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No. 80-1893

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE, et al.,

Plaintiffs-Appellants

v.

THE WILMINGTON MEDICAL CENTER, INC., et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The United States has a direct interest in the Title VI issue in this case. Under 42 U.S.C. 2000d-1 federal agencies dispensing funds are charged with the responsibility of insuring nondiscrimination in the programs they administer. Specifically, each agency is directed "to effectuate the provisions of [Title VI] * * * by issuing rules, regulations, or orders of general applicability." If recipients fail to comply with these requirements, the responsible federal agency is authorized to secure compliance by terminating financial assistance or by "any other means authorized by law." Pursuant to these statutory obligations, virtually all federal agencies have adopted regulations that prohibit recipients from engaging in practices that have the effect of discriminating on the ground of

race, color or national origin.[1] Wilmington Medical Center's (WMC) argument (Br. 13 n. 9) that Title VI prohibits only purposeful discrimination is inconsistent with this federal position and if accepted, could impede effective enforcement of Title VI.

The United States also has a substantial interest in the resolution of the question whether Section 504 of the Rehabilitation Act of 1973 prohibits only intentional discrimination against the handicapped. Executive Order 11914, 3 C.F.R. 117 (1976 Comp.), reprinted in 29 U.S.C. 794 note (1976 ed.) directed the Department of Health, Education and Welfare (HEW) to issue guidelines for determining what constitutes discrimination within the meaning of Section 504. In the exercise of this responsibility, HEW

1 / The sole exception is the Small Business Administration, 13 C.F.R. 112. All the other agency regulations prohibit discriminatory effects. ACTION, 45 C.F.R. 1203.4(b)(2); Dept. of Agriculture, 7 C.F.R. 15.3(b) (2); Nuclear Regulatory Commission, 10 C.F.R. 4.12(b); AID, 22 C.F.R. 209.4(b)(2); CAB, 14 C.F.R. 379.3(b)(2); Dept. of Commerce, 15 C.F.R. 8.4(b)(2) and (3); Office of Personnel Management, 5 C.F.R. 900.404(b) (2); Dept. of Defense, 32 C.F.R. 300.4(b)(2); EPA, 40 C.F.R. 7.4(b)(2); Federal Home Loan Bank Board, 12 C.F.R. 529.4(b)(2) and (3); Federal Property Management Regulations, 41 C.F.R. 101-6.204-2(a)(2) and (3); HEW, 45 C.F.R. 80.3(b)(2) and (3); HUD, 24 C.F.R. 1.4(2)(i) and (3); Dept. of Interior, 43 C.F.R. 17.3(b)(2) and (3); Department of Justice, 28 C.F.R. 42.104(b)(2) and (3); Dept. of Labor, 29 C.F.R. 31.3(b)(2) and (3); NASA, 14 C.F.R. 1250.103-2(a)(3) and (b); National Foundation on the Arts and Humanities, 45 C.F.R. 1110.3(b)(2) and (3); National Science Foundation, 45 C.F.R. 611.3(b)(2) and (3); Community Services Administration, 45 C.F.R. 1010.4(b)(2) and (3); Dept. of State, 22 C.F.R. 141.3(b)(2); Dept. of Transportation, 49 C.F.R. 21.5(b)(2) and (3); TVA, 18 C.F.R. 302.3(b)(2) and (3); Veterans Administration, 38 C.F.R. 18.3(b)(2) and (3); Water Resources Council, 18 C.F.R. 705.4(b)(2).

issued detailed regulations. See 45 C.F.R. Parts 84 and 85. These regulations require federal recipients to operate their programs so that they are accessible to the handicapped. The Court's decision in this case could affect the validity of these regulations.

QUESTIONS PRESENTED

The United States will address the following two questions:

1. Whether Title VI authorizes federal agencies to adopt regulations that prohibit practices which are discriminatory in effect, but not in purpose.

