

THE *SANDOVAL* RULING

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Injustice anywhere is a threat to justice everywhere.

Martin Luther King, Jr.

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Purpose of this Analysis

In its 2000-2001 term, the U.S. Supreme Court issued a number of decisions that dramatically changed the ground rules for civil rights lawsuits, making it significantly harder for victims of the most pervasive kinds of discrimination to win court relief. One decision in particular, *Board of Trustees of the University of Alabama v. Garrett*, 121 S.Ct. 955 (2001), devastatingly stripped the right of state workers to sue their employers for money damages for violations of Title I of the Americans with Disabilities Act (ADA), which prohibits employment discrimination against people with disabilities. In response, NCD convened a series of meetings with disability policy experts and litigators to gain their assessment of the breadth and nature of the impact of these decisions on key civil rights laws.

During the group's discussions, the Supreme Court's ruling in *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001) elicited great concern about contrariness of the decision to both long-standing legal precedent and Congressional intent. NCD is deeply troubled by the *Sandoval* decision and its potential to curb lawsuits under a variety of civil rights laws. The elimination of an important legal avenue as a result of the *Sandoval* decision undermines across the board Americans' ability to respond to systemic denials of their civil rights with lawsuits that employ systemic legal approaches. This is especially true for people with disabilities from diverse communities; the *Sandoval* decision represents one less systemic approach available for the protection of their civil rights.

NCD conducted the following analysis of the *Sandoval* decision and its implications for litigation under ADA, Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act (IDEA).

Background

The Supreme Court of the United States issued a decision in *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001) on April 24, 2001. The *Sandoval* case involved a class action claim brought by non-English-speaking residents of the State of Alabama against the Director of the Alabama Department of Public Safety. The plaintiff class claimed that the Department's offering Alabama's drivers' licensing exams only in English had the effect of discriminating against them on the basis of their national origin. The plaintiffs argued that such discrimination violated Title VI of the Civil Rights Act of 1964, and the implementing regulations promulgated pursuant to Section 602 of the Act by the Departments of Justice and Transportation. Section 601 of the Civil Rights Act prohibits discrimination on the basis of race, color or national origin in federally funded programs. 42 U.S.C. § 2000d. Section 602 authorizes federal agencies to issue regulations to effectuate the requirements of § 601. 42 U.S.C. § 2000d-1. A bitterly divided Court ruled 5-to-4 that there is no private right of action to enforce the disparate impact regulations promulgated under Title VI. This means that private individuals do not have the right to file lawsuits under Title VI alleging that they have suffered disparate impact discrimination by recipients of federal funds.

To understand the ruling in *Sandoval*, it is necessary to appreciate the distinction between disparate impact and intentional discrimination. “Disparate impact” refers to facially neutral actions that discriminate in their effect; this type of discrimination is contrasted with actions that involve intentional discrimination—acts taken for the direct purpose of discriminating. Thus, a rule that excluded people of French heritage from taking the driver’s license exam would constitute intentional discrimination on the basis of national origin. Presenting the exam only in English, on the other hand, might not be the result of an intent to discriminate, and it would not eliminate all applicants with origins in foreign countries or any particular foreign country, only those who had not mastered English. The plaintiffs in *Sandoval* argued that offering the exam only in English had the effect of denying a license to them because of their national origins in countries where English was not spoken, and thus constitutes disparate impact discrimination.

It is clear that the statute (Section 601) prohibits intentional discrimination; the Court had indicated in two prior decisions that it *only* prohibits intentional discrimination. This was the ultimate outcome in *Guardians Assn. v. Civil Serv. Comm’n of New York City*, 463 U.S. 582 (1983), a decision that resulted in a complicated hodgepodge of different decisions on the part of various groups of Justices, none of whom could garner a majority for its reasoning. In *Alexander v. Choate*, 469 U.S. 287, 293 (1985), however, the Court had stated clearly, in dicta, that “Title VI itself directly reach[es] only instances of intentional discrimination.” The regulations issued pursuant to Section 602 to implement the statutory nondiscrimination requirement of Section 601 prohibit both intentional and disparate impact discrimination. The two sets of regulations involved in *Sandoval*—those of the Department of Justice and those of the Department of Transportation—both, in addition to prohibiting intentional discrimination, forbid recipients of federal funding from using “criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color or national origin.” 28 C.F.R. § 42.104(b)(2) (DOJ regulations) (emphasis added) and 49 C.F.R. § 21.5(b)(2) (DOT regulations) (emphasis added).

