

# LANGUAGE ACCESS ADVOCACY AFTER *SANDOVAL*: A CASE STUDY OF ADMINISTRATIVE ENFORCEMENT OUTSIDE THE SHADOW OF JUDICIAL REVIEW

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## ABSTRACT

Many individuals with limited English proficiency (“LEP”) face language barriers that make it difficult for them to access federally funded services for which they are eligible, including public housing, welfare benefits, and health care. In response to this concern, the federal government issued regulations under Title VI of the Civil Rights Act of 1964 that require any programs receiving federal funding to provide oral interpretation and written translation for LEP individuals. In 2001, the Supreme Court ruled in *Alexander v. Sandoval* that individuals have no private right of action to enforce these language access regulations in court. Instead, lawyers for LEP individuals have been forced to rely on filing administrative complaints with federal agencies rather than using litigation to vindicate their clients’ rights under Title VI. This Article examines language access advocacy in the decade since *Sandoval* as a case study of how effectively federal civil rights laws can be enforced in the absence of judicial review. As this Article finds, the administrative enforcement process provides incentives for all parties to reach a negotiated solution. In a setting that is often less adversarial than litigation, advocates and federal funding recipients can collaborate on long-term, comprehensive plans to improve services for the LEP community. At the same time, the administrative enforcement process fails to redress the harms to individual LEP clients who are denied access to services. The federal government uses a form of cost-benefit analysis to respond to administrative complaints, which supports efficient systemic reforms but denies relief to individual clients. The Article concludes by offering recommendations for how advocates can work within the

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administrative enforcement process for as long as *Sandoval* remains the law and judicial review of Title VI language access claims is foreclosed. Advocates should make the cost-benefit case for language access reforms by gathering additional data to quantify the benefits and to minimize the costs. Advocates should also encourage the federal government to provide more specific guidance to funding recipients about language access obligations. Finally, advocates should seek other avenues for protecting the rights of individual LEP clients, since the administrative enforcement process does not provide individual remedies.

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I.  
INTRODUCTION

In 2008, a Spanish-speaking woman in New York State complained to the federal government that her local social services agency, the Montgomery County Department of Social Services (“MCDSS”), did not provide a Spanish interpreter during a home visit.<sup>1</sup> The agency receives funding from the federal Department of Health and Human Services (“HHS”) to implement the county’s Medicaid, food stamps, and other public benefit programs.<sup>2</sup> The agency therefore falls within the reach of Title VI of the Civil Rights Act of 1964, which prohibits federal funding recipients from discriminating on the basis of race, color, or national origin.<sup>3</sup> Federal directives implementing Title VI require funding recipients to provide individuals with limited English proficiency (“LEP”) “meaningful access” to services.<sup>4</sup> Yet in her complaint to HHS, the Spanish-speaking woman reported that because she was not able to communicate with the caseworker who came to her home to assess her eligibility for benefits, she had to wait five additional months before receiving necessary personal care services.<sup>5</sup>

HHS and other federal agencies are required to investigate complaints regarding LEP individuals who are denied access to federally funded services.<sup>6</sup> In this case, MCDSS agreed to resolve the complaint by implementing a new policy providing interpretation services to all of the LEP individuals that the agency serves.<sup>7</sup> In the written agreement with HHS, the agency specifically noted that it would train its staff on the

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1. U.S. DEP’T OF HEALTH AND HUMAN SERVS., NO. 08-79992, MONTGOMERY COUNTY DEPARTMENT OF SOCIAL SERVICES RESOLUTION AGREEMENT (2009), available at <http://www.hhs.gov/ocr/civilrights/activities/examples/LEP/mcdssra.html> [hereinafter Montgomery Agreement]; Press Release, U.S. Dep’t of Health and Human Servs., Montgomery County Department of Social Services (NY) to Enhance How it Provides Language Services (Oct. 8, 2009), available at <http://www.hhs.gov/news/press/2009pres/10/20091008a.html> [hereinafter Press Release].

2. Press Release, *supra* note 1.

3. 42 U.S.C. § 2000d (2006).

4. See Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000) [hereinafter Exec. Order 13,166]; Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency, 61 Fed. Reg. 50,123, 50,124 (Aug. 16, 2000) [hereinafter DOJ Policy Guidance]. The federal government identifies individuals of limited English proficiency as those who “do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English.” *Frequently Asked Questions*, LIMITED ENGLISH PROFICIENCY: A FEDERAL INTERAGENCY WEBSITE, [www.lep.gov/faqs/faqs.html](http://www.lep.gov/faqs/faqs.html) (last visited July 30, 2012).

5. Press Release, *supra* note 1.

6. Michael Mulé, *Language Access 101: The Rights of Limited-English-Proficient Individuals*, 44 CLEARINGHOUSE REV. 24, 28–29 (2010) (“Title VI administrative complaints on behalf of LEP individuals who have been denied meaningful access to a government program or service that receives federal financial assistance may be filed with the federal agency that is the source of the funding or assistance.”).

7. Montgomery Agreement, *supra* note 1 at IV.A.

requirement of providing interpreters for home visits.<sup>8</sup>

Facing similar language barriers, legal service attorneys and community leaders in Philadelphia formed a coalition to address language access in that city's health care system. Philadelphia's Department of Health receives Medicaid and other federal funding, so it also falls within Title VI and the HHS regulations implementing Title VI. Yet the department employed only a limited number of interpreters, some of whom had to travel between clinics, and did not provide interpreters for all languages spoken by patients.<sup>9</sup> Instead, LEP patients often brought friends and family members with them for assistance, even though this compromised their privacy and forced them to rely for interpretation on individuals who lacked knowledge of medical terminology. In some cases, patients even pulled their children out of school to help them at appointments, making the difficult choice to expose their children to sensitive medical discussions.<sup>10</sup>

Instead of filing a complaint with HHS, lawyers at Community Legal Services of Philadelphia and leaders of groups serving the city's immigrant, refugee, and non-English-speaking population began meeting directly with the Philadelphia Department of Health in 2003.<sup>11</sup> Advocates came to the meetings armed with the results of a survey of clinic staff members that documented their frustration with their inability to communicate with patients.<sup>12</sup> Over a series of lengthy meetings, advocates worked with city officials to analyze the needs of LEP patients at all stages of a clinic visit, from the first interaction with the receptionist during walk-in hours, to the meeting with the health provider in the examination room, to the follow-up conversation with the pharmacist.<sup>13</sup> The Department of Health implemented a new language access policy that provided interpretation services at each of these stages, adopted a training program on working with LEP patients, and remained in contact with community groups to monitor the success of its programs.<sup>14</sup>

As these two examples show, lawyers can employ a variety of strategies to ensure that their LEP clients have access to federally funded services, such as health care, housing, and other public benefits, that play

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8. *Id.* at IV.P ("The training will specifically address MCDSS's responsibility to provide interpreter services to LEP individuals during home visits to determine eligibility for services.").

9. Telephone Interview with Beth Shapiro, Senior Attorney, Language Access Project, Cmty. Legal Servs. of Phila. (Feb. 1, 2012) [hereinafter Shapiro Interview Feb. 2012].

10. *Id.*; see also Barbara Plantiko, *Not-So-Equal Protection: Securing Individuals of Limited English Proficiency with Meaningful Access to Medical Services*, 32 GOLDEN GATE U. L. REV. 239, 240 (2002) (discussing the problems with using friends or family members as interpreters).

11. Shapiro Interview Feb. 2012, *supra* note 9.

12. *Id.* Students from Drexel University's School of Public Health conducted the survey.

13. *Id.*

14. *Id.*

a critical role in their daily lives. They can file complaints with the federal government, as the Spanish-speaking woman in New York State chose to do. The federal agency wields the ultimate power to terminate funding if a recipient refuses to comply with its Title VI obligations.<sup>15</sup> Before pursuing such an extreme remedy, however, the federal government will seek to negotiate a voluntary agreement with the funding recipient to implement a language access policy, such as the Montgomery County agreement.<sup>16</sup> As the example in Philadelphia demonstrates, advocates can also bypass the federal agency enforcement process and negotiate directly with funding recipients, achieving the same type of language access reforms that the federal agency would likely have required in its investigation.

As lawyers pursue administrative complaints or direct negotiation, however, they will rarely have the option of litigating their clients' federal language access claims in court. Language access claims are based on a theory of disparate impact discrimination: Title VI prohibits national origin discrimination, and since language is closely correlated with national origin, a lack of interpretation and translation services has a disparate impact on LEP individuals based on their national origin.<sup>17</sup> However, in the 2001 case *Alexander v. Sandoval*, the Supreme Court held that Title VI does not provide a private right of action to enforce federal disparate impact regulations,<sup>18</sup> effectively removing Title VI language access claims from judicial review.

The *Sandoval* decision removed a major tool from the arsenal of language access advocates; more broadly, it threatened the notion that civil rights plaintiffs are entitled to their day in court. Title VI formed part of the landmark Civil Rights Act of 1964, which, as President Lyndon Johnson declared, was aimed to "promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity."<sup>19</sup> The Civil Rights Act outlawed discrimination in

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15. 42 U.S.C. § 2000d-1 (2006); 28 C.F.R. § 42.108(b) (2011). Section 602 of Title VI requires a hearing on the record before funding can be terminated. 42 U.S.C. § 2000d-1 (2006).

16. 42 U.S.C. § 2000d-1 (2006) (providing for enforcement by termination of funding or other means, but stating that "no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means."); 28 C.F.R. § 42.107(d)(1) (2011) ("[T]he matter will be resolved by informal means whenever possible.").

17. See, e.g., *Sandoval v. Hagan*, 197 F.3d 484, 508–10 (11th Cir. 1999), *rev'd on other grounds sub nom. Alexander v. Sandoval*, 532 U.S. 275 (2001).

18. 532 U.S. 275, 293 (2001) ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.").

19. *President Lyndon B. Johnson's Radio and Television Remarks Upon Signing the Civil Rights Bill* (July 2, 1964), <http://www.lib.utexas.edu/johnson/archives.hom/speeches.hom/640702.asp>.

employment, public facilities, and public accommodations.<sup>20</sup> As part of this anti-discrimination scheme, Title VI was designed to prevent the federal government's funds from being used to subsidize racially segregated programs.<sup>21</sup>

The federal courts represented a critical forum where members of disfavored groups could vindicate the rights that the Civil Rights Act granted to them. A citizen could act as a "private attorney general," bringing suit in court and working in partnership with the federal government to enforce the new anti-discrimination laws.<sup>22</sup> Lawyers initially fought court battles to end overt, intentional discrimination, but, by the time of *Sandoval*, they had moved on to challenging policies and practices that had a disparate impact on minorities.<sup>23</sup> *Sandoval* closed the courthouse doors to these claims under Title VI.

The field of language access, therefore, provides a valuable case study for understanding whether federal anti-discrimination laws can be effectively enforced without judicial review. This article does not aim to address why *Sandoval* should be overturned, either by the Court or through an act of Congress. Other scholars have provided powerful critiques of the decision and arguments for how to restore judicial review of disparate impact claims under Title VI.<sup>24</sup> Instead, this article evaluates the strategies that advocates can use while *Sandoval* remains the law. This article builds on the work of scholars and advocates for LEP individuals who have examined the need for language access in federally funded sectors such as housing, state courts, and health care. They have documented the unique needs of LEP individuals in these specific sectors, as well as recent reforms and ongoing challenges.<sup>25</sup> This article surveys

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20. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

21. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 329–31 (1978) (Brennan, J., dissenting) (discussing the statements made in Congress about Title VI).

22. *Newman v. Piggie Park Enters, Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

23. See Adele P. Kimmel, Rebecca Epstein & James L. Ferraro, *The Sandoval Decision and Its Implications for Future Civil Rights Enforcement*, 76 FLA. BAR J. 24, 26 (2002) (stating that the majority of Title VI suits, by the time of *Sandoval*, were based on disparate impact claims, "in large part because few federally funded programs are overtly discriminatory and, as a result, intentional race and national origin discrimination have become increasingly difficult to prove").

24. See Audrey Daly, *How to Speak American: In Search of the Real Meaning of "Meaningful Access" to Government Services for Language Minorities*, 110 PENN ST. L. REV. 1005, 1008 (2006); Benjamin Labow, *Federal Courts: Alexander v. Sandoval: Civil Rights Without Remedies*, 56 OKLA. L. REV. 205, 218–25 (2003); John Arthur Laufer, *Alexander v. Sandoval and its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1640 (2002) (criticizing the "strained, unsubstantiated logic" of *Sandoval*'s holding).

25. See, e.g., April Kuehnhoff,  *Holding on to Home: Preventing Eviction and Termination of Tenant-Based Subsidies for Limited English Proficiency Tenants Living in Housing Units with HUD Rental Assistance*, 17 GEO. J. ON POVERTY L. & POL'Y 221, 230 (2010) ("LEP individuals face a variety of barriers to accessing HUD assisted rental housing and are likely to be even more underrepresented in HUD assisted rental housing than immigrants who are proficient in English."); LAURA ABEL, BRENNAN CENTER FOR JUSTICE, LANGUAGE ACCESS IN STATE COURTS (2009),

all of these areas to try to identify the benefits of administrative enforcement and the costs of denying a judicial forum.

Advocates for LEP individuals have achieved significant success in bringing language access claims under Title VI, but they have been forced to rely on strategies that work without the threat of taking funding recipients to court. Lawyers have focused on collaborative negotiation rather than adversarial litigation, and they have had to convince funding recipients that their desired reforms are not only necessary but also feasible. This approach has led federal funding recipients to make systemic changes that benefit LEP communities as a whole, but it also has an important drawback: the reform process is not designed to vindicate the rights of individual LEP clients. For example, federal agencies that enforce Title VI generally do not have power to impose damages, so HHS could not require the Montgomery County social services agency to compensate the Spanish-speaking woman for missed months of services.<sup>26</sup> In the decade since *Sandoval*, then, important language access reforms have been adopted in many federally funded sectors, but many LEP individuals have been left without remedies for the harms they have suffered.

Part II of this article sets out the framework for providing language access protections under federal law and describes how the Court's decision in *Sandoval* removed these protections from judicial review. Part III examines the legal landscape after *Sandoval*. Civil rights lawyers have tried to find ways of restoring judicial review of Title VI disparate impact claims, while the federal government has expressed its commitment to the administrative enforcement process. Part IV argues that advocates have achieved reforms for their LEP clients since *Sandoval* precisely because of the ways that Title VI administrative enforcement is different from litigation. The process emphasizes voluntary compliance, and all parties have incentives to reach negotiated agreements, so advocates have been able to work with federal funding recipients to develop comprehensive plans to improve language access. Part V considers the cost of denying a judicial forum for language access claims, with particular emphasis on the loss of protection for individual rights. The administrative enforcement process uses a form of cost-benefit analysis to determine federal funding recipients' language access obligations, possibly leaving individuals

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available at [http://www.brennancenter.org/content/resource/language\\_access\\_in\\_state\\_courts/Language\\_Access](http://www.brennancenter.org/content/resource/language_access_in_state_courts/Language_Access), NATIONAL HEALTH LAW PROGRAM, [http://www.healthlaw.org/index.php?option=com\\_content&view=article&id=239&Itemid=196](http://www.healthlaw.org/index.php?option=com_content&view=article&id=239&Itemid=196) (last visited June 5, 2012).