2. Whether a violation of Section 504 can be established without proof of intentional discrimination.

INTRODUCTION

With the exception of the discussion in the footnote below, the United States' brief addresses only the questions whether a violation of Title VI and Section 504 can be established without proof of discriminatory intent.[2/] Appellants have argued that a violation of these statutes can be established without such proof, while Wilmington Medical Center (WMC) has argued that such proof is essential. We agree with appellants that discriminatory intent is not a necessary element of a cause of action under either Title VI or Section 504.

2/ In deciding that Congress intended to apply a lesser degree of scrutiny to actions resulting in age discrimination than to those resulting in racial discrimination, the district court relied upon the reference in the original Age Discrimination Act to "unreasonable" age discrimination. The 1978 amendments to the Act removed the word unreasonable from the Act's statement of purpose. See 42 U.S.C. (Supp. II) 6101. Accordingly, there is no longer any basis for drawing a distinction between what the Age Discrimination Act prohibits and what Title VI and Section 504 prohibit.

The district court held that appellants had failed to establish any violations under either an intent standard or an impact standard. It therefore saw no need to decide which standard was the appropriate one. While appellants have not challenged the district court's conclusion that they failed to demonstrate discriminatory intent, they have attacked many of the predicates for the district court's conclusion that WMC would also prevail under an impact standard. Should this Court agree with one or more of their contentions, it will have to decide whether intent is a necessary element of a cause of action under Title VI or Section 504. The purpose of this brief is to assist the Court in resolving those questions.

ARGUMENT

I

THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' TITLE VI REGULATIONS REQUIRE AN EFFECTS STANDARD TO BE APPLIED IN THIS CASE

Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides that:

> 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.

The Act also requires federal agencies to issue regulations to enforce these prohibitions. 42 U.S.C. 2000d-1. The Department of Health, Education and Welfare (HEW), the predecessor to the Department of Health and Human Services (HHS), adopted several such regulations. One regulation prohibits recipients from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program." 45 C.F.R. 80.3(b)(2). Another proscribes site selections that have "the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any [federally assisted] programs." 45 C.F.R. 80.3(b)(3).

Under both of these regulations, the recipient's intent is irrelevant. A practice with a disparate effect on a group protected by Title VI violates the regulations, unless the recipient can demonstrate that the challenged practice is a "program necessity." This requirement is similar to that imposed by provisions of other Civil Rights statutes[3/] and involves a showing that (1) the practice substantially serves one or more of the purposes of the program receiving federal assistance and that (2) there are no less

3 / Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (under Title VII, employment practices with a disproportionate impact must be justified by business necessity); Board of Education v. Harris 444 U.S. 130, 151 (1979) (under the Emergency School Aid Act, faculty assignment practices with a disproportionate impact must be justified by educational necessity). Resident Advisory Board v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978) (under Title VIII, a housing practice with a disparate effect must be justified by a showing that it substantially serves a legitimate interest and that no alternative with less discriminatory impact would serve that interest equally well.

discriminatory alternatives that would serve these purposes equally well.[4/]

Because HHS's regulations incorporate an "effects standard" rather than an "intent standard," they may prohibit some practices that would not violate the Constitution. See Washington v. Davis, 426 U.S. 229 (1976). The question we address is whether Title VI authorizes such regulations.

A. Lau v. Nichols establishes the validity of the Department of Health and Human Services' regulations

In Lau v. Nichols, 414 U.S. 563, 568 (1974), the Supreme Court expressly approved the very regulations at issue in this case as a proper interpretation of Title VI and held that under Title VI "discrimination is barred which has that effect even