It is well-established that there is an implied private right of action to enforce Section 601 itself. Where no express right of action is specifically established in a statute, an implicit right of action is one that is inferred from congressional intent even though it is not expressly spelled out in the language of the statute itself. The question addressed in *Sandoval* was whether private individuals have a right of action permitting them to go to court to enforce the disparate impact provisions of the regulations. This question had been left unresolved in the Court’s earlier decision in the *Guardians Assn.* case, in which five Justices expressed the view, in separate opinions, that the Title VI disparate impact regulations were permissible under Section 602, but three of those Justices expressly reserved the question of whether those regulations may be privately enforced. *Sandoval* at 121 S.Ct. 1517.

In *Sandoval*, the Supreme Court held 5 to 4 that the plaintiffs could not privately enforce the disparate impact provisions of Title VI regulations.

The majority opinion, written by Justice Scalia, accepts that regulations applying Section 601’s ban on intentional discrimination are covered by the cause of action to enforce that section. *Id.* at

1518. The majority also assumes for purposes of deciding *Sandoval* that the regulations promulgated under Section 602, including the disparate impact regulations, are valid. *Id.* at 1517. The majority concludes, however, that the disparate impact provisions do not apply Section 601 since they “forbid conduct that Section 601 permits.” *Id.* at 1519. Therefore, the majority reasons, if there is a private right of action to enforce the disparate impact provisions, it “must come, if at all, from the independent force of Section 602.” *Id.* The majority found that the “text and structure of Title VI” evidence “no congressional intent to create a private right of action” under Section 602. *Id.* at 1520-21. According to the majority, “rights-creating language” such as that in Section 601 “is completely absent from Section 602.” *Id.* at 1521. Instead, the language of Section 602 focuses on the agencies that are directed to issue regulations, and the methods, including withholding of federal funds, that are to be used to enforce the requirements of the regulations. *Id.* The majority reasons that the mentioned enforcement mechanisms “tend to contradict a congressional intent to create privately enforceable rights through Section 602 itself.” *Id.* Ultimately, the majority reaches the following conclusion: “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 Section 602. We therefore hold that no such right of action exists.” *Id.* at 1523.

THE DISSENT

Justice Stevens, writing on behalf of himself and Justices Souter, Ginsburg, and Breyer, filed a lengthy and contentious dissenting opinion. The dissenting opinion and the majority’s comments in response to the dissent are highly adversarial, if not outright hostile, in tone, and characterized at times by biting rebukes of the other side’s reasoning and conclusions. Justice Stevens, for example, calls the decision in *Sandoval* “unfounded in our precedent and hostile to decades of settled expectations,” and accuses the majority of making “three distinct, albeit interrelated errors,” including “a muddled account of both the reasoning and the breadth of our prior decisions,” a “flawed and unconvincing analysis of the relationship between Sections 601 and 602... ignoring more plausible and persuasive explanations detailed in our prior opinions,” and “badly misconstru[ing]” prior precedent. *Id.* at 1524.

A basic point argued in the dissent is that even though the issue had not been explicitly addressed, a proper reading of the prior relevant precedents of the Court, including *Guardians Assn.*, *Lau v. Nichols*, 414 U.S. 563 (1974), and *Cannon v. University of Chicago*, 441 U.S. 677 (1979), should have led to a conclusion that the private right of action to enforce the disparate impact provisions of Title VI regulations had already been recognized by the Court. Justice Stevens’ opinion also contends that the disparate impact provisions are an integral part of achieving the antidiscrimination goals established in Section 601 so that “it makes no sense to differentiate between private actions to enforce Section 601 and private actions to enforce Section 602.” *Sandoval* at 121 S.Ct. 1533. In addition, the dissent maintains that the majority is wrong in not finding a congressional intent to create a private right of action to enforce disparate impact provisions and that the majority “adopts a methodology that blinds itself to important evidence of congressional intent.” *Id.* at 1534.