26. See Kuehnhoff, *supra* note 25, at 240 (stating that the federal agency's "resolution of a Title VI complaint need not include specific relief" for the individual complainant because the "primary remedy under Title VI is termination of the recipient's funding."); Daly, *supra* note 24, at 1024 (stating that the administrative process "does not serve to compensate the LEP individual for any harm suffered as a result of the Recipient's failure to provide meaningful access.").

without recourse if the cost of providing access to them is too high. Finally, Part VI recommends strategies that lawyers can use to promote language access for their clients after *Sandoval*. Advocates should make the case for reforms within the framework of cost-benefit analysis, gathering data to show that language access measures can help federally funded programs operate more efficiently and effectively. They should also urge the federal government to provide more detailed guidance about recipients' Title VI obligations, since advocates rely on the administrative enforcement process rather than courts to back up their negotiations. Finally, lawyers should seek other ways of enforcing the individual rights that the administrative enforcement process fails to protect.

## II.

### THE FEDERAL FRAMEWORK FOR PROTECTING LANGUAGE ACCESS

Over 55 million Americans—about 20 percent of the population—speak a language other than English at home, and this number has been rising over the past decades.<sup>27</sup> One in four of these individuals—approximately 13 million Americans—speaks English either “not well” or “not at all.”<sup>28</sup> Many of these LEP individuals qualify for government-funded services in areas such as housing, health care, and public benefits, but a limited grasp of English can make it significantly harder for them to access or make effective use of these services. For example, LEP individuals may have difficulty navigating the process of applying for public housing or vouchers funded by the Department of Housing and Urban Development (HUD). Even if they complete this process, they may face eviction or the termination of their housing subsidy if they accidentally violate terms of a lease that, due to the language barrier, they do not understand.<sup>29</sup> Other difficulties appear in the area of health care: if LEP patients are unable to explain their symptoms or understand their doctors' orders, they may receive unnecessary diagnostic tests, fail to give informed consent, or require extra follow-up care because they did not follow the treatment plan.<sup>30</sup> As these examples show, communication barriers can cut off LEP individuals from many types of government-

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27. HYON B. SHIN & ROBERT A. KOMINSKI, LANGUAGE USE IN THE UNITED STATES: 2007 (2010), available at <http://www.census.gov/hhes/socdemo/language/data/acs/ACS-12.pdf>.

28. *Id.* About 56 percent speak English “very well,” 20 percent “well,” 16 percent “not well,” and 8 percent “not at all.”

29. Kuehnhoff, *supra* note 25, at 230.

30. Siddharth Khanijou, *Rebalancing Healthcare Inequities: Language Service Reimbursement May Ensure Meaningful Access to Care for LEP Patients*, 9 DEPAUL J. HEALTH CARE L. 855, 856 (2005) (“Communication is the most fundamental element in the physician-patient relationship.”); see also Plantiko, *supra* note 10, at 241 (noting that “the language barrier for patients of limited English proficiency was the most frequently cited obstacle to receiving care”).



funded services for which the law makes them eligible.<sup>31</sup>

In response to this problem, the federal government mandates that programs receiving federal funding take steps to ensure that LEP individuals can access their services by providing oral interpretation and written translation services. The following section outlines the federal government's protection of LEP individuals' rights before *Sandoval* and examines how the Supreme Court's decision foreclosed judicial review of language access claims under Title VI.

#### *A. Language Access Protections Before Sandoval*

The federal government prohibits recipients of federal funding from discriminating based on language under Title VI of the Civil Rights Act. Section 601 of the statute provides: "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."<sup>32</sup> The statute applies to programs that are the beneficiaries of federal grants, loans, or contracts, such as state public assistance programs that receive funding from HHS and state public housing programs that receive funding from HUD. The statute does not apply to federal agencies that administer programs directly, such as the Social Security Administration.<sup>33</sup>

Section 602 directs federal agencies to implement the statute by issuing anti-discrimination regulations for the programs that they fund.<sup>34</sup> Pursuant to Section 602, each federal agency issues regulations tailored to the specific programs it funds and operates its own office to enforce those regulations and investigate complaints. For example, HHS's Office for Civil Rights enforces anti-discrimination regulations for federally funded public assistance and health care programs, while HUD's Fair Housing/Equal Opportunity office enforces anti-discrimination regulations for public housing programs.<sup>35</sup> The agencies can terminate funding to any recipient that fails to comply with those regulations; the

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31. See DOJ Policy Guidance, *supra* note 4, at 50,124 (noting that if federal funding recipients fail to meet their language access obligations, "recipients effectively may deny those who do not speak, read, or understand English access to the benefits and services for which they qualify").

32. 42 U.S.C. § 2000d (2006).

33. See *Soberal-Perez v. Heckler*, 717 F.2d 36, 38 (2d Cir. 1983) (holding that the Social Security Administration's failure to provide Spanish-language notices did not violate Title VI because the statute does not apply to direct benefit programs).

34. 42 U.S.C. § 2000d-1 (2006).

35. See, e.g., U.S. Department of Health & Human Services, Office for Civil Rights, <http://www.hhs.gov/ocr/civilrights/understanding/race/index.html>; U.S. Department of Housing & Urban Development, Fair Housing/Equal Opportunity, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp).

agencies can also enforce their regulations “by any other means authorized by law.”<sup>36</sup> Before the federal agency can take any enforcement action, however, it must find that “compliance cannot be secured by voluntary means.”<sup>37</sup>

The text of Title VI prohibits discrimination only based on race and national origin and does not explicitly address discrimination based on language. Courts have viewed policies that draw distinctions based on language as facially neutral.<sup>38</sup> Yet federal civil rights law recognizes both intentional discrimination, where an action on its face targets members of a protected class, and disparate impact discrimination, where an action is neutral on its face but has the effect of imposing a disproportionate burden on a protected class.<sup>39</sup> Since language correlates so closely with national origin, a practice that denies access to non-English speakers could have the effect of discriminating based on national origin, and would therefore be a form of disparate impact discrimination.<sup>40</sup> Using its authority under section 602, the Department of Justice (“DOJ”) issued regulations in 1966 barring recipients of DOJ funding from engaging in disparate impact discrimination, and other agencies issued similar prohibitions.<sup>41</sup> The

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36. 42 U.S.C. § 2000d-1 (2006). The statute entitles federal funding recipients to a hearing and “express finding on the record” before their funding can be terminated. *Id.*

37. *Id.*

38. See *Sandoval v. Hagan*, 197 F.3d 484, 508 (11th Cir. 1999), *rev’d on other grounds sub nom. Alexander v. Sandoval*, 532 U.S. 275 (2001) (describing an English-only policy as a “facially neutral classification”). Courts have also found English-only policies to be facially neutral when interpreting Title VII, a different provision of the Civil Rights Act. See *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) (holding that under Title VII, an “English-only” rule in the workplace does not discriminate based on national origin, because “[n]either the statute nor common understanding equates national origin with the language that one chooses to speak.”). In *Hernandez v. New York*, the Supreme Court suggested the possibility of analyzing language-based policies as a form of racial discrimination rather than national origin discrimination. In a decision addressing a prosecutor’s exclusion of Spanish-speaking jurors, the Court mentioned in dicta, “[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.” 500 U.S. 352, 371 (1991). But the Court held that the prosecutor in the case had not relied on language ability alone, so it did not have to address this issue. *Id.* at 360.

39. See *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (noting Title VII of the Civil Rights Act “prohibits both intentional discrimination (known as ‘disparate treatment’) as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as ‘disparate impact’).”). The disparate impact analysis outlined in *Ricci* applies to employment discrimination claims under Title VII of the Civil Rights Act, but courts have used the same approach when deciding claims under Title VI. See *Sandoval*, 197 F.3d at 507 (noting that “[i]n prior cases, our circuit has applied explicitly Title VII’s disparate impact framework to Title VI disparate impact suits.”)

40. See, e.g., *Sandoval*, 197 F.3d at 508 (finding that the majority of Alabama residents affected by the state Department of Public Safety’s “English-only” policy came from a country other than the United States, so the policy “significantly impacts Alabama residents of foreign descent, in both an adverse and disproportionate manner.”).

41. 28 C.F.R. § 42.104(b)(2) (2011) (prohibiting funding recipients from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination

following decade, the DOJ issued regulations that specifically covered language access, requiring funding recipients who served LEP individuals to take “reasonable steps . . . to provide information in appropriate languages.”<sup>42</sup>

Even though the executive branch extended Title VI to cover discrimination based on language and other forms of disparate impact discrimination, the Supreme Court initially offered conflicting views on whether it shared this interpretation.<sup>43</sup> In a seminal case, the Supreme Court construed Title VII, the provision of the Civil Rights Act covering private employers, as outlawing both intentional and disparate impact discrimination.<sup>44</sup> A case from the same era, *Lau v. Nichols*, suggested that the Court would take the same approach to interpreting Title VI.<sup>45</sup> The Court found that the San Francisco school system denied Chinese-speaking students “a meaningful opportunity to participate in the educational program” by offering them instruction only in English without providing help in acquiring the language.<sup>46</sup> Writing for the majority, Justice Douglas declared, “[d]iscrimination is barred which has that effect even though no purposeful design is present . . . .”<sup>47</sup> The Court in *Lau* interpreted Title VI to cover discrimination based on language because it had the effect, even if not the intent, of discriminating based on national origin.

In a subsequent case, however, the Court indicated that Title VI covers only those forms of discrimination that are barred by the Equal Protection Clause of the Fourteenth Amendment.<sup>48</sup> In enacting the statute, the justices reasoned, Congress intended to prohibit federal funding recipients from engaging in forms of discrimination that would be

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because of their race, color, or national origin.”). The former Department of Health, Education, and Welfare (now HHS) included the same prohibition on disparate impact discrimination in its regulations, which were first issued in 1964. 45 C.F.R. § 80.3(b)(2).

42. 28 C.F.R. § 42.405(d)(1) (2011).

43. See Laufer, *supra* note 24, at 1617 (describing the Supreme Court’s line of Title VI cases as a “veritable thicket”).

44. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”).

45. 414 U.S. 563 (1974).

46. *Id.* at 568.

47. *Id.*

48. See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (“In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause [of the Fourteenth Amendment] or the Fifth Amendment.”). Laufer notes that a broader interpretation of Title VI would have likely marked the end of the types of affirmative action programs at issue in *Bakke*. The justices therefore adopted a reading of section 601 that left room for affirmative action programs to be upheld but also restricted the statute’s reach, in “an example of the Court shooting itself in the foot to salvage a vital organ.” Laufer, *supra* note 24, at 1618 n.27.

unconstitutional if pursued by the government itself.<sup>49</sup> This interpretation raised doubts about the holding in *Lau*, because, under Equal Protection doctrine, a showing of disparate impact alone, without a showing of discriminatory intent, does not establish a constitutional violation.<sup>50</sup>

The Supreme Court eventually reached an uneasy compromise in the 1983 case *Guardians Association v. Civil Service Commission of the City of New York*.<sup>51</sup> The justices split on many issues and wrote six separate opinions, but two points emerged with a vote of the majority of justices. First, a majority affirmed that section 601 of Title VI is coextensive with the Equal Protection Clause and therefore prohibits only intentional discrimination.<sup>52</sup> Some of the justices suggested that *Lau* had been effectively overruled, though the Court did not explicitly so hold.<sup>53</sup> Second, a different majority of justices concluded that section 602 of Title VI allows federal agencies to go beyond this statutory floor and adopt regulations for funding recipients banning disparate impact discrimination.<sup>54</sup> The multiple opinions in *Guardians Association*,

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49. *Bakke*, 438 U.S. at 329 (opinion of Brennan, J.).

50. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”). While the opinion in *Bakke* addressed racial discrimination, later decisions seemed to assume that national origin discrimination must also be intentional in order to violate Title VI. See *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (noting in a case involving a national origin claim that “[i]t is similarly beyond dispute—and no party disagrees—that § 601 [of Title VI] prohibits only intentional discrimination.”) (citing *Bakke*).

51. 463 U.S. 582 (1983).

52. *Id.* at 610 (Powell, J., joined by Burger, C.J. & Rehnquist, J., concurring); *Id.* at 612 (O’Connor, J., concurring); *Id.* at 642 (Stevens, J., joined by Brennan, J., & Blackmun, J., dissenting).

53. *Id.* at 611 (Powell, J., concurring); *Id.* at 615 (O’Connor, J., concurring). The continuing validity of *Lau* is unclear. In *Lau*, a concurring opinion by Justice Stewart suggested that Title VI on its own might not ban discrimination based on language, but that the Department of Health, Education and Welfare had promulgated valid regulations under Title VI requiring schools to provide language assistance. *Lau v. Nichols*, 414 U.S. 563, 570–71 (1974) (Stewart, J., concurring). This position could be reconciled with *Guardians Association*. Cases, scholars, and the federal government continue to cite *Lau* for the proposition that Title VI and its regulations together can require protections for LEP individuals. See, e.g., DOJ Policy Guidance, *supra* note 4, at 50,123–24 (“Courts have applied the doctrine enunciated in *Lau* both inside and outside the education context.”). But the majority in *Lau* said it based its decision “solely on § 601 of the Civil Rights Act of 1964.” *Lau*, 414 U.S. at 566. Since subsequent cases have made clear that section 601 on its own does not cover language discrimination, some have suggested that *Lau* is no longer good law. See, e.g., *Almendares v. Palmer*, 284 F. Supp. 2d 799, 804 n.4 (N.D. Ohio 2003).

54. Three justices found that regulations prohibiting disparate impact discrimination were a valid exercise of agencies’ power to “further the purposes of Title VI.” *Guardians Ass’n*, 463 U.S. at 643–44 (Stevens, J., joined by Brennan, J. & Blackmun, J., dissenting). They joined with two other justices who believed Title VI itself banned disparate impact discrimination, but agreed that even if the statute did not extend that far, agencies would be free to go beyond the statutory floor in enacting regulations. *Id.* at 591–92 (opinion of White, J.); *Id.* at 623 n.15 (Marshall, J., dissenting). *But see id.* at 614–15 (O’Connor, J., concurring) (stating that agencies are not free to go beyond their statutory authority and “proscribe conduct that Congress did not intend to prohibit”).

therefore, limited the scope of section 601 while also leaving in place the broader federal regulations covering language access that had been in place since the early days of Title VI.<sup>55</sup>

During the Clinton administration, the federal government established its current framework for using these regulations to protect LEP individuals' rights. On August 11, 2000, President Clinton issued Executive Order 13,166, which directed each federal agency to "develop and implement a system by which LEP persons can meaningfully access" programs and services.<sup>56</sup> On the same day, the DOJ issued a guidance document setting out a four-factor test for determining what constitutes "meaningful access." The factors include "the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come in contact with the program, the importance of the service provided by the program, and the resources available to the recipient."<sup>57</sup> The Executive Order required agencies to use the DOJ guidance to create their own guidelines for funding recipients.<sup>58</sup> The order also required federal agencies that directly serve LEP individuals to create language access plans, even though Title VI itself does not cover those agencies.<sup>59</sup> In response to Executive Order 13,166, federal agencies issued new language access guidelines for funding recipients based on the DOJ's four-factor model.<sup>60</sup>

Even with the federal government's expanding set of language access directives, advocates still faced an open question about whether they could seek judicial review of Title VI language access claims. The Court had already established that Congress intended to create a private right of action to enforce section 601 of Title VI.<sup>61</sup> A majority of justices in

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55. In *Alexander v. Choate*, a unanimous Court described a "two-pronged holding" that could be found among the many opinions in *Guardians Association*: "First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." 469 U.S. 287, 293 (1985). The Court's attempt to discern a holding from *Guardians Association* has been described as "certainly dictum, and perhaps inaccurate," since it may have incorrectly counted the justices' votes. Laufer, *supra* note 24, at 1625 & n.70. Yet *Choate's* interpretation of *Guardians Association* has often been cited by circuit courts when upholding the validity of disparate impact regulations. *Id.* at 1625–26.