4/ The district court held that WMC had the burden of producing evidence but not the burden of persuasion on the issue of program necessity. This holding is incorrect. While the district court properly turned to Title VII for guidance in resolving the issue, it failed to recognize that there are two kinds of Title VII cases, disparate treatment cases and disproportionate impact cases. Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977). Disparate treatment cases involve claims that an employer treats some people less favorably than others because of a personal characteristic such as race. In such cases, proof of discriminatory intent is critical. Disproportionate impact cases involve claims that an employment practice, though facially neutral, has a disproportionate impact on a group protected by Title VII and is not justified by business necessity. In these cases, proof of discriminatory intent is not required. In a disparate treatment case, once a prima facie case is shown, the employer need only produce evidence of a non-discriminatory reason for its decision. In a disproportionate impact case, however, the employer has the burden of persuasion on the issue of business necessity. Vulcan v. Civil Service Commission, 490 F.2d 387, 393 (2d Cir. 1973). Because program necessity is a justification for a practice that would otherwise violate Title VI and not evidence designed to rebut an inference of discriminatory intent, the appropriate Title VII analogy is to the disproportionate impact cases, rather than the disparate treatment cases relied upon by the district court. Thus, under Title VI, the recipient has the burden of persuasion and not merely the burden of producing evidence on the issue of program necessity.

though no purposeful design is present."[5] The Court stated that Title VI was an exercise of Congress' power "to fix the terms upon which its money allotments to the State shall be disbursed" and concluded that "[w]hatever may be the limits of that power, * * * they have not been reached here." Id. at 569. Lau's interpretation of Title VI is binding on this Court and should be followed in this case.

Without any discussion of Lau, Wilmington Medical Center asserts that a violation of Title VI cannot be established without proof of discriminatory purpose. It relies almost exclusively on the Supreme Court's decisions in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) and Board of Education v. Harris, 444 U.S. 130 (1979) to support this assertion.[6] WMC's reliance on Bakke and Harris is misplaced.

Bakke did not purport to overrule Lau; indeed, all nine justices cited Lau with approval. 438 U.S. at 303-304 (Powell, J.); id. at 342, 350-353 (Brennan, White, Marshall and Blackmun, JJ.); id. at 416-417 and n. 20 (Stevens, J.) Nor is the holding in Bakke inconsistent with the holding in Lau.

Bakke involved a medical school admission program that created an explicit preference for members of certain racial groups. The defendant university did not deny that it intended

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5 / The Court specifically held that a school district's failure to attempt to rectify the language deficiency of Chinese speaking children violated Title VI, even though the school board's failure to offer remedial instruction was not motivated by discriminatory intent.

6 /The only other decision relied upon by WMC is Guardians v. Civil Service Commission, 23 Empl. Prac. Dec. ¶ 31,153 (D.C. N.Y. 1980) (petition for rehearing pending). In that case two district court judges sitting by designation concluded that Bakke had overruled Lau. For the reasons discussed above, that conclusion is incorrect and should not be followed.

to treat minority applicants more favorably than white applicants. Instead, it sought to justity this preference as a remedy for past discrimination.

Accordingly, the only Title VI issue in Bakke was whether Title VI prohibits all explicit racial preferences, including those intended to remedy the effects of past discrimination. Four justices interpreted Title VI as a per se ban on all racial preferences, regardless of what the Constitution would permit. It was in response to this contention that a majority of the Court held that Title VI permits an explicit use of race so long as it is consistent with the Constitution. Mr. Justice Powell stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." Id. at 287 (emphasis added). And the four justices in the Brennan group agreed that "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself." Id. at 325 (emphasis added).

Thus, Bakke involved only the question whether a purposeful acknowledged use of race could be justified under Title VI. Because the university conceded that its resort to race was deliberate, the question whether a violation could be established without proof of such intentional discrimination was not at issue. In this situation, Lau continues to state the governing principle -- practices with a discriminatory effect are prohibited "even though no purposeful design is present." 414 U.S. at 568.