In an auxiliary point whose ramifications are discussed below, Justice Stevens considered the impact of 42 U.S.C. § 1983 on the private right of action issue.

POTENTIAL ADVERSE CONSEQUENCES OF THE *SANDOVAL* DECISION

Some defendants have begun to latch onto the *Sandoval* decision to argue that plaintiffs are not entitled to a private right of action to enforce some regulatory provisions. The broadest reading of the decision would contend that there can be no implied private right of action to enforce any regulatory provisions that go beyond the statutory provisions. Slightly, more narrowly, the opinion can be interpreted as establishing that there can be no private right of action for enforcing a regulatory provision dealing with disparate impact discrimination where the statute does not itself prohibit disparate impact discrimination. Section 504 of the Rehabilitation Act and Title II of ADA are particularly likely targets of such arguments because Section 504 expressly incorporates the rights and remedies of Title VI, 29 U.S.C. § 794a(2), and Title II of ADA incorporates Section 504 rights and remedies, 42 U.S.C. § 12133.

The broad nondiscrimination provisions of Section 504 and Title II of ADA are worded very similarly to the language of Section 601 of Title VI, which may lead defendants to argue that they prohibit only intentional discrimination. Some of the provisions of the regulations implementing Section 504 and Title II, particularly those that prohibit methods of administration that have the effect of discriminating based on disability, prohibit certain kinds of nonintentionally discriminatory actions. Defendants may seek to characterize other regulatory provisions, such as those requiring reasonable accommodations and barrier removal, as going beyond simply prohibiting intentional discrimination.

Indeed, in the first reported decision to address the *Sandoval* ruling in a disability nondiscrimination context, *Access Living of Metropolitan Chicago v. Chicago Transit Authority*, No. 00 C 0770, 2001 WL 492473 (N.D.Ill., May 9, 2001), the defendant argued in brief supporting a motion to dismiss that because the “remedies, procedures, and rights” available to private litigants under Title VI are the same as those under ADA and the Rehabilitation Act, the Supreme Court’s analysis in *Sandoval* “bears directly on the cause of action here.”¹ 2001 WL 492473 at *6. The *Access Living* case involves a challenge to various inadequacies of the Chicago Transit Authority’s (CTA) accessibility efforts as violating ADA and Section 504. Relying on *Sandoval*, the CTA contended that the plaintiffs may only bring a claim under ADA if they can show proof of intentional discrimination and that the regulations upon which plaintiffs

¹ Just prior to the completion of this document, the U.S. District Court for the Eastern District of Pennsylvania issued a ruling declining to expand *Sandoval* to preclude plaintiffs’ Section 504 and ADA claims against a state mental hospital for failing to transfer community living situations. *Frederick L. v. Department of Public Welfare*, 2001 WL 830480 (E.D. Pa.).

relied were no longer good law because those regulations extend to more than intentional discrimination. 2001 WL 492472 at *6.

The federal district court judge ruled that *Sandoval* did not present an obstacle to the plaintiffs' cause of action in the *Access Living* case because of ADA Title II statutory provisions providing that discrimination against disabled persons includes the failure to take certain affirmative steps, including purchasing or leasing accessible buses (42 U.S.C. § 12142), providing paratransit services (*Id.* Section 12143), constructing new public transportation facilities to be accessible to and usable by individuals with disabilities (*Id.* Section 12146), and making altered portions of major stations accessible (*Id.* Section 12147). 2001 WL 492472 at *6. The court reasoned that, unlike in *Sandoval*, the *Access Living* plaintiffs had pled and presented evidence of the precise type of discrimination defined by Congress—the failure to make certain reasonable modifications, and that the regulatory provisions they relied on under ADA and Section 504 do not expand the meaning of discrimination, but simply clarify the definition of discrimination prohibited in the statutes. *Id.*

In a scary footnote, however, the judge added the following comment: “In light of *Sandoval* and this court’s discussion of its implications, it is doubtful that individual plaintiffs would have a cause of action under ADA merely by proof of a disproportionate impact on disabled persons.” *Id.* at *7, n.1.