56. Exec. Order 13,166, *supra* note 4, at 50,121.

57. DOJ Policy Guidance, *supra* note 4, at 50,124–25.

58. Exec. Order 13,166, *supra* note 4, at 50,121–22. Agencies had to submit their guidelines to the DOJ for approval, then publish them in the *Federal Register* and solicit public comment. *Id.*

59. *Id.* at 50,121.

60. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-91, LANGUAGE ACCESS: SELECTED AGENCIES CAN IMPROVE SERVICES TO LIMITED ENGLISH PROFICIENT PERSONS 7 (2010) (finding that by the end of 2009, twenty-two federal departments and agencies had posted language access guidance for funding recipients online). The federal guidance documents are available online at [http://www.lep.gov/guidance/guidance\\_index.html](http://www.lep.gov/guidance/guidance_index.html).

61. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979) (finding that Congress intended to

*Guardians Association* suggested that litigants would also have a private right of action to enforce regulations promulgated under section 602, including the disparate impact regulations on which language access claims are based.<sup>62</sup> Yet the Court's fractured views, with multiple opinions that split on different points, left it hard to tell how far this private right of action extended. Justice Marshall argued that the resolution of this question would have important practical implications, since "a right without an effective remedy has little meaning."<sup>63</sup>

In 2001, the Supreme Court addressed the issue in *Sandoval*, a decision that provoked an outcry from civil rights advocates, who protested that the decision left "a right without an effective remedy" in its wake.

*B. The Sandoval Decision Removes Language Access Claims from Judicial Review*

*Alexander v. Sandoval* squarely addressed the issue of whether Title VI gave individuals a private right of action to enforce language access protections and other disparate impact regulations. This time, a majority of the Court spoke with a clear holding: it does not.<sup>64</sup>

The language access claim in *Sandoval* arose after Alabama amended its state constitution to make English its official language.<sup>65</sup> The Spanish-speaking class of plaintiffs challenged the Alabama Department of Public Safety's decision to administer driver's license tests only in English, arguing that it would have the effect of discriminating based on national origin.<sup>66</sup> The briefs, arguments, and ruling on the case, however, did not focus narrowly on the issue of language access. Instead, they considered more broadly how Congress had intended to enforce disparate impact regulations that went beyond the scope of Title VI.

The two sides adopted different readings of section 602, which allows federal agencies to terminate funding to recipients that do not comply with regulations. The state of Alabama argued that because section 602

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create an implied right of action under both Title VI and the analogous provision in Title IX, which prohibits gender discrimination by federal funding recipients).

62. Justice White, joined by Justice Rehnquist, expressed the view that a plaintiff had a private right of action under Title VI disparate impact regulations, but would be limited to declaratory and injunctive remedies and could not receive compensatory relief without showing intentional discrimination. *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 607 (1983) (opinion of White, J., joined by Rehnquist, J.). The four dissenting justices argued that a private right of action existed for disparate impact claims, with all forms of relief available. *Id.* at 615 (Marshall, J., dissenting); *Id.* at 636 (Stevens, J., joined by Brennan, J. & Blackmun, J., dissenting).

63. *Id.* at 626 (Marshall, J., dissenting).

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

65. *Id.* at 278–79.

66. *Id.* at 279.

created a system for administrative enforcement, Congress intended to preclude a private right of action for agency regulations.<sup>67</sup> In opposition, both the Spanish-speaking plaintiffs and the United States government argued that the regulations should be viewed as part of a unified Title VI scheme, and that the private right of action in section 601 should extend to the regulations.<sup>68</sup> Without a private right of action to enforce the federal regulations, there would be “significant gaps in the overall enforcement structure,” the plaintiffs wrote in their brief.<sup>69</sup> Parties would face two conflicting sets of standards, one for the judicial enforcement of rights under section 601, and one for the administrative enforcement of regulations promulgated under section 602.<sup>70</sup>

The plaintiffs also suggested that administrative enforcement paled in comparison to judicial review as a remedy for discrimination. The administrative enforcement process would take place between the funding recipient and the federal agency that provided the funding. An individual party or class of plaintiffs alleging discrimination would have no right to participate in agency investigations and hearings and would not receive damages or back pay.<sup>71</sup> Even if agencies did find violations, their threat to cut off federal funding would carry little weight, since they so rarely exercised this extreme sanction.<sup>72</sup> Without a judicial forum for disparate impact claims, then, individuals would have no leverage to force funding recipients to comply with the regulations. The United States agreed in its brief that judicial review represented a “necessary supplement” to the administrative enforcement process.<sup>73</sup>

A majority of the Court agreed with the state of Alabama’s position and held that individuals could not bring Title VI disparate impact claims in court. Justice Scalia, writing for the majority, accepted that agencies

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67. Brief for Petitioner at 30, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (No. 99-1908), 2000 U.S. S. Ct. Briefs LEXIS 607, at \*56 (“Section 602’s careful elaboration of a framework for obtaining compliance together with its ear-splitting silence authorizing private-enforcement actions against States under agency rules defeats respondent’s claim.”).

68. See Transcript of Oral Argument at \*37, *Sandoval*, 532 U.S. 275 (2001) (No. 99-1908), 2001 U.S. Trans. LEXIS 10 (Solicitor Gen. Seth Waxman) (arguing that in determining the extent of a private right of action, no precedent supported the idea of distinguishing between “rights articulated in a statute itself, and rights articulated in substantive regulations that the statute mandates that the agency promulgate”).

69. Brief for Respondents at 29, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (No. 99-1908), 2000 U.S. S. Ct. Briefs LEXIS 717, at \*60.

70. *Id.* at 28, 2000 U.S. S. Ct. Briefs LEXIS 717, at \*56–57.

71. *Id.* at 28 n.37, 30, 2000 U.S. S. Ct. Briefs LEXIS 717, at \*57 n.37, \*60–61.

72. *Id.* at 30 n.41, 2000 U.S. S. Ct. Briefs LEXIS 717, at \*61 n.41 (“Recipients understand full well that there is no possibility that violations of Title VI or its implementing regulations will ever lead to funding termination; there have been virtually no such terminations in the thirty-six years since the adoption of Title VI.”).

73. Brief for the United States at 31, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (No. 99-1908), 2000 U.S. S. Ct. Briefs LEXIS 718, at \*58.

could issue regulations under section 602 barring disparate impact discrimination, since neither party challenged that issue in the case.<sup>74</sup> But these regulations extended to a broader range of conduct than section 601 prohibited, so the private right of action to enforce section 601 would not cover them.<sup>75</sup> The Court then found that section 602 did not create a private right of action to enforce the regulations on its own.<sup>76</sup> The regulations themselves could only invoke private rights of action that Congress had already created; they could not themselves create rights of action.<sup>77</sup> Unless the claim fell within section 601's prohibition on intentional discrimination, an individual could not pursue a remedy in court.

Four members of the Court dissented sharply from the ruling, arguing that the majority departed from established precedent and ignored Congress's broad intent to fight discrimination. Justice Stevens, writing for the dissenters, argued that Congress intended to give agencies power under section 602 to "transform the statute's broad aspiration into social reality" by issuing "broad prophylactic rules" that could extend beyond the conduct prohibited by the statute itself.<sup>78</sup> The private right of action to enforce Title VI covered regulations issued under section 602 because they were all part of one "integrated remedial scheme."<sup>79</sup> Justice Stevens took the rare step of reading parts of his dissent from the bench, showing the high stakes of the decision.<sup>80</sup>

Title VI claims regarding language access had always been based on disparate impact discrimination, so *Sandoval* effectively removed this area of advocacy from judicial review. In the years following *Sandoval*, advocates, scholars, and the federal government sought to make sense of this new legal landscape.

### III. THE REACTION TO *SANDOVAL*

In their arguments in *Sandoval*, both the attorneys for the Spanish-speaking challengers and the Solicitor General of the United States argued that administrative enforcement alone would be an inferior substitute for judicial review of Title VI disparate impact claims.<sup>81</sup> After the Court's

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74. *Alexander v. Sandoval*, 532 U.S. 275, 281–82 (2001).

75. *Id.* at 285.

76. *Id.* at 288–89 (finding that Congress did not include any "rights-creating" language in section 602).

77. *Id.* at 291 ("Agencies may play the sorcerer's apprentice but not the sorcerer himself.").

78. *Id.* at 305–06 (Stevens, J., dissenting).

79. *Id.* at 304.

80. Linda Greenhouse, *Supreme Court Limits Scope Of a Main Civil Rights Law*, N.Y. TIMES, Apr. 25, 2001, at A14.

81. *See supra* notes 68–70 and accompanying text.



decision in *Sandoval*, both the advocates and the federal government had to regroup. Civil rights advocates focused on the benefits of judicial review, looking for ways of getting disparate impact claims back into the courts. Meanwhile, the federal government emphasized that its administrative enforcement process remained in place. More recently, the executive branch has reaffirmed its commitment to language access and acknowledged its heightened role as the sole enforcer of LEP individuals' rights under Title VI.

*A. Civil Rights Advocates Search for Ways to Restore Judicial Review*

Even though *Sandoval* specifically involved a challenge to an English-only policy, the effects of the decision extended far beyond the language access field. All areas in which civil rights advocates had relied on disparate impact litigation to bring Title VI claims felt *Sandoval's* impact.<sup>82</sup> As many advocates noted, twenty-first century civil rights battles rarely involve overt, intentional discrimination, and, instead, target policies that systematically disadvantage minorities.<sup>83</sup> Theodore M. Shaw of the NAACP Legal Defense and Educational Fund said the inability to bring disparate impact claims in court "opened a significant hole in the ozone layer of civil rights protection."<sup>84</sup> Advocates viewed *Sandoval* as part of the conservative Rehnquist Court's pattern of dismantling civil rights protections.<sup>85</sup> In response, they have pursued three strategies for restoring judicial review of language access and other disparate impact claims: bringing claims of intentional discrimination, litigating under other statutes, and enacting legislation to overturn *Sandoval*.

If lawyers can show that discrimination against LEP individuals is intentional, rather than merely proving it had a disparate impact by

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82. See, e.g., Brian Crossman, *Resurrecting Environmental Justice: Enforcement of EPA's Disparate-Impact Regulations Through Clean Air Act Citizen Suits*, 32 B.C. ENVTL. AFF. L. REV. 599, 617 (2005) (calling *Sandoval* a "crushing blow" to lawyers challenging the concentration of environmental hazards in low-income and minority communities); Dan McCaughey, *The Death of Disparate Impact Under Title VI: Alexander v. Sandoval and its Effects on Private Challenges to High-Stakes Testing Programs*, 84 B.U. L. REV. 247, 274 (2004) (criticizing *Sandoval* for barring judicial review of high-stakes standardized testing programs that disproportionately penalize minority students). Some observers also argued that the decision in *Sandoval* called into question the future of disparate impact litigation outside of the Title VI arena. See Laufer, *supra* note 24, at 1641–57 (arguing that *Sandoval* demonstrated a skepticism toward disparate impact regimes in general that could undermine other legislation passed under Congress's power to enforce the Fourteenth Amendment).

83. See Kimmel, Epstein & Ferraro, *supra* note 23, at 26 (2002) (stating that the majority of Title VI suits prior to *Sandoval* were based on disparate impact claims, "in large part because few federally funded programs are overtly discriminatory and, as a result, intentional race and national origin discrimination have become increasingly difficult to prove").

84. Greenhouse, *supra* note 80.

85. David G. Savage, *Bias Claims Get Same 5-4 Answer From Justices: No*, L.A. TIMES, Apr. 29, 2001, at A1.

national origin, they can still bring the case to court under the private right of action to enforce section 601 of Title VI.<sup>86</sup> Courts have set a high standard for proving a claim of intentional discrimination: even if the results of an action lead to stark disparities, plaintiffs still must show that the action was taken with a discriminatory motive.<sup>87</sup> Language access claims typically focus on a funding recipient's failure to provide certain services, and it can be especially hard to show a discriminatory motive when the plaintiff is challenging inaction rather than action.<sup>88</sup> Still, this type of claim survived a motion to dismiss in *Almendares v. Palmer*, a 2003 class action by a group of Spanish speakers who argued that Ohio's food stamp program violated Title VI by failing to provide translation services.<sup>89</sup> A federal district court found that the plaintiffs made out a claim of discriminatory intent because they alleged that the defendants knew they were required to provide Spanish translations, failed to meet this obligation, and knew the plaintiffs would be harmed by this failure.<sup>90</sup> The parties eventually reached a settlement in which the state agency implemented a language access plan and paid attorney's fees to the plaintiffs.<sup>91</sup> After *Almendares*, some observers argue that lawyers should pursue a similar litigation strategy in other cases, bringing intentional discrimination claims under Title VI when a funding recipient knew of its obligation to serve LEP individuals and refused to comply with it.<sup>92</sup>

Advocates have also raised the possibility of bringing language access

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86. See *supra* note 61 and accompanying text (discussing the private right of action to enforce section 601).

87. See *Pers. Admin'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that to establish discriminatory purpose under the Equal Protection Clause, a plaintiff must show that an action was taken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); see also Laufer, *supra* note 24, at 1616 ("A standard of proof that requires a showing of discriminatory intent sets the bar particularly high for plaintiffs.").

88. Daly, *supra* note 24, at 1039.

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

90. *Id.* at 807–08 ("If these allegations are true, one could logically infer that the policy was implemented and is being continued 'because of' its impact on national origin" and therefore constitutes discriminatory intent). The District Court later granted class certification. *Almendares v. Palmer*, 222 F.R.D. 324 (N.D. Ohio 2004).

91. Memorandum from Jeanne Carroll, Deputy Dir., Office of Family Stability, Ohio Job & Family Servs., to Dirs., Cnty. Dep'ts of Job and Family Servs. (Sept. 25, 2005), available at <http://www.jfs.ohio.gov/ofam/pdf/OFAMLetter39.PDF> (reminding counties of the obligations under the proposed settlement in *Almendares*); Bruce L. Adelson, *Title VI, Limited English Proficiency, and the Public Lawyer*, 15 THE PUB. LAW. 12, 14 (Winter 2007) (referring to the *Almendares* case under an alternate name, *Rodriguez v. Lucas County Dep't of Job & Family Servs.*).

