI regulations until 1993.[68] And even with such enforcement, the EPA's Title VI regulations and corresponding agency policies have not been effective. Indeed, in many instances, EPA OCR either does not promptly investigate complaints, or the complaints are dismissed for jurisdictional or technical reasons.[69]

Options, p. 3 (April 1994). In addition, "[DOT] legal staff do not consult with one another on civil rights in a consistent manner." *Id.*

[62] The Federal Aviation Administration's OCR headquarters is operating with just two staff members. The Federal Highway Administration, Federal Railroad Administration, and Research and Special Program Administration also have documented lack of staffing, despite repeated requests for resources. *See id.*

[63] *See* U.S. Commission on Civil Rights at 52, *supra* note 60.

[64] For example, DOCR leaves it to its sub-agencies to ensure that recipients of federal funding have Title VI programs that are compliance, but some sub-agencies still do not have a data reporting requirement system in place for determining whether a recipient is in compliance with Title VI. In addition, DOCR has not required its sub-agencies to incorporate an analysis of the data they receive from their funding recipients in annual Title VI self-assessment. *See* U.S. Commission on Civil Rights at 71, *supra* note 60.

[65] U.S. Commission on Civil Rights, *Not In My Backyard: Executive Order 12,898 and Title VI Tools for Achieving Environmental Justice* at pp. 13-22 (Oct. 2003) (hereinafter "Not In My Backyard").

[66] 40 C.F.R. §§ 7.10-7.135 (2007).

[67] 38 Fed. Reg. 17, 968.

[68] *See Not In My Backyard*, *supra* note 65 at p. 31. In 1994, President Bill Clinton buttressed the EPA regulations by signing an Executive Order incorporating environmental justice principles into the work of all federal agencies. However, Executive Orders are neither judicially enforceable nor binding on agencies.

[69] *See* Not In My Backyard at 32 (EPA has failed to enforce its existing nondiscrimination regulations by assuming greater oversight over recipients of federal funding, implementing effective policy, and guidelines for administrative enforcement of Title VI violations; and imposing appropriate penalties when violations of Title VI occur).

43. Despite the EPA's admission that as of 2002, it had sufficient funding and staffing to implement and enforce Title VI,[70] examples of EPA OCR's dilatory practices and inability to meet its own regulatory deadlines abound. Between September 1993 and July 1998, for example, EPA OCR did not uphold a single race-based Title VI complaint.[71] And from 1998 to 2001, EPA accumulated a severe backlog of Title VI complaints.[72] As of August 2007, 29 complaints were under review, the oldest one having been filed in October 2003.[73] None of the pending complaints made EPA OCR's 20-day decision deadline.[74] In one case, OCR did not even decide to accept the case for investigation until six years after it was filed with the agency– a decision that should have been reached within 20 days.[75]

Health and Human Services (HHS): Lack of Agency Enforcement of Title VI in the Healthcare Context

44. The reach of federal funding in the United States is so enormous that very little of the modern healthcare enterprise falls outside the scope of Title VI.[76] Nonetheless, even when holding health conditions, insurance status and other factors constant, racial and ethnic minorities in the United States receive inferior and often less intense health care than white patients[77]. When federal health programs are at issue, the sub-agency tasked with investigating civil rights enforcement with respect to discriminatory conduct is the Department of Health and Human Services (HHS) Office for Civil Rights ("HHS OCR"), and this sub-agency is grossly inadequate.

45. Like the DOT and EPA OCRs discussed above, post-*Sandoval* and *Gonzaga*, HHS OCR remains one of the only vehicles to challenge systematic biases and structural discrimination in the policies, procedures, and practices by healthcare providers that have a discriminatory impact based on race.

46. HHS regulations were created to prohibit facially neutral policies and practices that have a disproportionate adverse impact, even absent evidence of intentional discrimination.[78] But HHS OCR has a history of weak monitoring and enforcement procedures in place to ensure compliance with the mandates of Title VI, including:

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[70] *See id.* at 62.
[71] *See id*. at 32-33
[72] *See id.* at 55.
[73] *See* EPA's Title VI Complaints Listing, available at http://www.epa.gov/ocrpage1/docs/t6saug07.pdf (last visited Sept. 26, 2007).
[74] *See id*.; 40 C.F.R. §7.120(d)(1) ("[e]ach allegation that satisfies the jurisdictional criteria will be accepted for investigation within 20 calendar days of acknowledgment of its receipt").
[75] *See Not In My Backyard*, *supra* note 65 at 57.
[76] *See* Rosenbaum, *supra* note 55 at 220.
[77] Institute of Medicine, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* (2003); *See also Unequal Health Outcomes in the United States: Disparities in Health Care and the Role of Social and Environmental Determinants of Health, a Report to the Committee on the Elimination of Racial Discrimination* (2007).
[78] 45 C.F.R. 80.3(b)(2) (2007).