It is likely that defendants in other disability nondiscrimination cases will argue that the *Sandoval* ruling precludes a private right of action to enforce other provisions in regulations issued to enforce ADA, Section 504, and possibly even the IDEA and other laws.²

ARGUMENTS LIMITING THE IMPACT OF *SANDOVAL* ON DISABILITY RIGHTS LITIGATION

1. The impact of *Sandoval* should be limited to the particular unique situation from which it arose.

The legal situation addressed in *Sandoval* was an unusual one. It involved a statutory prohibition of discrimination that previous Supreme Court precedents had ruled (at least according to the majority in *Sandoval*) was limited to intentional discrimination. It then involved disparate impact provisions that the Supreme Court believed went beyond the statutory prohibition but that the Supreme Court also assumed were valid regulations. To date, the Supreme Court has never ruled

² Our research has not disclosed any *Sandoval*-based challenges to enforcement of provisions of other disability nondiscrimination laws such as the Fair Housing Amendments Act, the Air Carrier Access Act, the Voting Accessibility for the Elderly and Handicapped Act, the Architectural Barriers Act, and Sections 501 and Section 508 of the Rehabilitation Act of 1973; and such other statutes are not addressed in this memorandum. For various reasons, most such statutes do not appear to be seriously vulnerable to *Sandoval*-like analysis.

that any major disability rights statute prohibits only intentional discrimination (although punitive and compensatory damages are limited to intentional discrimination under various such statutes). Moreover, unlike under Title VI, disability rights regulatory provisions stating requirements that go beyond prohibiting intentionally discriminatory acts are often based upon or supported by explicit statutory language. Under several disability nondiscrimination laws, a private right of action is established explicitly and need not be implied. Disability discrimination has different dynamics and different origins from the types of discrimination prohibited in Title VI. The *Sandoval* ruling should not be applied beyond the peculiar legal context in which it arose.

2. Despite the *Sandoval* ruling, where challenged discrimination is “under color of state law,” 42 U.S.C. § 1983 may provide a right of action to plaintiffs to protect “federal rights” created under disparate impact regulations.

The *Sandoval* case addressed the question of whether Congress intended to create a private right of action under Section 602 implicitly. 42 U.S.C. § 1983 provides an alternative, explicit avenue to such a right of action in certain circumstances. Section 1983 provides, in relevant part, as follows:

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

Basically, this provision creates a right to bring a lawsuit whenever rights secured under federal law are deprived by any person acting under state authority.

In his dissent in *Sandoval*, Justice Stevens noted the existence of this alternative source of a right of action, and accused the majority of “den[ying] relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim....” 121 S.Ct. at 1527. He added, “Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference Section 1983 to obtain relief,” and suggested further that the plaintiffs in *Sandoval* could rechallenge Alabama’s English-only policy in a complaint that invokes Section 1983 even after the Supreme Court’s ruling. *Id.*

This approach was quickly put to the test in a Title VI case, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, Civil Action No. 01-702, 2001 WL 491965 (D.N.J., Supplemental Opinion issued May 10, 2001). The defendants in that case argued that the court’s previously issued preliminary injunction on plaintiffs’ disparate impact discrimination claim should be vacated in light of the *Sandoval* ruling. The district court judge, however, ruled as follows:

(1) the Supreme Court’s decision in *Sandoval* does not preclude plaintiffs from pursuing their claim for disparate impact discrimination, in violation of the EPA’s implementing regulations to Title VI, under 42 U.S.C. § 1983; and (2) Plaintiffs are entitled to

preliminary injunctive relief based upon a claim for disparate impact discrimination in violation of the EPA's implementing regulations to Title VI, brought under 42 U.S.C. § 1983. 2001 WL 491965 at *2.