92. See Daly, *supra* note 24, at 1042. Derek Black argues that advocates could try to show a "type of deliberate indifference that rises to the level of intent" by establishing that a federal funding recipient is aware that a policy is not achieving its stated goal and has a racially disparate impact, and that there is a better way to achieve the goal without the disparate impact. Derek Black, *Picking Up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 388 (2002).

claims under other statutes, since *Sandoval* only limited the reach of Title VI. Justice Stevens' dissent in *Sandoval* suggested bringing disparate impact claims under section 1983 of the Civil Rights Act, which allows injured parties to sue a government official who deprives them of "any rights, privileges, or immunities secured by the Constitution and laws."<sup>93</sup> The Supreme Court has never addressed whether the term "laws" in section 1983 covers administrative regulations or whether it only refers to statutes; circuit courts have split on this issue.<sup>94</sup> Many observers are pessimistic about the chances that section 1983 will be a successful avenue for bringing claims to enforce Title VI regulations.<sup>95</sup>

Lawyers could also bring claims under state and local anti-discrimination laws. For example, California's equivalent of Title VI creates a private right of action for LEP individuals who are denied access to state-funded programs.<sup>96</sup> California has also passed other laws requiring health care providers and insurance plans to provide language assistance.<sup>97</sup> Lawyers in California can pursue remedies for LEP clients under these laws, and advocates in other states can seek to enact legislation following California's model.<sup>98</sup> In New York City, organizations serving LEP clients successfully campaigned for a local law, passed in 2003, requiring city agencies to provide translation assistance for LEP individuals seeking food stamps, medical benefits, and other social services.<sup>99</sup> Mayor Michael Bloomberg also signed an

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93. 42 U.S.C. § 1983 (2006). See *Sandoval*, 532 U.S. at 300 (2001) (Stevens, J., dissenting) ("Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief.").

94. See Bradford C. Mank, *Can Administrative Regulations Interpret Rights Enforceable Under Section 1983?: Why Chevron Deference Survives Sandoval and Gonzaga*, 32 FLA. ST. U. L. REV. 843, 843–45 (2005).

95. See Black, *supra* note 92, at 376 (predicting that based on subsequent Supreme Court cases, "it is unlikely that the Court would find that section 602 creates a 'right' for purposes of 1983 while not creating an independent right in section 602"); Labow, *supra* note 24, at 229; Daly, *supra* note 24, at 1027 n.150; Kuehnhoff, *supra* note 25, at 244–47. But see Mank, *supra* note 94, at 895 (arguing that the principle of *Chevron* deference allows agencies to fill gaps in a statute "so that implicit rights . . . become sufficiently definite to be enforceable through § 1983").

96. CAL. GOV. CODE § 11135 (West 2012) (prohibiting national origin discrimination by "any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state"); CAL. GOV. CODE § 11139 (West 2002) ("This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief, which shall be independent of any other rights and remedies.").

97. CAL. HEALTH & SAFETY CODE § 1257(c)(1)–(7) (Deering 2012); CAL. HEALTH & SAFETY CODE § 1367.04 (Deering 2012); CAL. INS. CODE § 10133.8 (Deering 2012). See also Lily Lo, *The Right to Understand Your Doctor: Protecting Language Access Rights in Healthcare*, 31 B.C. THIRD WORLD L.J. 377, 399–401 (2011).

98. Lo, *supra* note 97, at 402 ("Other states should follow California's example in creating a legal right of language access for LEP patients.").

99. N.Y.C. ADMIN. CODE §§ 8-1001 to 8-1011; see also Make the Rd. N.Y. & N.Y. Immigration Coal., *Still Lost in Translation: City Agencies' Compliance with Local Law 73 and*

executive order in 2008 requiring all city agencies that provide “direct public services” to enact language access policies.<sup>100</sup> Even after the passage of these two measures, many city agencies still failed to provide language services, and Legal Services NYC filed a state court suit in 2009 seeking to force the city’s Human Resources Administration to comply with the local law.<sup>101</sup> As these examples show, local and state laws can provide additional layers of protection for LEP individuals, and advocates can use these laws to bring claims in state courts. Still, the success of this approach will vary depending on the state, leaving a significant need for federal enforcement efforts.<sup>102</sup>

Finally, since civil rights advocates found the decision in *Sandoval* so disheartening, some have argued that the best solution would be to convince Congress to overturn it. In the past, Congress has passed statutes to overturn the Supreme Court’s narrow interpretations of civil rights laws.<sup>103</sup> Advocates have argued that Congress should amend Title VI to reverse two parts of *Sandoval*’s holding: first, to establish that section 601 covers disparate impact discrimination, and second, to allow private causes of action for violations of regulations established under section 602.<sup>104</sup> Senator Edward M. Kennedy and Representative John Lewis introduced a bill in Congress in 2008 that would have enacted both of these changes.<sup>105</sup> Lawmakers explicitly described the proposed legislation as a response to *Sandoval*. Senator Barbara Mikulski, a co-sponsor, said the Supreme Court’s decision “sent a dangerous message about equity in this country” that Congress had to fix.<sup>106</sup> The bill was referred to committee in both houses and never came to a vote.<sup>107</sup>

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*Executive Order 120: Examining Progress and Work Still to be Done* 10 (July 2010), [http://72.34.53.249/~thenyc/sites/default/files/Still\\_Lost\\_in\\_Translation\\_final%207\\_7\\_10\\_0.pdf](http://72.34.53.249/~thenyc/sites/default/files/Still_Lost_in_Translation_final%207_7_10_0.pdf) [hereinafter *Still Lost in Translation*].

100. Exec. Order No. 120 (July 28, 2008), available at <http://www.nyc.gov/html/imm/html/eoll/eo120.shtml>.

101. *Still Lost in Translation*, *supra* note 99, at 3; Jennifer 8. Lee, *Welfare Agency Is Sued Over Translation Services*, N.Y. TIMES, Aug. 19, 2009, at A19.

102. Kimmel, Epstein & Ferraro, *supra* note 23, at 28.

103. See Committee on Civil Rights, *Salvaging Civil Rights Undermined by the Supreme Court: Extending the Protection of Federal Civil Rights Laws in Light of Recent Restrictive Supreme Court Decisions*, 56 THE RECORD 510, 511 (2001) (listing examples of statutes Congress has passed to overturn the Court’s civil rights decisions).

104. See *id.* at 530 (“Congress could amend Title VI by providing that ‘any person aggrieved by the violation of any regulations issued pursuant to this Act may bring a civil action in an appropriate federal court for injunctive relief and damages. Such actions may include suits challenging any discriminatory practice or policy which will be deemed unlawful if it has a disparate impact upon persons protected by this title.’”); Daly, *supra* note 24, at 1044.

105. Civil Rights Act of 2008, S. 2554, H.R. 5129, 110th Cong. (2008).

106. *Sen. Kennedy, Rep. Lewis Introduce Civil Rights Act of 2008*, U.S. FED NEWS SERVICE, Jan. 28, 2008.

107. See Bill Summary and Status 110th Congress (2007-2008) S. 2554 (2008), [http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.02554](http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.02554;); Bill Summary and Status 110th Congress

The fate of the Civil Rights Act of 2008 is particularly striking in contrast with a second bill that Senator Kennedy introduced at the same time to overturn a different Supreme Court decision.<sup>108</sup> In 2007, the Court dismissed the case of Lily Ledbetter, a female Goodyear Tire employee who discovered, after the statute of limitations on suits for pay discrimination had expired, that she was paid less than male colleagues.<sup>109</sup> Senator Kennedy's bill, the Fair Pay Restoration Act, proposed to reset the statute of limitations with each discriminatory paycheck.<sup>110</sup> In the midst of the 2008 presidential campaign season, Senate Republicans rejected the bill, criticizing the measure for allowing more lawsuits.<sup>111</sup> After the election, Senator Mikulski reintroduced the bill, Congress passed it, and President Obama signed the Lily Ledbetter Fair Pay Act as the first new legislation of his presidency.<sup>112</sup>

Congressional Democrats had sought in 2008 to overturn two Supreme Court decisions that made it harder for plaintiffs to sue for discrimination. Faced with hostility toward the idea of increased litigation, Democrats may have had the political capital to address only one of the decisions. Whatever their strategic reasons, Democrats chose not to pursue a bill to overturn *Sandoval* in 2009 when they had their best opportunity, with a newly elected Democratic president and a majority in both houses of Congress. As more time passes since the Court's decision in *Sandoval*, it will likely become increasingly difficult for lawmakers to convince the bill's opponents of the urgency of reversing the decision.

The strategies of bringing intentional discrimination claims, exploring litigation under other federal and state statutes, and reversing the *Sandoval* rule in Congress all focus on the underlying goal of returning disparate impact claims to the courts. Until any of these strategies have broad success, however, the spotlight will be on the federal government and its administrative enforcement process.

### *B. The Response from the Federal Government*

The executive branch joined civil rights advocates in opposing the Court's decision in *Sandoval*. Before the decision, federal agencies had

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(2007-2008) H.R. 5129 (2008), <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR05129>.

108. Fair Pay Restoration Act, S.1843, 110th Cong. (2008). See also Editorial, *Restoring Civil Rights*, N.Y. TIMES, Jan. 30, 2008, at A22 (discussing Senator Kennedy's introduction of both the Fair Pay Restoration Act and the Civil Rights Act of 2008).

109. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621-23 (2007).

110. Fair Pay Restoration Act, S.1843, 110th Cong. (2008) at Sec. 3.

111. Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 28, 2008, at A22 ("Republicans said the proposal to ease the time constraints would prompt more lawsuits and lead to litigation over outdated cases.")

112. Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009); Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009.

relied for decades on a dual enforcement system in which agencies and private individuals shared the burden of enforcing Title VI's disparate impact regulations.<sup>113</sup> Seth Waxman, in his final appearance as Solicitor General for the Clinton administration, argued in *Sandoval* that federal agencies should not be the sole enforcers of LEP individuals' rights and that a judicial forum should be available as well.<sup>114</sup> After this argument lost at the Supreme Court, the government faced pressure to heighten its efforts.<sup>115</sup>

The federal government's initial concern was defending the validity of its disparate impact regulations. President Clinton's executive order and the DOJ guidance document regarding language access came out shortly before *Sandoval*.<sup>116</sup> The majority's decision raised doubts about the continued legality of these federal directives. Justice Scalia's majority opinion suggested that allowing agencies to issue regulations banning disparate impact discrimination was in "considerable tension" with the rule that Title VI only prohibited intentional discrimination.<sup>117</sup> However, the Court noted that five justices in *Guardians Association* agreed that agencies could issue regulations going beyond the scope of the statute, and since the parties had not challenged that issue in *Sandoval*, the Court did not address it directly.<sup>118</sup>

After the Supreme Court's decision, the DOJ issued a memo to federal agencies rejecting any interpretation of *Sandoval* as "impliedly striking down" Title VI disparate impact regulations.<sup>119</sup> The DOJ also responded to public comment that its revised LEP guidance was "unsupported by law," noting that "the Department's commitment to implement Title VI through regulations reaching language barriers is long-standing and is unaffected by recent judicial action precluding

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113. See *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1774 (2003) [hereinafter *After Sandoval*] (describing the arrangement as a "cooperative partnership").

114. See Transcript of Oral Argument at \*43, *Sandoval*, 532 U.S. 275 (2001) (No. 99-1908), 2001 U.S. Trans. LEXIS 10 (Solicitor Gen. Seth Waxman) (stating that "for 25 years at least there has been a shared understanding among the three branches" of government that individuals had a private right of action to enforce Title VI regulations); David Savage, *Justices Debate States' Rights Test of Federal Anti-Bias Law*, L.A. TIMES, Jan. 17, 2001, at A5 (stating that the *Sandoval* argument was Waxman's last as Solicitor General).

115. See *After Sandoval*, *supra* note 113, at 1775 ("If nothing else, the Court's decision has created an urgency that should encourage agencies to reassess how best to fulfill their enforcement mandates—an opportunity for self-evaluation of which agencies have failed to take full advantage in the past due to reliance on private litigation.").

116. Exec. Order 13,166, *supra* note 4; DOJ Policy Guidance, *supra* note 4.

117. *Alexander v. Sandoval*, 532 U.S. 275, 281–82 (2001).

118. *Id.*

119. Memorandum from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Heads of Dep'ts and Agencies, Gen. Counsels & Civil Rights Dir. (Oct. 26, 2001), available at <http://www.justice.gov/crt/about/cor/lep/Oct26memorandum.pdf>.

*individuals* from bringing judicial actions seeking to enforce those agency regulations.”<sup>120</sup> When a group of doctors who received federal Medicaid funding challenged the legality of Executive Order 13,166 and its accompanying guidance document in federal court, the DOJ won a dismissal of the suit on procedural grounds.<sup>121</sup> The federal language access regulations therefore remain in force after *Sandoval*, a result that some scholars argue is consistent with precedent and with the principle of deference to agency interpretations of statutes.<sup>122</sup>

In recent years, the federal government has moved beyond defending the legality of its language access directives and looked more closely at how often those directives are enforced. Advocates have observed a heightened commitment to language access enforcement under President Obama, with more staff and resources devoted to this area.<sup>123</sup> In a memorandum to federal agencies in early 2011, Attorney General Eric Holder reaffirmed the federal government’s commitment to language access, acknowledged “significant variations” in agency compliance with Executive Order 13,166, and directed agencies to establish working groups, update their language access plans, and prepare guidance for funding recipients.<sup>124</sup> Within the DOJ, the Civil Rights Division’s Federal Coordination and Compliance Section has taken the lead on coordinating language access efforts across the government. The office reviews agencies’ plans and guidance documents and maintains a centralized

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120. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,455 (June 18, 2002) [hereinafter DOJ Recipient Guidance].

121. In *ProEnglish v. Bush*, a group of doctors who received federal funding and an organization advocating for “English-only” laws challenged Executive Order 13,166, the DOJ guidance, and the HHS language access guidelines. 70 F. App’x 84 (4th Cir. 2003). The district court dismissed for lack of subject matter jurisdiction, finding the claims were not ripe because there was no allegation that HHS had threatened the plaintiffs with any action. *Id.* at 86. The Fourth Circuit affirmed. *Id.* at 88.

122. The principle of deference to agency interpretations of statutes comes from the Court’s test in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). The text of Title VI is ambiguous about how federal agencies should enforce the statute, and the federal agencies’ decision to bar disparate impact discrimination is a reasonable interpretation, so the courts should defer to that interpretation. *After Sandoval, supra* note 113, at 1781–86. *But see* Laufer, *supra* note 24, at 1635 & n.103 (predicting that, based on Justice Scalia’s language in *Sandoval*, the Court could find in a future case that Title VI unambiguously covers only intentional discrimination, so the disparate impact regulations exceed the statutory authority and should not receive deference under *Chevron*); Labow, *supra* note 24, at 229–31 (“*Sandoval* cast serious doubt as to the validity” of disparate impact regulations).

123. Telephone Interview with Claudia Johnson, LawHelp Interactive Program Manager, Pro Bono Net (May 16, 2011) [hereinafter Johnson Interview]; Telephone Interview with Beth Shapiro, Senior Attorney, Language Access Project, Cmty. Legal Servs. of Phila. (May 6, 2011) [hereinafter Shapiro Interview May 2011].