- failure to collect sufficient data relating to minorities and healthcare;[79]
- failure to develop Title VI guidelines and adequate policy directions;
- lack of a thorough pre-award review process to ensure that prospective recipients of federal financial assistance were in compliance with the law;
- infrequent post award audits or onsite compliance reviews;
- growing complaint backlog; and
- lack of an effective and comprehensive system for monitoring corrective action commitment.[80]

47. HHS OCR also seems to have little interest in enforcing prohibitions on racial discrimination in particular. Indeed, although the office has declared an interest in other civil rights issues, there is "little, if any, enforcement activity currently underway involving race discrimination, an impression that is reinforced in talking to OCR staff."[81]

48. Federal agencies, such as DOT, EPA and HHS, have been wholly ineffective in remedying racial discrimination under Title VI. This failure is particularly alarming in light of the *Sandoval* and *Gonzaga*, recent Supreme Court decisions, which have effectively eliminated access to courts and judicial remedies to enforce civil rights. As a result, the discriminatory effects of activities and programs receiving federal funding are going unchallenged.

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[79] Vernellia R. Randall, *Eliminating Racial Discrimination in Health Care: A Call for State Health Care Anti-Discrimination Law*, 10 DEPAUL J. HEALTH CARE L. 1, 15 (2006). For example, disaggregated information on subgroups within the five racial and ethnic categories is not collected systematically. Racial and ethnic classifications are often limited on surveys and minorities are often misclassified on vital statistics records. *See id*. Significantly, although the regulations specifically mandate such collection, 28 C.F.R. § 42.406(a), the courts have ignored OCR's sluggish data collection by interpreting health regulations on data collection as discretionary, not mandatory, determining that "it is up to the federal agency to determine what data collection is sufficient." *See Madison-Hughes v. Shalala*, 80 F.3d 1121, 1127 (6th Cir. 1996). In *Madison-Hughes*, the plaintiff alleged that HHS violated Title VI by failing to collect data and publish guidelines under its regulations to effectively enforce non-discrimination provisions. The Court of Appeals dismissed the case for lack of subject matter jurisdiction, holding that neither the Title VI statute nor regulatory provisions mandate that HHS collect specific racial data, other than as it determines is necessary to enforce Title VI. *See id*. The collection of complete and accurate data on racial and ethnic minorities and subpopulations is essential to fully understanding the health status of all individuals, and to recognize the barriers they face in obtaining quality healthcare. The collection of data and the development of a care report need the teeth of regulatory enforcement to provide adequate remedies to those who have suffered racial discrimination.

[80] Brietta R. Clark, *Hospital Flight from Minority Communities: How Our Existing Civil Rights Framework Fosters Racial Inequality in Healthcare*, 9 DEPAUL J. HEALTH CARE L 1023, 1058 (2006). A 1999 report by the U.S. Commission on Civil Rights not only confirmed many of the longstanding complaints lodged against OCR, it also issued a scathing indictment that concluded that the structure and operations of the OCR has actually exacerbated racial disparities in healthcare. *See* U.S. Commission on Civil Rights, *The Healthcare Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality: The Role of Governmental and Private Healthcare Programs and Initiatives*, Vol. 1 (1999).

[81] Timothy Stolzfus Jost, *Racial and Ethnic Disparities in Medicare: What the Department of Health and Human Services and the Centers for Medicare and Medicaid Services Can, and Should, Do*, 9 DEPAUL J. HEALTH CARE L. 667, 707 (2006).

III. RECOMMENDATIONS

1. Require the United States to investigate the effects of the lack of private enforcement of Title VI of the Civil Rights Act of 1964 on the overall effectiveness of this law in prohibiting discrimination on the basis of race, color, or national origin.

2. Require the United States to investigate the effects of recent procedural barriers requiring the filing of a complaint within 180 days of the first instance of discrimination on the overall effectiveness of Title VII of the Civil Rights Act of 1964 in prohibiting discrimination on the basis of race, color, or national origin.

2. Require the United States to investigate the effects of the unavailability of a private right of action under 42 U.S.C. §1983 in prohibiting discrimination on the basis of race, color, or national origin.

3. Recommend that the United States enact a federal law that would expressly allow a private right of action to enforce Title VI of the Civil Rights Act of 1964 and overturn *Alexander v. Sandoval*.

4. Recommend that the United States enact a federal law that would expressly remove procedural barriers to bringing a private right of action to enforce Title VII of the Civil Rights Act of 1964 and overturn *Ledbetter v. Goodyear*.

5. Recommend that the United States provide federal agencies charged with enforcing the anti-discrimination laws, including regulations, with sufficient and adequate funds and resources to ensure effective administrative enforcement of these laws, including the authority to withhold funding for violations of the anti-discrimination laws.

6. Define actionable discrimination to include actions with the purpose and effect of discriminating.

7. Recommend that OCRs be held accountable for the kind of investigations they undertake and timeliness of resolutions through annual reports to Congress and staggered public hearings.

8. Recommend that the United States enact a federal law that would expressly remove the barriers undocumented migrants have in bringing claims to enforce the NLRA, Title VII of the Civil Rights Act of 1964, and other statutes, and overturn *Hoffman Plastic Compounds, Inc. v. NLRB.*

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