We recognize that the Brennan group appears to have concluded that Title VI is absolutely coextensive with the Constitution and that Lau therefore may have been incorrectly decided. 438 U.S. at 352. But the Brennan group also sought to reconcile their decision with Lau. Independent of their conclusion that Title VI should always be interpreted like the Constitution, the Brennan group rejected a color blind interpretation of Title VI because it would be inconsistent with Congress' expressed purpose of ending the legacy of discrimination against blacks and other historically disadvantaged groups. Id. at 340, 353, 355. As they put it, a statute "designed to eliminate discrimination against racial minorities" should not be interpreted "in a manner which would impede efforts to obtain this objective." Id. at 355.[7/]

Moreover, the fact that some justices have expressed doubts about a decision "does not make it any less binding upon [this Court]." United States ex rel. Gockley v. Myers, 450 F.2d 232, 239 (3d Cir. 1971), cert. denied, 404 U.S. 1063 (1972). This Court is simply "not free to disregard an existing fiat and still live holding of the Supreme Court." Ashe v. Swenson, 399 F.2d 40, 45 (8th Cir. 1968), reversed on other grounds, 397 U.S. 436.

7/ The Supreme Court applied precisely this principle in holding that Title VII does not prohibit all race conscious affirmative action plans. United Steelworkers v. Weber, 443 U.S. 193, 201-202 (1979).

Harris did not involve a question under Title VI at all. That case concerned the proper construction of the Emergency School Aid Act (ESAA), a statute that makes federal aid available to local school districts that undertake efforts to reduce minority group isolation. The particular provision under review prohibited "discrimination" in the assignment of faculty. The Court held that this provision prohibits school districts from maintaining racially segregated faculties, even if the segregation is not intentional.

Title VI was introduced into the case by the school district, which argued that Title VI has an intent standard and that ESAA should be interpreted like Title VI. The Court specifically declined to resolve the question of the standard of liability under Title VI, however, because it found no evidence "that the two Acts were intended to be coextensive." 444 U.S. at 149.

The Court in Harris did not even mention Lau, much less overrule it. And the Court's careful reservation of the question of the appropriate standard of liability under Title VI makes clear that Bakke did not overrule Lau either.

WMC's view that Harris supports an intent standard under Title VI apparently comes from the Court's observation that (id. at 150):

> It does make sense * * * that Congress might impose a stricter standard under ESAA than under Title VI * * *. A violation of Title VI may result in a cut off of all federal funds and it is likely that Congress would wish this drastic result only when the discrimination is intentional.

This Court should not be guided by this statement for several reasons.

First, it is apparent from the Court's brief discussion that it merely presumed that the availability of the fund termination remedy might have prompted Congress to adopt an intent standard; the Court did not actually investigate the question.[8/]

A careful review of the legislative history leads to a different conclusion. Thus, opponents of the bill repeatedly argued that the fund termination remedy was too drastic and that Title VI should be defeated for this reason alone. The

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8 / Indeed, the only basis for the Court's presumption was that a violation of Title VI would result in a cut off of all federal funds. However, fund termination must "be limited in its effect to a particular program, or part thereof * * * [where] noncompliance has been so found." 42 U.S.C. 2000d-1. Since fund termination under Title VI must be program specific, it is arguably no more drastic than a refusal to fund a project under ESAA.

proponents of the bill did not respond to these attacks with assurances that Title VI would only be applied in cases of racial animus, however. Instead, they emphasized that the strict procedural safeguards built into Title VI would provide adequate protection against the possibility that funds would be terminated without sufficient justification.[9] The logical inference is that Congress sought to ameliorate the harshness of the fund termination remedy by guaranteeing procedural fairness and not by limiting Title VI to instances of intentional discrimination.

9 / 110 Cong. Rec. 6749 (Sen. Moss); id. at 6544 (Sen. Humphrey); id. at 1519 (Rep. Celler); id. at 7066-7067 (Sen. Ribicoff); id. at 8345 (Sen. Proxmire); id. at 6562 (Sen. Kuchel).