124. Memorandum from Eric Holder, Attorney Gen., to Heads of Fed. Agencies, General Counsels, and Civil Rights Heads (Feb. 17, 2011), available at <http://go.usa.gov/bs3> [hereinafter Holder Memo].

website with language access resources.<sup>125</sup>

The Obama administration has publicly embraced its role in enforcing Title VI disparate impact regulations after *Sandoval* left the federal government with sole responsibility for doing so.<sup>126</sup> Lawyers representing LEP individuals have found that this administrative enforcement process offers both significant benefits and frustrating shortcomings. Their experiences provide insights into the way administrative enforcement operates when it is removed from judicial oversight.

#### IV.

#### ACHIEVING REFORMS THROUGH THE ADMINISTRATIVE ENFORCEMENT PROCESS

The Supreme Court's decision in *Sandoval* ended judicial review of language access claims under Title VI, but lawyers in the field had never relied solely on the courts to bring about changes for their clients.<sup>127</sup> Advocates had already learned that they could achieve successes by filing complaints with the federal government and then working with the funding recipients to implement agreements. For example, lawyers in Washington State in the 1970s and 1980s filed complaints with HHS's Office for Civil Rights to challenge LEP clients' lack of access to federally funded medical, educational, and welfare services. The lawyers reached consent decrees with each of the entities they challenged.<sup>128</sup> These experiences left lawyers for LEP clients with a way to continue their work after *Sandoval* removed litigation as an option.

In fact, as this section will argue, language access advocates have been able to achieve significant reforms since *Sandoval* by taking advantage of the ways in which the Title VI administrative enforcement process differs from litigation. The administrative enforcement process emphasizes collaboration, in contrast to adversarial courtroom proceedings, and this difference benefits lawyers in two important ways. First, when lawyers file administrative complaints, all parties involved have unique incentives to reach negotiated settlements, which can result in comprehensive plans that increase access for large numbers of LEP

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125. The DOJ Federal Coordination and Compliance Section maintains a website, <http://www.lep.gov>, for the federal intra-agency working group on LEP issues. The section's webpage is <http://www.justice.gov/crt/about/cor/>.

126. See Memorandum from Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Fed. Agency Civil Rights Directors and Gen. Counsels (July 10, 2009), available at [http://www.lep.gov/titlevi\\_enforcement\\_memo.pdf](http://www.lep.gov/titlevi_enforcement_memo.pdf) (noting that *Sandoval* left agencies with a much more important role in fighting disparate impact discrimination and calling on them to be "particularly vigilant in ensuring strong enforcement in this area").

127. Johnson Interview, *supra* note 123 (noting that while *Sandoval* was a disappointing decision for language access advocates, they had never depended solely on litigation).

128. Leticia Camacho & Gillian Dutton, *How Coalitions Can Help Legal Aid Attorneys Improve Access for Their Limited-English-Proficient Clients*, 42 CLEARINGHOUSE REV. 551, 552-53 (2009).



individuals. Second, lawyers are able to bring about changes even without filing complaints, by going directly to funding recipients and using the federal government's written guidance to educate the recipient agencies about the steps they should be taking to ensure language access. Agencies may be more receptive to advocates' demands when they are not facing the threat of a lawsuit, allowing the advocates to serve in the role of consultant and demonstrate how improving language access can make the agency's operations run more effectively.

#### *A. Negotiating Voluntary Compliance Agreements*

Title VI and its regulations express a clear preference for resolving discrimination complaints through negotiation. If an individual believes a federally funded program has failed to provide adequate language access, she can file a complaint with the Office for Civil Rights ("OCR") in the specific federal agency that provides the funding to that program.<sup>129</sup> Federal regulations require the OCR to investigate all complaints that are received.<sup>130</sup> If the recipient is found to be out of compliance with the language access regulations, the agency will inform the recipient in writing of the steps that must be taken. Both the statute and the regulations require the federal government first to seek voluntary compliance and monitor the recipient's development of a language access policy.<sup>131</sup> The agency can terminate federal funding only if the voluntary compliance process does not succeed.<sup>132</sup>

Advocates and scholars note that the threat to terminate federal funding is rarely exercised.<sup>133</sup> Federal courts have held that Title VI does not mandate that agency officials terminate funds as the only means of

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129. 28 C.F.R. § 42.107(b) (2011) ("Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this subpart may by himself or by a representative file with the responsible Department official or his designee a written complaint.").

130. 28 C.F.R. § 42.107(c) (2011) ("The responsible Department official . . . will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply."); DOJ Recipient Guidance, *supra* note 120, at 41,465–66.

131. 42 U.S.C. § 2000d-1 (2006) (providing for enforcement by termination of funding or other means, but stating that "no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means"); 28 C.F.R. § 42.107(d)(1) (2011) ("[T]he matter will be resolved by informal means whenever possible.").

132. 42 U.S.C. § 2000d-1 (2006) (requiring a hearing on the record before funding can be terminated); 28 C.F.R. 42.108(e) (2011).

133. Telephone Interview with Laura Klein Abel, Deputy Dir., Justice Program, Brennan Center for Justice (May 10, 2011) [hereinafter Abel Interview]; Shapiro Interview May 2011, *supra* note 123; *After Sandoval*, *supra* note 113, at 1777 ("This power is rarely invoked, in part because Title VI requires congressional authorization for any agency decision to terminate funds."); Black, *supra* note 92, at 357 n.7 (noting that "the Department of Education has only terminated funds on two occasions in the past two decades").

enforcement.<sup>134</sup> Some argue that the longer agencies go without exercising this power, the more recipients will view it as an empty threat and the less leverage the federal government will have over funding recipients.<sup>135</sup>

Yet funding recipients are in a contractual relationship with the federal government and agree to accept language access obligations under Title VI as a condition of receiving federal money.<sup>136</sup> The Office of Management and Budget (“OMB”) has developed draft language for federal agencies to use in their funding contracts, in which recipients acknowledge that they must provide “meaningful access” to LEP individuals in order to comply with Title VI and the regulations of the specific funding agency.<sup>137</sup> This written commitment may make recipients take the threat of losing federal funding more seriously than if no such contract existed. In the rare early cases outside the field of language access where the government did terminate funding, recipients responded to the sanction. For example, between July 1964 and March 1970 the Department of Health, Education, and Welfare brought about six hundred administrative proceedings against school districts. Of those cases, four hundred districts achieved compliance without the threat being carried out. In the two hundred districts that lost their federal funding, all but four achieved compliance afterward; HEW then restored their funding.<sup>138</sup>

More significantly, all of the parties in the administrative enforcement process have a strong incentive to prevent termination of funding from occurring, which may help to explain why the government’s threat is so infrequently used. The recipients whose LEP policies are being challenged, of course, want to keep their federal funding. These recipients are often public housing authorities, welfare programs, or other local offices that provide critical services to low-income residents, and the federal agencies realize that cutting off these programs’ funding will

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134. See *Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) (en banc) (finding that agencies have a “responsibility to enforce Title VI by one of the two alternative means contemplated by the statute,” either the termination of funding or “any other means authorized by law”); *Nat’l Black Police Ass’n, Inc. v. Velde*, 712 F.2d 569, 576–77 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 963 (1984) (holding that agency officials are entitled to qualified immunity in any suit challenging their failure to terminate funding, because Title VI does not impose a clear statutory duty to pursue the termination of funds as opposed to other approaches).

135. Abel Interview, *supra* note 133.

136. 28 C.F.R. § 42.105(a)(1) (2011) (“Every application for Federal financial assistance to which this subpart applies . . . shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this subpart. . .”).

137. OFFICE OF MGMT. & BUDGET, DRAFT ASSURANCE LANGUAGE: LANGUAGE FOR OMB STANDARDIZED AWARD TERMS AND CONDITIONS, <http://go.usa.gov/bs7>.

138. *Nat’l Black Police Ass’n, Inc.*, 712 F.2d at 576 n.32 (citing VI UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 384–85 (1974)).

cause significant harm to the communities they serve.<sup>139</sup> Advocates for LEP individuals similarly do not want an outcome that would put their clients' benefits in jeopardy. All parties are therefore better off if the recipient keeps its federal funding and agrees to take steps to improve access for LEP individuals.

This alignment of incentives can result in voluntary compliance plans that achieve comprehensive reforms for LEP communities. The plans generally require recipients to conduct assessments of the language needs in their communities, create language access plans for their offices, and provide training for their staff on working with LEP individuals.<sup>140</sup> The recipients agree to develop procedures that receptionists and intake staff can use to identify individuals in need of language assistance.<sup>141</sup> Recipients must then make oral interpretation services available through bilingual staff, interpreters, or telephone services.<sup>142</sup> They also commit to providing written translations of critical notices, such as application forms, hearing notices, and approvals or denials of benefits.<sup>143</sup> Finally, the agreements establish systems for tracking the services provided to LEP individuals and monitoring the program going forward.<sup>144</sup>

The agreements can also go beyond these broad changes, tailoring the new language access policies to the specific needs of the funding recipient or responding to particular problems uncovered during the federal government's investigation. After a DOJ investigation, the Palm Beach

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139. See Kuehnhoff, *supra* note 25, at 240 (“Ironically, the severity of this remedy [the termination of funding] can harm the interests of LEP tenants since HUD may be reluctant to use this tool in light of the innocent program beneficiaries who would also be harmed by the loss of program funding.”); *After Sandoval*, *supra* note 113, at 1777 n.19 (“Realistically, such a response is often too draconian for an agency to pursue. In the educational context, for instance, withholding funds would hurt the very people whom Title VI aims to protect.”).

140. See, e.g., OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NO. 08-76828, RHODE ISLAND DEPARTMENT OF HUMAN SERVICES RESOLUTION AGREEMENT (2011), available at <http://www.hhs.gov/ocr/civilrights/activities/agreements/ridhhsagreement.pdf> [hereinafter R.I. Agreement]; Montgomery Agreement, *supra* note 1; DEP'T OF JUSTICE, NO. 171-18-17, MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE PALM BEACH COUNTY SHERIFF'S OFFICE (2010), available at <http://www.justice.gov/crt/lep/PalmBeachSheriffMOA.pdf> [hereinafter Palm Beach Agreement].

141. This might include asking individuals to point to their language on a poster with many languages, using a telephone service, or using bilingual staff. R.I. Agreement, *supra* note 140, at 12–13; Montgomery Agreement, *supra* note 1, at IV(C)(2); Palm Beach Agreement, *supra* note 140, Attachment A, at 2.

142. R.I. Agreement, *supra* note 140, at 14–15; Montgomery Agreement, *supra* note 1, at IV(F)(1); Palm Beach Agreement, *supra* note 140, Attachment A, at 3.

143. Recipients may be required to decide which of its documents are “vital documents” and translate them into any language that is spoken by at least 5 percent of the eligible client population. R.I. Agreement, *supra* note 140, at 15–16; Montgomery Agreement, *supra* note 1, at IV(G).

144. The monitoring program could include reviewing case records, requesting feedback from LEP clients, making unannounced site visits, and sending testers. R.I. Agreement, *supra* note 140, at 21–22; Montgomery Agreement, *supra* note 1, at IV(T).

County Sheriff's Office in Florida adopted both general language access reforms and a set of operating procedures unique to the correctional context. For example, the procedures require staff to seek assistance in communicating with inmates when determining their dietary needs or imposing disciplinary measures.<sup>145</sup> The Sheriff's Office also agreed that fellow inmates should not be relied upon to interpret in critical situations.<sup>146</sup> The voluntary compliance process allows the federal funding agency to study the recipient's program at this level of detail, identifying unmet needs of LEP individuals and requiring steps to address them.

As these examples show, when the administrative enforcement process works, it can achieve results precisely because of the ways in which it differs from litigation. An individual can file a complaint simply by filling out a form, without having to pay any filing fees or meet any pleading requirements that a court proceeding might impose.<sup>147</sup> More importantly, the process can be more collaborative than litigation, because all parties have incentives to reach a voluntary agreement allowing the recipient to keep its funding. In the plans that emerge from the negotiation process, recipients agree to make concrete changes to the way their programs operate, which can lead to long-term benefits for the LEP populations they serve.

#### *B. Making the Case Directly to Funding Recipients*

While the Title VI administrative enforcement process remains a viable option after *Sandoval*, lawyers for LEP clients have in some cases opted to forego the process and instead make the case for language access reforms directly to the funding recipients. Advocates emphasize that they are able to take a positive, collegial approach, which they contrast to an adversarial court proceeding.<sup>148</sup> They try to present themselves in the role of consultant, pointing out areas where the program is not serving LEP individuals effectively and suggesting ways that the program could fix those problems. By adopting this strategy, lawyers have been able to achieve the same types of reforms that could be reached in the voluntary agreements.

The development of a new language access policy for Philadelphia's Department of Health shows the wide-ranging impact of this strategy.<sup>149</sup> Advocates first conducted a survey of clinic staff to document their

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145. Palm Beach Agreement, *supra* note 140, Attachment A, at 4.

146. *Id.*

147. Federal agencies provide Title VI complaint forms online in multiple languages. *See, e.g.*, U.S. Dep't of Health & Human Servs., <http://www.hhs.gov/ocr/civilrights/complaints/index.html>; U.S. Dep't of Justice, <http://www.justice.gov/crt/about/cor/complaint.php>.

148. Johnson Interview, *supra* note 123.

149. *See supra* notes 9–14 and accompanying text.

problems communicating with LEP patients.<sup>150</sup> Beth Shapiro, a lawyer representing the LEP patients, recalls that the survey results made a significant impact on Department of Health officials, since they were hearing from their own staff about the need for reforms. Advocates and city officials all agreed as a starting point on the importance of language access, which allowed them to move to a practical discussion about how to implement it. They resolved major questions of policy, such as establishing a preference system for interpretive services: the Department would use bilingual staff members when available, then staff interpreters, and then telephone interpretation hotlines, while strongly discouraging the use of friends or family members. Their discussions also touched on more mundane but equally important details of day-to-day implementation, from deciding where to post signs notifying patients of available interpretation services, to creating a system for tracking patients' language abilities in their files. As advocates worked with the Department of Health to create this language access plan, they held meetings at community health centers so staff could participate directly in the creation of the plan.<sup>151</sup>

During these discussions, city officials showed a willingness to adopt new language access measures even when they carried a substantial cost. For example, the new plan called for the use of telephone interpretation hotlines when in-person interpreters were not available, but the Department of Health discovered that many of the examination rooms were not equipped with telephones or even telephone lines. City officials acknowledged that patients needed to have access to interpretation services in every examination room, so they agreed to install new telephone lines.<sup>152</sup> Since lawyers had brought the survey results and made sure city officials were on board with the goal of improving language access, the lack of telephone lines became a practical obstacle to work around rather than a point of contention.