The court found that the EPA Title VI regulations created a federal right (citing *Wright v. City of Roanoke*, 479 U.S. 418 (1987) for the proposition that agency regulations may create "rights" within the meaning of Section 1983) and found that right to be enforceable under Section 1983. 2001 WL 491965 at *19, *38.

Where discrimination by an agency or instrumentality of a state or territory is alleged to violate federal regulations, Section 1983 may provide an explicit private right of action. However, the law is not settled. The Supreme Court has not spoken conclusively on this issue nor is there consensus among the circuits on the enforceability of disparate impact regulations.³ Future cases will surely test the viability of this approach as a way of sidestepping the *Sandoval* ruling in applicable circumstances.

3. The *Sandoval* rationale does not apply to the principal disability nondiscrimination statutes because, unlike under Title VI, the Supreme Court has not and reasonably could not declare that these statutes only prohibit intentional discrimination.

As noted previously, a central premise of the majority's ruling in *Sandoval* was that the Court had ruled previously "that Section 601 prohibits only intentional discrimination." 121 S.Ct. at 1516. The same cannot be said of any of the major disability rights statutes.

In the only case in which the Supreme Court approached the issue, although it ultimately found it did not need to decide the issue, the Court in *Alexander v. Choate*, 469 U.S. 287 (1985), provided clear signals that discrimination on the basis of disability—unlike discrimination prohibited under Title VI—is not limited to intentional discrimination, but encompasses at least some types of disparate impact. In *Choate*, the Court distinguished Section 504 from Title VI and discussed at great length the legislative history of Section 504 indicating Congress's intent to prohibit discrimination against people with disabilities that "was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Id.* at 295. The Court's opinion suggests that it would be illogical to read Section 504 to prohibit only intentional discrimination, since "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296-97. The Court observed that elimination of architectural barriers and the "discriminatory effect" of job

³ See, *Harris v. James*, 127 F.3d 993 (11th Cir. 1997)(Medicaid regulation unenforceable under Section 1983); *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987)(Social Security Act's implementing regulations do not create an enforceable right); But see, *Boatman v. Hammons*, 64 F.3d 286 (6th Cir. 1998); *Buckley v. Redding*, 66 F.3d 188 (9th Cir. 1995); *West Virginia University Hospitals v. Casey*, 885 F.2d 11, 18 (3rd Cir. 1989).

qualification procedures were among the central aims of the Act, and such forms of discrimination are typically not the product of intentional discrimination. *Id.* at 297. The Court also recognized in *Choate* that Congress enacted Section 504 to address the “‘shameful oversights,’ which caused the handicapped to live among society ‘shunted aside, hidden, and ignored.’” *Id.* at 295-96 (citations omitted).

That discrimination on the basis of disability cannot be limited only to intentional discrimination is made crystal clear by the ruling in *Choate* that reasonable adjustments/reasonable accommodations must at times be made to assure meaningful access. 469 U.S. at 300-01 (clarifying and elaborating on *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)); *see particularly* 469 U.S. at 301 & n. 21. No discussion of intentionality is included in the Court’s analysis of the meaningful access and reasonable accommodation requirements. Thus, the regulations promulgated under Section 504—unlike the Title VI regulation at issue in *Sandoval*—fall squarely within the scope of disability-based “discrimination” that the statute prohibits.

In fact, the majority decision in *Sandoval* includes the *Choate* decision in a list of decisions in which the Court had addressed regulations that would be enforceable through a private right of action because the regulations simply constituted an authoritative interpretation of the discrimination prohibited by the statute. 121 U.S. at 1518. In a parenthetical, the *Sandoval* opinion characterizes the provisions at issue in *Choate* as “regulations clarifying what sorts of disparate impacts upon the handicapped were covered by Section 504 of the Rehabilitation Act of 1973, which the Court assumed included some such impacts.” *Id.* at 1518-19.

Moreover, a huge body of legal scholarship—including congressional commentary and findings, and analysis by NCD and the U.S. Commission on Civil Rights; the lower courts; writers of books, treatises, law review and journal articles—documents the dynamics by which people are discriminated against on the basis of disability and establishes indisputably that much such discrimination takes forms other than intentionally discriminatory acts and that Congress was fully aware of this fact when it enacted statutes such as Section 504, ADA, and IDEA.