Senator Moss pointed out that before federal funds are withdrawn, (110 Cong. Rec. 6749):

> [R]egulations giving notice of what conduct is required must be drawn up by the agency administering the program. * * * Before such regulations become effective, they must be submitted to and approved by the President.
>
> Once having become effective, there is still a long road to travel before any sanction whatsoever is imposed. Formal action to compel compliance can only take place after the following has occurred: first, there must be an unsuccessful attempt to obtain voluntary compliance; second, there must be an administrative hearing; third, a written report of the circumstances and the grounds for such action must be filed with the appropriate committees of the House and Senate; and fourth, 30 days must have elapsed between such filing and the action denying benefits under a Federal program. Finally, even that

(continued)

Second, the dictum in Harris addresses the issue of the Title VI standard only as it applies to fund terminations, while this suit is one for injunctive relief. While we believe that proof of intentional discrimination is not required to make out a violation of Title VI in any type of enforcement action, one court of appeals has suggested that the dicta in Harris may be completely inapplicable in suits for injunctive relief. Bryan v. Koch, Nos. 80-6085, 80-7401 (2d Cir., July 10, 1980).

Finally, this Court's obligation is to follow the law as it currently stands, regardless of how the Supreme Court may ultimately decide the issue. Because neither Bakke nor Harris overruled Lau, it remains good law and this Court has no authority to disregard it.[10/]

9 / (continued)

> action is by no means final because it is subject to judicial review and can be further postponed by judicial action granting temporary relief pending review in order to avoid irreparable injury. It would be difficult indeed to concoct any additional safeguards.

These procedures are found in 42 U.S.C. 2000d-1.

10/ The Supreme Court's recent decision in Fullilove v. Klutznick, 48 U.S.L.W. 4979 (U.S. July 2, 1980), confirms the propriety of following Supreme Court precedent rather than attempting to predict how various justices will decide an issue when it finally comes before them. There, the plurality opinion cited Lau with approval, although two of the justices joining the opinion had previously questioned it. Id. at 4987-4988.

B. The regulations at issue in this case are authorized by Title VI

1. The administrative interpretation of Title VI is reasonable

We believe that this Court is not free to reexamine Lau. However, because this Court may disagree, we now address the validity of the Title VI regulations at issue. In arguing that the regulations are invalid, WMC ignores the critical point that the interpretation of a statute by those charged with its enforcement "is entitled to great deference," and should be followed "unless these are compelling indications it is wrong." Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971); Udall v. Tallman, 380 U.S. 1, 16 (1965); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). This principle applies with even greater force here because Congress has delegated HHS and other federal agencies the task of formulating legislative regulations to carry out the purposes of the Act. 11/ General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976). In this situation, the agency's interpretation of the statute must be followed unless it is "demonstrably irrational." Ford Motor Credit Co. v. Milhollin, 48 U.S.L.W. 4145, 4148 (U.S. Feb. 20, 1980).

11/ Under Title VI, agencies are "directed to effectuate the provisions of section 2000d * * * by issuing rules, regulations, or orders of general applicability." 42 U.S.C. 2000d-1. Because the statute expressly provides that non-compliance with the regulations may lead directly to sanctions (ibid.), the regulations are properly classified as legislative rather than merely interpretive. Gilbert, supra, 429 U.S. at 141-142; Chrysler Corp. v. Brown, 441 U.S. 281, 301-302 (1979); see generally, K.C. Davis, Administrative Law § 5.03 (3d ed. 1972).

To be sure, in some circumstances it is appropriate to attach less weight than usual to an agency's interpretation of a statute. But there is no basis for departing from the usual rule here.

Thus, this is not a case where the agency's interpretation was formulated long after passage of the Act. Gilbert, supra, 429 U.S. at 142. The regulations at issue in this case were first adopted in 1964, only several months after Title VI became effective. Such contemporaneous regulations are a particularly reliable indication of the meaning of the Act. Udall v. Tallman, supra, 380 U.S. at 16; Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961).