The negotiations with Philadelphia's Department of Health not only resulted in a comprehensive language access policy but also laid the groundwork for an ongoing dialogue between LEP advocates and city officials. Shortly after the city implemented the new policy, a Department of Health representative met with a group of LEP clients at a senior center to ask them whether they had noticed changes, and the patients gave largely positive reports about their recent interactions with health clinic staff. Since then, advocates from the Pennsylvania Immigration and Citizenship Coalition have continued to monitor the Department of Health's language access measures and meet with officials to notify them

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150. Shapiro Interview Feb. 2012, *supra* note 9.

151. *Id.*

152. *Id.*

of problems.<sup>153</sup> The goal of this type of language access advocacy is not to resolve a specific dispute, but to create a new policy for serving LEP individuals that will evolve as new challenges emerge. As the Philadelphia example demonstrates, the collaborative strategy leaves room for lawyers to remain involved in the implementation of the policy.

While advocates find it most successful to emphasize the benefits of enacting language access reforms, their position is strengthened by having the weight of federal directives behind them. President Clinton's Executive Order 13,166 instructed federal agencies to create LEP guidance for funding recipients modeled after the DOJ guidance.<sup>154</sup> Following the executive order, over twenty-five agencies have issued guidance documents, all of which are available online.<sup>155</sup> Each agency's guidance document outlines how that specific agency's funding recipients should apply the DOJ's four-factor test to determine what language services they are obligated to provide.<sup>156</sup> The guidance documents also remind funding recipients that they must ensure the competency of the oral interpreters and written translators that they hire, and they outline how to create a language access plan that includes training for staff, notice to LEP individuals of available services, and ongoing monitoring and updating of the plan.<sup>157</sup> Advocates can stress to recipients that they are in violation of the law, pointing to provisions of these guidance documents as proof of what the law requires.<sup>158</sup> They can also cite examples of past voluntary compliance agreements, which the government is now making available online.<sup>159</sup> The federal guidance documents and past agreements put funding recipients on notice, showing what language access reforms the federal government would likely demand if advocates filed a complaint. Advocates have thus been able to convince recipients to make these changes without needing to file administrative complaints.

Recent progress in state court systems also illustrates how guidance from the federal government complements the work of advocates on the ground. In 2009, the Brennan Center for Justice reported that courts in many states failed to provide interpreters for all civil cases or charged a fee to LEP litigants for interpreters.<sup>160</sup> Following the report, the DOJ sent

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153. *Id.*

154. Exec. Order 13,166, *supra* note 4, at 50,121–22.

155. The guidance documents are posted at [http://www.lep.gov/guidance/guidance\\_index.html](http://www.lep.gov/guidance/guidance_index.html).

156. *See supra* note 57 and accompanying text.

157. *See, e.g.*, DOJ Recipient Guidance, *supra* note 120, at 41,461–65.

158. Shapiro Interview May 2011, *supra* note 123.

159. *Id.* To find agreements online, see, e.g., <http://www.justice.gov/crt/about/cor/agreements.php>; <http://www.hhs.gov/ocr/civilrights/activities/agreements/index.html>.

160. Abel, *supra* note 25, at 1 (reporting that out of the 35 state court systems studied, 46 percent did not guarantee interpreters in all civil cases, 80 percent did not require the court to pay

a letter to all state court systems informing them that Title VI and its regulations prohibited these practices.<sup>161</sup> Since then, several states have taken important steps to reform their interpreter programs and are explicitly acknowledging their Title VI obligations for the first time.<sup>162</sup> In some states, these reforms occurred as a result of active DOJ enforcement: advocates filed Title VI complaints, the DOJ investigated and issued findings, and the state court systems adopted new language access measures in order to comply with federal directives.<sup>163</sup> However, at least two state court systems enacted new language access policies proactively after receiving the DOJ letter, rather than waiting for an administrative complaint to be filed.<sup>164</sup> Advocates still point to ways in which some state court systems are failing to ensure access to justice for LEP litigants and emphasize that the courts need more funding for interpreters.<sup>165</sup> Still, the recent improvements in the state courts show that advocates do not always have to file Title VI complaints in order to prompt funding recipients to implement language access measures. Funding recipients may respond to guidance from the federal government that outlines their language access obligations, just as the two state court systems responded to the DOJ letter even though no administrative complaints had been filed against them.

The above discussion shows how success in the field of language advocacy depends on a partnership between players on the national and

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for interpreters, and 37 percent did not require interpreters to have credentials).

161. Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Chief Justices and State Court Adm'rs (Aug. 16, 2010), *available at* <http://go.usa.gov/bet>, at 2–3 [hereinafter Perez Letter] (warning that “DOJ has observed that some court systems continue to operate in apparent violation of federal law”).

162. *See* Laura Abel & Matthew Longobardi, *Improvements in Language Access in the Courts, 2009 to 2012*, CLEARINGHOUSE REV. (forthcoming Nov.—Dec. 2012); Abel Interview, *supra* note 133 (citing positive changes in some states and commenting that some state court administrators did not even seem to be aware of Title VI before the Brennan Center report and the letter from Perez).

163. *See* Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. John W. Smith, Director, N.C. Administrative Office of the Courts (March 8, 2012), *available at* [http://www.justice.gov/crt/about/cor/TitleVI/030812\\_DOJ\\_Letter\\_to\\_NC\\_AOC.pdf](http://www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf); DEP'T OF JUSTICE, NO. 171-13-63, MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE COLORADO JUDICIAL DEPARTMENT (2011), *available at* [http://www.justice.gov/crt/about/cor/agreements/Colorado\\_MOA\\_6\\_28\\_11.pdf](http://www.justice.gov/crt/about/cor/agreements/Colorado_MOA_6_28_11.pdf); R.I. Supreme Court, Exec. Order No. 2012-05 (June 13, 2012), *available at* <http://www.courts.ri.gov/Courts/SupremeCourt/ExecutiveOrders/Executive Order 2012-05.pdf>; *see also* Abel & Longobardi, *supra* note 162 (discussing the Title VI complaints filed in Colorado, North Carolina, and Rhode Island)

164. Abel & Longobardi, *supra* note 162 (discussing language access reforms in Tennessee and Utah that occurred without any known Title VI complaints).

165. *See* Mulé, *supra* note 6, at 29–31 (discussing progress in language access in state courts but arguing that state court systems need additional funding to meet the need for interpreters). Abel notes, for example, that one state's chief justice proposed to provide interpreters in all civil cases but stressed that judges would still have discretion to charge for interpreters, even though this specifically contradicts the DOJ letter. Abel Interview, *supra* note 133.

local level. Federal officials offer guidance on Title VI obligations coupled with the threat of enforcement, while advocates collaborate with recipients to show them how to comply with those obligations. Through this process, advocates have promoted a growing awareness of the need for language access and have achieved systemic, long-term reforms, even without the threat of litigation under Title VI.

## V.

### WHAT IS LOST WITHOUT JUDICIAL REVIEW

The Supreme Court has described Title VI as having a dual purpose: preventing federal funding from being used to discriminate, and protecting individuals from such discrimination.<sup>166</sup> Language access advocates can still use the administrative enforcement process to address the first purpose and push funding recipients to change their practices. Following *Sandoval*, however, the lack of judicial review significantly curtails advocates' ability to uphold the statute's second purpose and protect individual rights.<sup>167</sup>

This section argues that the Title VI administrative enforcement process is not designed to vindicate the rights of the specific individuals harmed by discrimination. The enforcement process itself operates between the recipient and the federal funding agency, largely shutting the individual named in the complaint out of the process. More broadly, federal agencies do not wield the same kind of remedial power that courts offer to individuals. Agencies use a form of cost-benefit analysis to determine what steps recipients must take to achieve compliance with Title VI and its regulations. Courts, on the other hand, can redress individual grievances without having to justify their remedies on efficiency grounds. Unlike agencies, courts can also award attorney's fees to deter civil rights violations and promote enforcement. For LEP individuals, therefore, the *Sandoval* decision represents a serious limitation on the right to be made whole after suffering discrimination.

#### *A. Federal Enforcement Shuts Individuals Out of the Process*

The difference between the administrative enforcement process and

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166. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (attributing these two purposes to Title IX and "its model," Title VI, and citing comments by legislators supporting both of these purposes).

167. *Id.* at 704–06 (stating that the remedy of terminating federal funding serves Title VI's first purpose, but individuals need a private right of action in situations where they cannot show that a recipient's "practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate"); Labow, *supra* note 24, at 220–23 (arguing that *Cannon's* reasoning about Title VI's dual purpose should apply to both intentional and disparate impact discrimination, and that *Sandoval* undermined the statute's second purpose).



adversarial litigation helps advocates in some ways, as discussed above.<sup>168</sup> In other ways, however, the contrast reveals significant drawbacks to the Title VI administrative enforcement scheme. In an administrative enforcement proceeding, unlike in litigation, the individual claimant's role largely ends after the complaint is filed. The parties to the federal investigation are the funding agency's Office for Civil Rights and the funding recipient.<sup>169</sup> The LEP individual and her attorney can submit information to the agency, but the agency makes the decision about whether the recipient has violated Title VI regulations and, if so, what corrective action to require.<sup>170</sup> The LEP individual has no role in approving any agreement that the agency reaches with the funding recipient, in contrast to litigation, where a party must approve any settlement.<sup>171</sup>

Even if the voluntary agreement adopts broad policy changes that improve access for LEP individuals, the process may happen too slowly to help a specific complainant.<sup>172</sup> For example, if an LEP tenant in federally funded public housing faces eviction because she violated a lease provision she did not understand, she can bring a language access complaint with HUD. However, HUD's administrative enforcement process moves much more slowly than the eviction process in court, and filing a language access complaint does not stay the eviction proceeding. The tenant may, therefore, lose her housing even if HUD later finds that the local housing authority violated agency regulations.<sup>173</sup> The complainant is not entitled to receive damages from the administrative enforcement process, leaving her with no redress for this harm.<sup>174</sup>

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168. *See supra* Part IV.

169. *See* U.S. Dep't of Health & Human Servs., Office for Civil Rights, Frequently Asked Questions, <http://www.hhs.gov/ocr/civilrights/faq/Procedures/304.html> (stating that OCR does not represent the individual bringing the complaint and is a "neutral fact-finding agency" charged with enforcing civil rights laws).

170. 28 C.F.R. § 42.107(d) (2011) (granting authority to the "responsible Department official" to determine whether the investigation "indicates a failure to comply" with the regulations or whether it "does not warrant action"); *see*

U.S. Dep't of Health & Human Servs., Office for Civil Rights, Frequently Asked Questions, <http://www.hhs.gov/ocr/civilrights/faq/Procedures/303.html> (describing HHS's authority to investigate the complaint, decide whether a violation has occurred, and require corrective action).

171. *See* U.S. Dep't of Health & Human Servs., Office for Civil Rights, Frequently Asked Questions, <http://www.hhs.gov/ocr/civilrights/faq/Procedures/304.html> ("If your complaint is accepted for investigation, we may, for example, obtain a promise that the program will change its practices or provide you with a service. Although we will consult with you, you may not be satisfied with any individual remedies proposed."); Abel Interview, *supra* note 133.

172. Abel Interview, *supra* note 133 (discussing the long wait for resolutions of administrative complaints, and citing several administrative complaints regarding state courts' language access that had been pending for years).

173. Kuehnhoff, *supra* note 25, at 239–40.

174. *See id.* at 240; Daly, *supra* note 24, at 1024 ("Although Recipients are likely to appreciate the non-adversarial nature of the administrative process, the complainant may feel that

Individuals therefore have power to set a federal investigation in motion by filing a complaint, but the results of the process largely depend on the government's willingness to enforce its regulations. Advocates often express concern that the federal government does not have enough resources to conduct thorough investigations of all complaints or to monitor compliance closely enough.<sup>175</sup> Advocates also note that the government's commitment to enforcement seems to be subject to political pressures, observing stark differences between presidential administrations in the amount of staffing and resources devoted to Title VI compliance.<sup>176</sup>

If an agency fails to conduct a thorough investigation or compliance review because of a lack of resources, an advocate has no way to challenge such lack of enforcement. An early Title VI case involving racial discrimination held that an agency's "consistent failure" to enforce the statute "is a dereliction of duty reviewable in the courts."<sup>177</sup> Since this case involved intentional rather than disparate impact discrimination, it is of limited application in the language access context. Furthermore, a challenge to an agency's lack of enforcement would be very difficult to win under current law. The Supreme Court has held that an agency's decision not to bring an enforcement action is left to the agency's discretion and presumed to be "immune from judicial review."<sup>178</sup>

Together, all of these factors mean that LEP clients bringing Title VI claims are at the mercy of the government's discretionary exercise of authority and lack the control of the process that litigation offers.

### *B. Losing Sight of Individual Justice in Cost-Benefit Analysis*

These specific flaws reflect a broader reality about the administrative enforcement process: it is designed to force agencies to take systemic steps to improve LEP access efficiently, not to do justice in individual cases. By contrast, where plaintiffs have judicial review of discrimination

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the system is flawed because it does not serve to compensate the LEP individual for any harm suffered as a result of the Recipient's failure to provide meaningful access.").

175. See *After Sandoval*, *supra* note 113, at 1777-79 (arguing that before *Sandoval*, private litigation was the preferred method of enforcement, since the agencies faced procedural and resource constraints); Khanijou, *supra* note 30, at 865 (arguing that a lack of resources has "reduced administrative enforcement to all but a dead letter").

176. Johnson Interview, *supra* note 123; Shapiro Interview May 2011, *supra* note 123.

177. *Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) (en banc). The court ordered the Department of Health, Education, and Welfare to undertake dozens of enforcement proceedings against school districts found to be in violation of desegregation plans. *Id.* at 1161.

178. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (holding that the FDA's decision not to bring enforcement actions was left to the agency's discretion and not subject to judicial review under the Administrative Procedure Act); see also *After Sandoval*, *supra* note 113, at 1779 n.32 (arguing that although *Sandoval* left open the possibility of challenging an agency's lack of enforcement, it would not be a successful strategy under *Chaney*).

claims, courts can find discriminatory acts wrongful and order remedial action regardless of cost or efficiency.

The federal government's language access directives under Title VI use a form of cost-benefit analysis to decide what language access measures recipients must take. The DOJ guidance document accompanying Executive Order 13,166 establishes a balancing test that uses four factors to determine what constitutes "meaningful access." One side measures the benefits to LEP individuals, including a consideration of the number of LEP individuals who use the program, the frequency with which they use it, and the significance of the program to their lives.<sup>179</sup> The agency balances these factors against the funding recipient's resources.<sup>180</sup> The DOJ acknowledges that a small program may not have to take costly language access measures if the program only serves a few LEP individuals, serves them infrequently, or provides non-critical services.<sup>181</sup>

The DOJ guidelines therefore borrow a tool that the administrative state often uses to evaluate which regulatory measures agencies should take. Under President Reagan, the White House began requiring all agencies to submit a cost-benefit analysis of proposed "major" regulations for review by the Office of Information and Regulatory Affairs in OMB.<sup>182</sup> Later presidential administrations have continued this requirement of centralized review, and cost-benefit analysis remains an influential mode of analysis for agency rulemaking and planning.<sup>183</sup> In the field of language access, though, cost-benefit analysis is used in a process that resembles adjudication rather than rulemaking, since the federal government is evaluating individual complaints and deciding what actions to take in response. This process can lose sight of the adjudicatory goal of achieving justice for the individual. For example, a small group of LEP individuals will experience harm if they cannot take their children to a federally funded recreation center because they do not understand how to fill out the English-only membership application form. Under the four-factor DOJ test, the funding agency might conclude that government-

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179. DOJ Policy Guidance, *supra* note 4, at 50,124–25.