4. The *Sandoval* analysis clearly does not apply to Titles I and III of ADA nor to IDEA because these statutory provisions contain an explicit private right of action and clarify what types of discrimination they prohibit, including some forms of discrimination that are not necessarily intentional.

The rationale and analysis of the *Sandoval* opinion are manifestly inapplicable to the disparate impact provisions of regulations issued under Titles I and III of ADA and under IDEA. Unlike the one-sentence prohibition of discrimination in Section 601, IDEA and Titles I and III of ADA are lengthy, detailed, and specific. The statutory provisions of IDEA are so extensive that the regulations issued under the Act do little other than to restate the statutory requirements.

Titles I and III of ADA explicitly clarify various types of discrimination that are prohibited, and these include a number of forms of discrimination that go beyond intentional discrimination. *See*,

e.g., 42 U.S.C. § 12112(b)(5) (requiring employers to make reasonable accommodations); 42 U.S.C. § 12112(b)(6) (barring employers from using tests and standards that tend to screen out individuals with disabilities); 42 U.S.C. § 12182(b)(2)(A)(ii) (requiring public accommodations to make reasonable modifications to their policies and practices); 42 U.S.C. § 12182(b)(2)(A)(iii) (requiring public accommodations to provide auxiliary aids and services); 42 U.S.C. § 12182(b)(2)(A)(iv) (requiring public accommodations to remove architectural and communication barriers). Both Titles I and III bar the use of methods of administration that have the effect of discriminating against people with disabilities. 42 U.S.C. § 12112(b)(3) (Title I); 42 U.S.C. § 12182(b)(1)(D) (Title III). The regulations under both Titles I and III clarify and interpret the requirements slightly, but do not establish any new forms of discrimination not prohibited in the statutory language.

It is impossible to characterize regulations under IDEA and under ADA Titles I and III, as the *Sandoval* majority described the Title VI regulations, as “forbid[ding] conduct that [the statute] permits.” 121 S.Ct. at 1519.

Moreover, unlike under Title VI, IDEA and Titles I and III of ADA create a private right of action explicitly in the statutory language. Under IDEA, parties aggrieved by the results of due process hearing are explicitly given a right to bring a civil action. 20 U.S.C. § 1415(i)(2). Title I of ADA provides that a list of particular remedies and procedures of Title VII of the Civil Rights Act shall be available to address violations of Title I. 42 U.S.C. § 12117(a). Among the referenced Title VII remedies is the one that explicitly gives aggrieved parties the right to file a civil action. 42 U.S.C. § 2000e-5(f). Similarly, Title III of the ADA provides that remedies and procedures under Title II of the Civil Rights Act shall be available to persons subjected to discrimination on the basis of disability under Title III. 42 U.S.C. § 12188(a)(1). Among the referenced provisions is the one that authorizes a civil action by an aggrieved person. 42 U.S.C. § 2000a-3(a). The existence of a private right of action explicitly granted in the statutory language obviously removes these statutes from the situation addressed in *Sandoval* where the Court sought to determine whether a private right of action should be implied under Section 602.

5. Although they are modeled to some degree on language in Title VI, Title II of ADA and Section 504 of the Rehabilitation Act differ from Title VI in significant ways that make *Sandoval* inapplicable.

The prohibition of discrimination in Section 504 was modeled to some extent on Title VI, and Section 504 incorporates the rights and remedies of Title VI. 29 U.S.C. §§ 794(a) & 794a(2). The prohibition of discrimination in Title II of the ADA was derived from the language of Section 504, and Title II incorporates the rights and remedies of Section 504. 42 U.S.C. §§ 12132 & 12133. Simplistically, these facts might give the impression that Section 504 and Title II regulations are susceptible to the same analysis accorded Title VI regulations in *Sandoval*. Informed scrutiny reveals, however, that Section 504 and Title II differ in critical ways from the Title VI situation. Indeed, the Supreme Court has itself cautioned that “too facile an assimilation of Title VI law to Section 504 must be resisted.” *Alexander v. Choate*, 469 U.S. at 293 n. 7.