Nor is this a case where the administrative interpretation is entitled to less weight than usual because it "conflict[s] with earlier pronouncements of the agency." Gilbert, supra, 429 U.S. at 143; Espinoza v. Farah Mfg. Co., 414 U.S. 86, 93-94 (1973). HHS and its predecessor, HEW, have consistently interpreted the Act as prohibiting acts with a discriminatory effect.

Finally, this is not a case where the agencies enforcing the statute are divided on the proper interpretation of the statute and the principle of agency deference therefore points "in diametrically opposite directions." Gilbert, supra, 429 U.S. at 145. To the contrary, at least twenty-five federal agencies enforcing Title VI have adopted regulations that prohibit practices with a discriminatory effect. See note 1, supra.

Accordingly, the issue is whether this federal position is "demonstrably irrational." Ford Motor Credit Co. v. Milhollin, supra, 48 U.S.L.W. at 4148. As we demonstrate below, the interpretation of Title VI adopted by the federal agencies is not only a rational one, but it is the one that is most consistent with the language of the statute and its legislative history.

a. The language of the statute

The argument that Title VI was intended to be absolutely coextensive with the Equal Protection Clause and that it therefore prohibits only intentional discrimination is not supported by the language of the statute. The statute does not protect beneficiaries of federally assisted programs against "denials of equal protection." Instead, the statutory terms provide that no person is to be "excluded from," "denied the benefits of" or "subjected to discrimination under" any federal program. If Congress had the limited objective of prohibiting denials of equal protection and nothing more, it presumably would have used equal protection language.

A comparison between the language of Title VI and other titles of the Civil Rights Act of 1964 strongly supports this conclusion. Title III of the Act protects an individual from being "deprived of * * * his right to the equal protection of the laws * * * by being denied equal utilization of any public facility." 42 U.S.C. 2000b. And Title IV of the same Act protects a minor child from "being deprived by a school board of the equal protection of the laws." 42 U.S.C. 2000c-6.

Thus, when Congress wanted to incorporate equal protection standards, it used equal protection language. The far more expansive language in Title VI is strong evidence that Congress did not intend to link Title VI to the Equal Protection Clause of the Fourteenth Amendment.

b. Legislative history

The legislative history of Title VI supports the agency construction of Title VI. Thus, President Kennedy, in his message to Congress proposing the legislation that ultimately became Title VI, outlined the broad objectives of the proposal (109 Cong. Rec. 1161 (1964))(emphasis added):

> Simple justice requires that public funds, to which all taxpayers contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.

Senator Humphrey repeated President Kennedy's message in his speech opening the debate on Title VI. 110 Cong. Rec. 6543. And the statements of other proponents also reflect that Congress was concerned with results of recipients' practices and not simply the motivation.[12/]

12/ 110 Cong. Rec. 6562 (Sen. Kuchel); id. at 2484 (Rep. O'Hara); id. at 1519 (Rep. Celler).

This emphasis on eliminating discriminatory results regardless of motivation was not lost on opponents of the bill. For example, Congressman Robertson complained that under Title VI, as under Title VII, "it would not be necessary to show any willful purpose or intentional volition * * *. It would appear to be sufficient to show that discrimination does in fact exist." Id. at 8428 (quoting legal memorandum of the National Association of Manufacturers). Congressman Willis also complained that the bill went beyond constitutional prohibitions (id. at 1623):

> If people are being denied equal protection of the laws under the 14th amendment or if their right to vote is being abridged or denied under the 15th amendment * * * and if that is all you want * * * I would support it. But that is a far cry from the unlimited provisions of this bill.

Supporters of the bill did not dispute these charges.