180. *Id.* at 50,125.

181. *Id.*

182. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194 (Feb. 17, 1981) (requiring agencies to submit a Regulatory Impact Analysis of every "major rule" setting out the potential costs, benefits, and net benefits).

183. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993) (under President Clinton, continuing to require that agencies "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs"); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 11 (2008) (arguing that in the federal regulatory arena, cost-benefit analysis is "here to stay," since it has been incorporated into statutes, supported by presidents of both parties, and required as part of OMB review).

funded recreation programs are a non-critical service affecting only a small number of people. Using this balancing test, the individuals' harm would go unaddressed if requiring the recreation center to provide translators would be considered inefficient.

When individuals can bring discrimination claims in court, by contrast, they do not have to justify their desired remedies on efficiency grounds. For example, courts have required school systems to enact large-scale student reassignment and busing plans in order to carry out desegregation orders, even when these plans involved significant cost and social disruption.<sup>184</sup> In other civil rights claims subject to judicial review, courts have recognized discrimination as a rights violation and ordered broad remedies to make the plaintiff whole. Under Title VII of the Civil Rights Act, which prohibits employment discrimination, courts can order plaintiffs to be reinstated to their former jobs, award back pay, and assess punitive damages when an employer's conduct was "sufficiently egregious."<sup>185</sup> Some civil rights claims only allow injunctive relief, and even where damages are available, many plaintiffs lose in civil rights litigation and do not receive any relief. Once courts find that discrimination has occurred, however, they often have broad power to order remedies without having to conduct a cost-benefit analysis.<sup>186</sup>

The loss of judicial review also means that language access claimants cannot receive attorney's fees and, therefore, may be less likely to bring their claims in the first place. By statute, courts have discretion to award "a reasonable attorney's fee" to the prevailing plaintiff in Title VI litigation.<sup>187</sup> As the Supreme Court has explained, attorney's fees in civil rights suits allow a plaintiff to serve as a "private attorney general," providing the means and incentive for them to obtain counsel, go to court, and help the federal government enforce the statute.<sup>188</sup> Since the administrative enforcement process does not offer attorney's fees,

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184. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971) ("The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.").

185. *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 756 (7th Cir. 2002).

186. See *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 66 (1992) (finding a damages remedy available for Title IX gender discrimination claims and stating, "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done" (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946))).

187. 42 U.S.C. § 1988(b) (2006).

188. *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968) (per curiam) ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II.").

advocates report difficulty in finding attorneys willing to assist LEP individuals with their claims.<sup>189</sup>

After *Sandoval*, LEP individuals lost all of these benefits of judicial review of their Title VI claims. The administrative enforcement process can require a funding recipient to make changes that are justified by cost-benefit analysis, but it cannot award attorney's fees to protect individuals' abilities to assert their rights, nor can it compensate individuals directly for the injuries they have suffered.

## VI.

### HOW ADVOCATES CAN MAKE THE CASE FOR REFORMS

Lawyers bringing Title VI claims on behalf of LEP individuals no longer have the option of making their arguments to a judge who can order federal funding recipients to implement reforms. Instead, in a more collaborative system with no judicial review, the advocates' audience is the funding recipients themselves. Advocates need to develop convincing arguments for language access that they can use in proactive discussions with recipients and that funding agencies can use in voluntary compliance negotiations.

In making the case for language access, advocates will be most successful if they can show that cost-benefit analysis justifies their proposed reforms. Advocates may be tempted to frame language access as a right that cannot be quantified.<sup>190</sup> Yet because the federal government's language access policies embrace a form of cost-benefit analysis, advocates will need to work within this framework to argue that the law requires their proposed reforms.<sup>191</sup> More importantly, while funding recipients often acknowledge the importance of being able to communicate with LEP individuals, they cite cost considerations as the primary reason for not taking language access measures.<sup>192</sup> Advocates can

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189. Shapiro Interview May 2011, *supra* note 123; Abel Interview, *supra* note 133.

190. In 2002, the Office of Management and Budget sought public comment while preparing a report on the costs and benefits of implementing Executive Order 13,166. At least two LEP advocates submitted comments describing language access as a right that could not be reduced to numerical terms. OFFICE OF MANAGEMENT AND BUDGET, REPORT TO CONGRESS: ASSESSMENT OF THE TOTAL BENEFITS AND COSTS OF IMPLEMENTING EXECUTIVE ORDER NO. 13,166: IMPROVING ACCESS TO SERVICES FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY 62 (2002) [hereinafter OMB Report].

191. See *supra* notes 179–181 and accompanying text.

192. See OMB Report, *supra* note 190, at 63–64 (reporting that over fifteen state agencies, local governments, and medical providers raised concerns about the costs of implementing the executive order or complained that it was an unfunded mandate); Brandy L. Glasser & Bryan A. Liang, *Hearing Without Understanding: A Proposal to Modify Federal Translation Guidelines to Improve Healthcare for Citizens with Limited English Proficiency*, 35 J. HEALTH L. 467, 475–76 (2002) (discussing health providers' opposition to the HHS language access guidelines because of the financial burdens they impose).

work more collegially if they assume that funding recipients are well intentioned and want to uphold LEP individuals' rights, and focus on helping recipients find feasible ways of doing so.<sup>193</sup>

Drawing on the experience on the ground in the ten years since *Sandoval*, this section proposes five strategies that advocates should use going forward. First, on the benefits side, advocates should push for additional research to demonstrate that language access measures can help programs run more effectively and efficiently. Second, on the costs side, advocates should convince funding recipients not to rely on unreliable and inflated estimates of the costs of serving LEP individuals. Third, advocates should identify ways to reduce the expense of providing services to LEP individuals, especially using new technology. Fourth, they should urge the federal government to provide more specific guidance, since guidance documents can shape the terms of the discussion when advocates approach recipients about reforms. Finally, since the administrative enforcement process is poorly suited to redressing the harms suffered by LEP individuals, advocates should develop other means of achieving individual remedies.

#### *A. Demonstrating the Benefits of Language Access*

Advocates need to show recipients that improved language access offers rewards not only for LEP individuals, but also for the programs that serve them and the taxpayers who fund the programs. When offices cannot communicate effectively with LEP individuals, they end up with longer lines, wasted staff time, duplication of efforts, and costly errors. By adopting systematic language access policies and training staff on how to implement them, these programs can run their operations more effectively and efficiently.<sup>194</sup>

In the area of health care, for example, providing interpreters for LEP patients can improve their health while also reducing costs. If doctors can communicate effectively with their patients, they will be less likely to make medical errors, which drive up costs significantly across the health care sector.<sup>195</sup> LEP patients can avoid unnecessary and expensive visits to

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193. Johnson Interview, *supra* note 123; see Daly, *supra* note 24, at 1030–32; see generally Revesz & Livermore, *supra* note 183, at 9–19. Revesz and Livermore argue that progressive groups will be more influential if they “seek to mend, not end, cost-benefit analysis,” fixing its anti-regulatory biases and using it to make arguments in favor of regulation. *Id.* at 10–11. While their arguments focus on environmental regulation as a case study, similar arguments apply in the language access context.

194. See Daly, *supra* note 24, at 1031–32; OMB Report, *supra* note 190, at 17; Shapiro Interview May 2011, *supra* note 123; Johnson Interview, *supra* note 123.

195. OMB Report, *supra* note 190, at 20–21. The report notes that medical errors are estimated to cost \$17-29 billion each year. Although it is unclear what part of this cost comes from the LEP population, one study found that patients who spoke a language other than English reported more medical complications. *Id.* at 21.

the emergency room if their primary care doctors offer interpreter services, and, when they do go to the emergency room, they may need fewer diagnostic tests if they can provide fuller information about their symptoms.<sup>196</sup> They will be more likely to follow their doctors' orders, take medications correctly, and avoid complications necessitating follow-up care.<sup>197</sup> Presenting such evidence to funding recipients can demonstrate the efficiency of language access reforms, making recipients more likely to implement changes.

Advocates should devote more time and resources to gathering similar information about the benefits of language access in other areas.<sup>198</sup> Advocates have powerful anecdotal evidence of the human costs of failing to provide interpreters or providing unqualified interpreters. These stories also demonstrate financial costs to taxpayers that could have been avoided. In one case, grandparents with limited English proficiency went to court multiple times seeking an order that would allow them to enroll their granddaughter in school and provide medical care for her. After attending two hearings that were postponed because no interpreter was available, the grandparents almost decided to put their grandchild in foster care so she could obtain the education and health care she needed. The grandparents finally received help from a volunteer interpreter and discovered they had been seeking the wrong type of order because they had been unable to explain to court staff what they needed.<sup>199</sup> This delay undoubtedly caused pain for the family, and it also caused the state's court system to waste its resources on multiple hearings. If the volunteer interpreter had not been available to resolve the communication barrier, the state might have even been forced to pay for foster care for the child.

Advocates should combine this type of illustrative example with empirical data to demonstrate the costs of failing to provide qualified interpreters and translators. They should argue that since funding recipients are accountable to taxpayers, they have a responsibility to scrutinize their practices and assess the ways in which they are incurring costs and delays that could be avoided by implementing language access reforms.

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196. *Id.* at 22; Plantiko, *supra* note 10, at 266–67.

197. Johnson Interview, *supra* note 123.

198. Abel Interview, *supra* note 133; see OMB Report, *supra* note 190, at 16 (“While it is not possible to estimate, in quantitative terms, the value of language-assistance services for either LEP individuals or society, we are able to discuss the benefits of the Executive Order qualitatively.”). If advocates had the necessary data, many of the benefits could in fact be discussed in quantitative terms, such as the more efficient use of staff time or the reduction in medical errors and emergency room visits.

199. Abel, *supra* note 25, at 2–3.

*B. Cost Estimates are Unreliable and Likely to be Inflated*

Even if advocates can demonstrate that language access services will save money over the long term, recipients may still balk at the initial investment of time and money that these services require. Advocates will therefore need to convince recipients that the proposed reforms are not as expensive as they fear by pointing out the ways in which the cost estimates for LEP services are unreliable and likely inflated.

Federal funding recipients may argue that the costs of providing increased LEP access, such as interpreters' salaries and telephones for calling interpreter hotlines, are easier to quantify than the benefits.<sup>200</sup> In response, advocates should demonstrate that the precision of these cost estimates is deceptive. An OMB report attempts to estimate the "LEP premium," or the additional cost of serving an LEP person as compared with an English-speaking person, in several different sectors and then extrapolate this to a government-wide level.<sup>201</sup> The report finds that the "LEP premium" might be from 0.5 to 15 percent in specific sectors, and the aggregate cost of language access programs across the government "may be less than \$2 billion, and perhaps less than \$1 billion."<sup>202</sup> These figures may seem dramatic, but they come in a report laced with many caveats about the assumptions being made. Most significantly, the report attempts to quantify the *total* cost of language access, a figure that is only relevant where a program has no language access measures already in place. In reality, most programs start with some existing language access measures that their budgets are already funding. As the report acknowledges, where programs already have some language access measures in place, the added cost of improving existing language access services to comply with federal directives will be "substantially less" than the total figure.<sup>203</sup> The report also relies on data from a small sample of states and a small number of sectors. Advocates should argue that any attempt to aggregate the cost of LEP services across the country is far too speculative to be persuasive in any particular setting.

Advocates should develop more reliable data about the costs of implementing language access measures in particular programs, and use this data to argue that implementation costs are not as high as they seem. For example, the state of California provides bilingual staff and translations of documents at its Department of Motor Vehicles offices at a

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200. See OMB Report, *supra* note 190, at 17 ("The benefits . . . are clearly very difficult to quantify in units comparable to the costs of the Executive Order.").

201. *Id.* at 52-57.

202. The term "LEP premium" refers to the additional cost of serving an LEP individual relative to a non-LEP individual. *Id.* at 53-54, 57.

203. *Id.* at 57.



cost of about \$2.2 million.<sup>204</sup> The OMB report estimates, however, that this figure only represents about 4 cents for each contact with an LEP individual.<sup>205</sup> The cost seems significant when expressed as a total figure, but advocates may be able to make a convincing case for spending four additional pennies on each LEP individual, particularly when they can demonstrate the attendant benefits of better serving them.<sup>206</sup>

### *C. Using Technology to Reduce Costs*

In addition to shifting the terms of the debate away from inflated cost estimates, advocates can draw upon new technology to help recipients reduce the actual costs of language access services. Advocates caution that technology is a mixed blessing and that recipients can be too quick to embrace cost-saving devices that fail to serve LEP individuals effectively. While promoting uses of technology that maximize efficiency, advocates should also steer recipients away from technological approaches that reduce the quality of language access.

For example, recipients may want to rely on telephone interpretation as a cheaper alternative to hiring in-person interpreters.<sup>207</sup> Yet body language, facial expressions, and other important nuances of communication are lost when the interpreter cannot see the LEP individual face-to-face.<sup>208</sup> In addition, since telephone services operate as hotlines, a different person will provide the interpretation each time the recipient calls. By contrast, in-person interpreters can often work consistently with the same program, allowing them to build relationships with clients and staff and develop expertise in program-specific terminology.<sup>209</sup> Thus, while telephone interpretation can play an important part in a comprehensive language access plan, such as in reception areas

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204. *Id.* at 25–26 (describing the range of services offered by the California DMV).

205. *Id.* at 54. The report estimates that it costs \$2.51 to serve each “public contact” at the DMV offices, and about 4 additional cents for each LEP contact. The “LEP premium” is therefore 1.7%.

206. *See* Daly, *supra* note 24, at 1030–31.

207. *See* Glasser & Liang, *supra* note 192, at 479–81 (proposing that HHS remove an earlier provision of its language access regulations that barred recipients from using telephone services as their sole mode of interpretation).

208. *See* DOJ Recipient Guidance, *supra* note 120, at 41,462 (“Nuances in language and non-verbal communication can often assist an interpreter and cannot be recognized over the phone.”); Shapiro Interview May 2011, *supra* note 123; Abel Interview, *supra* note 133.

209. *See* Bruce Downing & Cynthia E. Roat, *Models for the Provision of Language Access in Health Care Settings*, National Council on Interpreting in Health Care Working Paper, March 2002, available at [www.ncihc.org/assets/documents/NCIHC Working Paper - Models for Provision of Language Access.pdf](http://www.ncihc.org/assets/documents/NCIHC%20Working%20Paper%20-%20Models%20for%20Provision%20of%20Language%20Access.pdf), at 12, 15 (noting that on-site staff interpreters “come to know the patient and provider population, the vocabulary and processes in the clinic or hospital,” whereas telephone interpreters “never become familiar with particular venues” and “in some cases...may be called upon to serve clients in multiple industries, making it difficult to master the vocabulary of all of them.”).

or for unusual languages where an in-person interpreter is not available, it should not be used as the sole option.