First, as discussed at some length in section 3 above, the prohibition of discrimination on the basis of disability necessarily encompasses various forms of discrimination that go beyond intentional discrimination. In particular, the discussion of the Court's analysis of Section 504 and its legislative history in *Alexander v. Choate* clearly indicates that Section 504 addresses forms of disparate impact discrimination. The broader congressional concept of discrimination was underscored with the enactment of ADA; Congress declared in the findings section of ADA that "individuals with disabilities continually encounter various forms of discrimination" including, in addition to intentional discrimination, "the *discriminatory effects* of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5) (emphasis added). In *Olmstead v. L.C.*, 527 U.S. 581 (1995), the Supreme Court specifically rejected the argument that discrimination under ADA requires a showing of "uneven treatment of similarly situated individuals" (*i.e.*, disparate treatment), and concluded that "Congress had a more comprehensive view of the concept of discrimination advanced in ADA." *Id.* at 598.

The specific text of Section 504 also indicates that Congress intended it to cover non-intentional discrimination. For example, Section 504(d) provides that the standards of Title I of ADA (which include a prohibition on the use of methods of administration that have the effect of discriminating, reasonable accommodation requirements, and prohibitions on criteria that tend to screen out people with disabilities) are to be applied for purposes of employment discrimination claims under Section 504, and Section 504(c) states that small providers are "not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available," 29 U.S.C. §§ 794(d), (c). These provisions demonstrate that Section 504 reaches various forms of non-intentional discrimination.

Insofar as Title II of ADA builds upon the concept of discrimination under Section 504, the discussion of the breadth of discrimination covered by Section 504 applies to Title II. Moreover, in Title II, Congress did not, as in Section 602 of the Civil Rights Act, simply authorize the issuance of regulations to implement the Act; it expressly incorporated by reference particular Section 504 regulations that include various provisions reaching non-intentional discrimination. *See* 42 U.S.C. § 12134 (directing the Attorney General to promulgate regulations to implement Title II and specifying that such regulations must be consistent with the regulations in 28 C.F.R. Part 39 with respect to program accessibility and communications, and must be consistent with the coordination regulations of Section 504 (which include provisions requiring integrated settings, reasonable accommodations, and prohibiting methods of administration that have the effect of discrimination), 28 C.F.R. Part 41, for all other areas). The requirement in the statutory language of consistency with these specified regulations amounts to statutory incorporation of the nondiscrimination standards articulated in the referenced regulations that certainly are not limited to intentional discrimination. (In light of the discussion of the Section 1983 alternative in section 2 above, it should also be noted that, since Title II of ADA deals with the activities of state and

local government entities, discrimination covered by Title II would be an obvious candidate for a Section 1983 right of action.)

For these reasons, despite superficial associations of Section 504 and ADA Title II with some aspects of Title VI, Section 504 and Title II of ADA differ in important respects that make the reasoning and analysis of the majority in *Sandoval* inapplicable.

CONCLUSION

As the *Access Living of Metropolitan Chicago v. Chicago Transit Authority* case illustrates, there is every reason to believe that defendants will seek to use the Supreme Court's decision in *Alexander v. Sandoval* to try to derail disability discrimination lawsuits. This analysis seeks to demonstrate, however, that there are sound reasons for distinguishing the *Sandoval* situation and strong arguments for defending a right to a private cause of action to enforce regulatory requirements, including disparate impact provisions, under ADA, Section 504, IDEA, and other disability rights statutes.

Members of the disability rights community, including especially the legal advocates, need to be on guard to anticipate and respond vigorously to *Sandoval*-based challenges. NCD hopes that the analysis presented here will help prevent the use of *Sandoval* to abridge the ability to remedy violations of civil rights laws. NCD is concerned about the erosion of the critical protections afforded by civil rights laws and remains committed to continuing to dialogue with disability advocates and the broader civil rights community about maintaining the integrity of these civil rights laws. The Court's decision in *Sandoval* is much more than a legal abstraction; it marks a poignant shift in how Americans are allowed to treat one another.