Similarly, recipients may be eager to reduce the cost of written translation by using machine translation services such as Google Translate. However, these programs often produce inaccurate translations because they cannot capture context, tone, or complicated legal terminology.<sup>210</sup> Recipients may be able to reduce costs by using machine translation to produce an initial draft, but a human translator must review the translation to ensure that it conveys the meaning of the document accurately and effectively.<sup>211</sup>

Advocates find other technological advances more promising for helping LEP individuals while also reducing costs. Video interpreting offers a way to group interpreters in one centralized location, reducing travel costs while still allowing the face-to-face contact that telephone services cannot provide.<sup>212</sup> Where programs must rely on telephone interpretation services, dual handset phones allow the LEP individual and the staff member to each have their own handset when speaking to the interpreter. This arrangement offers better comfort, privacy, and sound quality than putting the interpreter on speakerphone.<sup>213</sup>

To reduce the costs of translating written documents, recipients can use the Internet to share boilerplate documents and avoid duplication of efforts. Many programs across the country use similar documents, such as explanations of the right to a hearing or notices of denials of benefits, which must be translated into other languages. Advocates should support the creation of a website to post translated standard documents, allowing recipients to download and edit them rather than starting anew each time.<sup>214</sup> The federal government has taken steps to share written translations across federal agencies; this model should be expanded to include funding recipients as well.<sup>215</sup> The legal services community is also

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210. Shapiro Interview May 2011, *supra* note 123; Abel Interview, *supra* note 133; see also Michael Mulé & Claudia Johnson, *How Effective is Machine Translation of Legal Information?*, 44 CLEARINGHOUSE REV. 32, 32-33 (2010).

211. Mulé & Johnson, *supra* note 210, at 34.

212. Shapiro Interview May 2011, *supra* note 123; Abel Interview, *supra* note 133.

213. Shapiro Interview May 2011, *supra* note 123.

214. Johnson Interview, *supra* note 123. Johnson recommends a project modeled after the TED Open Translation Project, available at <http://www.ted.com/OpenTranslationProject>. TED holds conferences in which the world's leading thinkers give short speeches that are then made available for free online. Its Open Translation Project allows volunteer translators to produce subtitles of the speeches in other languages; then, other volunteers edit the translations before they are posted. Johnson suggests that legal services programs could spearhead a similar effort to recruit a group of volunteer translators, screen them to make sure they are qualified, have them translate documents, then make those documents available online to programs across the country.

215. See Holder Memo, *supra* note 124, at 2 (discussing collaboration across agencies in the area of written translation, in order to "share resources, improve efficiency, [and] standardize federal terminology").

beginning to offer online programs in multiple languages to guide users in filling out court forms.<sup>216</sup> Recipients could use similar programs in their intake systems to reduce the need for interpreters.

Advocates have achieved greater success in the administrative enforcement process when they frame their role as consultants rather than critics.<sup>217</sup> The area of technology offers advocates an important opportunity to play this role. To combat recipients' incentives to focus narrowly on the cost-saving potential of new devices, advocates can educate them about the problems with some forms of technology, while helping them find creative ways of using other innovations to streamline processes and share resources across the country.

#### *D. Improving Federal Guidance*

Even if advocates can make a convincing cost-benefit case for language access reforms, they still need to be able to point to federal directives that show recipients they are obligated to comply.<sup>218</sup> Since the federal government plays such an important role in notifying recipients of their responsibilities, advocates should push for federal agencies to make their regulations and guidance documents more specific. The government can promote language access more effectively if it sends a proactive message about what it expects from recipients, rather than relying on the resource-intensive method of investigating complaints and enforcing compliance.<sup>219</sup>

The DOJ's four-factor test has influenced all federal agencies' guidance documents on language access, and the government should provide better direction on how this form of cost-benefit analysis should be implemented.<sup>220</sup> Most importantly, the government should send a clear signal that recipients cannot simply rely on the fourth factor, their limited resources, to outweigh the other three factors.<sup>221</sup> In its letter to state courts, the DOJ emphasized that it would scrutinize any claims that state court systems were unable to implement language access reforms because of funding constraints. The DOJ would consider factors such as whether the system had also failed to provide language access measures when it had more money, or whether its spending cuts fell disproportionately on

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216. Johnson Interview, *supra* note 123. See [https://lawhelpinteractive.org/legal\\_information\\_and\\_forms](https://lawhelpinteractive.org/legal_information_and_forms).

217. Shapiro Interview May 2011, *supra* note 123.

218. See *supra* notes 154–158 and accompanying text.

219. See *After Sandoval*, *supra* note 113, at 1790 (arguing that “[i]n a post-*Sandoval* regulatory environment, Title VI will have force only if agencies act to facilitate and to enable compliance, rather than merely to police complaints”).

220. Abel Interview, *supra* note 133 (saying that recipients often do not know how to implement the four-factor test).

221. See Mulé, *supra* note 6, at 26.

language access measures rather than other budget categories.<sup>222</sup> The federal government should convey the same message to recipients in all sectors.

In addition to providing this type of general guidance on the four factors, the government should demonstrate more clearly how the test applies in particular situations. The test is not simply quantitative, since the DOJ instructs agencies to consider the “nature and importance” of the federally funded program to LEP individuals’ daily lives.<sup>223</sup> Each agency should specify which services within its area are so critical that recipients must ensure access to LEP individuals regardless of the cost. The DOJ has provided this type of program-specific guidance for the different areas it funds, such as law enforcement, corrections, and courts.<sup>224</sup> For instance, the section on law enforcement notes that “911 calls, custodial interrogation, and health and safety issues for persons within the control of the police . . . should be considered the most important under the four-factor analysis.”<sup>225</sup> The DOJ guidance is meant to serve as a model for government-wide language access efforts, and other agencies should follow suit by explaining how the four-factor test applies in each of the areas they fund. For example, the HHS guidelines do not provide separate descriptions of how the test applies to hospitals, public assistance offices, and child welfare programs, all of which fall under the agency’s funding.<sup>226</sup> Since LEP individuals will have different needs in each type of programs, the agency should consider breaking down its guidance for each type.

Advocates should also urge the federal government to aid them in getting the information they need to make stronger cost-benefit arguments to recipients. The government can use its resources to conduct studies that advocates can use to demonstrate the quantitative benefits of improved language access, from shorter lines to better use of staff time to fewer errors.<sup>227</sup> In addition, the government can investigate various forms of cost-saving technology to determine which devices to recommend to recipients. For example, while video translation promises to reduce costs, its quality varies widely. The government could research available services and determine the necessary specifications for screen size and audio and video quality.<sup>228</sup>

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222. Perez Letter, *supra* note 161; Abel Interview, *supra* note 133.

223. DOJ Policy Guidance, *supra* note 4, at 50,125.

224. DOJ Recipient Guidance, *supra* note 120, at 41,466–72.

225. *Id.* at 41,468.

226. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311 (Aug. 8, 2003).

227. Abel Interview, *supra* note 133.

228. *Id.*

Advocates face several obstacles in trying to convince the federal government to provide more specific guidance. First, the government has expressed reluctance about incorporating detailed technical standards into its language access guidelines, since they are meant to be generally applicable to a wide variety of recipients with different needs and constraints.<sup>229</sup> In addition, the government may want to avoid facing a backlash from funding recipients, who have already organized in opposition to particular federal requirements. For example, many doctors and medical societies have urged HHS to reconsider its language access guidelines, especially its bans on the use of family members as interpreters and the use of telephone services as the sole method of interpretation.<sup>230</sup> Any attempt to make federal guidance more specific would likely provoke a similar reaction.

Advocates should work collaboratively with the federal government to find ways of improving language access guidance while acknowledging these constraints. For example, rather than mandating the use of specific interpretation technology in its guidance documents, the federal government could simply conduct studies of available technology and share the results with advocates. The advocates would be able to approach funding recipients armed with information they do not have the resources to obtain themselves, while the government could avoid committing itself to particular technology recommendations and sparking opposition from recipients. Advocates should also work to convince the government that other types of guidance, such as instructions on implementing the four-factor test, are so critical that they should be incorporated into the government's written documents regardless of the reaction from recipients.

#### *E. Vindicating Individuals' Rights*

As advocates use cost-benefit analysis to push for language access reforms, they must also recognize the significant limitations of this approach. The Title VI administrative enforcement process can be an effective way of promoting systemic change, but it is not designed to provide redress for violations of individual LEP claimants' rights.<sup>231</sup> Instead, advocates must look to other avenues within each substantive area of law to address the harms that their clients have suffered from lack of access to federally funded programs.

For example, in the area of health care, LEP patients can file a

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229. See DOJ Recipient Guidance, *supra* note 120, at 41,456 & n.1 (seeking a "balance between recommendations and requirements," and declining to set "professional or technical standards for interpretation applicable to all recipients" because of the case-by-case variations).

230. Glasser & Liang, *supra* note 192, at 477.

231. See *supra* Part V.

malpractice suit if their inability to communicate with their provider leads to medical errors, or they can argue that their doctor failed to obtain informed consent or breached the duty to warn.<sup>232</sup> In the area of public housing, if LEP tenants face eviction because they did not understand the terms of their lease, their advocates can raise language access issues in a grievance hearing with the housing authority.<sup>233</sup> Housing attorneys can also bring claims under the Fair Housing Act, which prohibits national origin discrimination in the rental of housing.<sup>234</sup> A party bringing an administrative complaint under the Fair Housing Act can obtain forms of relief that are unavailable under Title VI, including injunctive relief, damages, and attorney's fees.<sup>235</sup> In one recent case, advocates filed complaints under both Title VI and the Fair Housing Act on behalf of Spanish-speaking tenants in Nashua, New Hampshire public housing who owed rent because of a miscommunication.<sup>236</sup> Under the agreement, the housing authority paid damages to the client, paid attorney's fees to the advocates, and agreed to develop a language access plan.<sup>237</sup> By filing under both provisions of the Civil Rights Act, the advocates won compensation for their clients as well as system-wide improvements for all LEP tenants of the Nashua public housing authority.

As this example illustrates, advocacy for individuals' rights and advocacy for systemic reforms can complement each other.<sup>238</sup> Legal services programs can train their staffs to look for language access problems across all the substantive areas of law that their offices handle. In the course of representing individual clients in evictions or appeals for public benefits, lawyers can also point out federal funding recipients' failure to comply with Title VI regulations. They may uncover patterns that they can use as evidence to approach recipients directly or to file

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232. Khanijou, *supra* note 30, at 869–71; Lo, *supra* note 97, at 395–97.

233. Kuehnhoff, *supra* note 25, at 237–38.

234. Fair Housing Act, 42 U.S.C. § 3604 (2006).

235. 42 U.S.C. § 3612(g)(3) (setting out the injunctive and damages remedies available in an administrative hearing to enforce the Fair Housing Act); § 3612(p) (authorizing attorney's fees); *see* Kuehnhoff, *supra* note 25, at 239 (discussing the contrast between relief available under Title VI and under the Fair Housing Act).

236. *See* Kuehnhoff, *supra* note 25, at 242–43.

237. OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUSING AND URBAN DEV., No. 01-06-0526-8 (FAIR HOUSING ACT) & 01-06-0062-6 (TITLE VI), CONCILIATION AGREEMENT 4–5 (Jan. 2007), *available at* <http://www.hud.gov/offices/fheo/enforcement/nha-conciliation.pdf>.

238. *See* Kuehnhoff, *supra* note 25, at 262–63 (“A three-prong approach of prevention, administrative claims, and litigation could simultaneously create systemic change and advocate for individual clients who are faced with eviction or termination of tenant-based subsidies.”); Daly, *supra* note 24, at 1029 (arguing that improving the administrative enforcement process is “potentially the most productive strategy” but that advocates should also bring intentional discrimination claims under Title VI where possible and pursue legislative advocacy).

administrative complaints.<sup>239</sup>

## VII.

### CONCLUSION

*Sandoval* represented a significant setback for civil rights activists because it prevented many victims of discrimination from seeking aid from the courts under Title VI. Language access advocates were not the only ones who had used disparate impact regulations under Title VI to fight discrimination by federal funding recipients. For example, lawyers brought Title VI cases to challenge the concentration of environmental hazards in low-income and minority communities.<sup>240</sup> Other lawyers had used Title VI to challenge high-stakes standardized testing programs that disproportionately penalized minority students.<sup>241</sup> *Sandoval* closed the courts to these types of disparate impact claims against federal funding recipients.

On a practical level, the past decade has shown that it is still possible to achieve major language access reforms without judicial review. While LEP individuals still face many challenges in accessing federally funded services, lawyers have used collaborative negotiating strategies to convince funding recipients to enact comprehensive reforms.

On a symbolic level, however, the post-*Sandoval* legal landscape challenges the notion that every individual harmed by discrimination has a remedy. Language access reforms may happen too late to help the person who initially filed the complaint, and the individual cannot receive compensation for her harms.

In an era of deep cuts to legal services funding, when advocates must make difficult choices about how to use their limited resources, the rights of LEP individuals across the country depend on careful consideration of the tools still available to lawyers after *Sandoval*, what those strategies can accomplish, and where they fall short.

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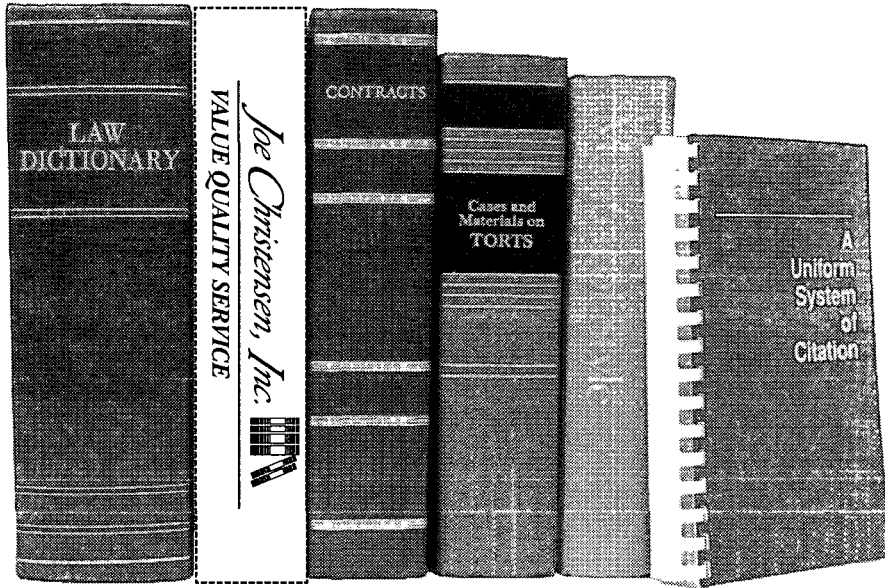
239. Claudia Johnson recalls that the Language Access Program at Community Legal Services in Philadelphia started this way. Lawyers raised language access issues in individual clients' eviction hearings, food stamp appeals, and other areas, then moved to system-wide challenges. Johnson Interview, *supra* note 123.

240. See, e.g., Crossman, *supra* note 82, at 617 (calling *Sandoval* a "crushing blow" in the area of environmental justice).

241. See McCaughey, *supra* note 82, at 274 (criticizing *Sandoval* for barring judicial review of these claims).







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