The debate over the failure of Title VI to include a definition of discrimination furnishes particularly strong evidence that Congress did not want to link Title VI to the Equal Protection Clause. Much of the opposition to Title VI centered on its failure to define discrimination. Opponents repeatedly argued that the absence of a definition meant that each federal agency would have discretion to determine for itself what constituted discrimination.[13/]

If Congress had intended to incorporate the equal protection standard, the sponsors of the bill would very likely have

13/ 110 Cong. Rec. 1619 (Rep. Abernathy); id. at 1630 (Rep. Dowdy); id. at 9083-9084 (Sen. Gore); id. at 10690 (Sen. Thurmond).

responded to these charges with assurances that the agencies would be limited to enforcing the equal protection standard of discrimination. But the supporters of the bill did not want to confine the agencies' discretion in this way. Instead, they thought it "wise to leave the agencies a good deal of discretion as to how they [would] act." 110 Cong. Rec. 6546 (Sen. Humphrey).[14/] Accordingly, they refused to equate discrimination under Title VI with the standard of equal treatment incorporated in the Equal Protection Clause.

The legislative history also reflects that in enacting Title VI, Congress relied primarily on its spending power and not its power to enforce equal protection guarantees. 110 Cong. Rec. 1527, 2467 (Rep. Celler); id. at 6546 (Sen. Humphrey); id. at 6562 (Sen. Kuchel); id. at 12675-12677 (Sen. Allott). This reliance on the spending power strongly indicates that Congress intended to do more than simply prohibit violations of the Equal Protection Clause.

Of course, one the goals of Title VI was to eliminate federal involvement in violations of equal protection guarantees. But there is no evidence in the legislative history that this was all Congress intended to accomplish.[15/]

14/ Attorney General Robert F. Kennedy made a similar point in his testimony on the bill. Responding to criticism of the bill's failure to define discrimination, he stated (ibid.):

> We are dealing with a large number of programs, each with its own special problems * * *. What is appropriate for one program may not fit another.

15/ The statements cited in the Brennan group opinion in Bakke (438 U.S. at 330-333) all show that eliminating federal involvement in constitutional violations was one objective of Title VI, not that it was the only objective. Moreover, the cited passages all come from general remarks that did not focus on the meaning of discrimination under Title VI. As discussed above, when pressed for a definition of discrimination, the sponsors refused to provide one.

c. De facto segregation

Congress' treatment of de facto segregation under Title VI also supports the federal agencies' construction of Title VI. From the beginning, Congress has taken specific steps to insure that in the single area of school segregation, federal agencies enforcing Title VI would have no authority to go beyond constitutional requirements. These measures reflect Congress' awareness that Title VI does not by its own terms express a constitutional standard and that any such limitation would require additional language.

First, Congress enacted 42 U.S.C. 2000c-6, which provides that "nothing herein shall enpower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another." Although that provision was passed as part of Title IV, the legislative history of Title VI reveals that the word "herein" refers to the entire Civil Rights Act of 1964, including Title VI.[16/] In 1966, Congress added 42 U.S.C. 2000d-5 which provides that "compliance * * * with a final [desegregation] order * * * of a Federal court * * * shall be deemed to be compliance with [Title VI]." Finally, in 1970, Congress amended Title VI to include a provision requiring uniformity in the treatment "of segregation by race, whether de jure or de facto * * * in all regions of the United States" and

16/ 110 Cong. Rec. 12715 (Sen. Humphrey).

explained that "[s]uch uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found." 42 U.S.C. 2000d-6(a),(b).

Thus, Congress was plainly aware that the language of Title VI was broader than the constitutional prohibition against denials of equal protection. When it wanted to confine Title VI to constitutional standards, as in the area of school segregation, it did so explicitly.

d. Subsequent legislation

Since the passage of Title VI, Congress has enacted several statutes modeled on Title VI, including Section 504 of the Rehabilitation Act (29 U.S.C. 794), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681), the Revenue Sharing Act (31 U.S.C. 1242), the Age Discrimination Act (42 U.S.C. 6106) and the Local Public Works Capital Development and Investment Act (42 U.S.C. 6709). Each of these statutes was passed after the federal agencies enforcing Title VI had adopted regulations with an effects standard and the latter two provisions were passed after the Supreme Court's decision in Lau. If Congress thought that either the agencies or the Supreme Court had misconstrued Title VI, it presumably would have taken steps to make sure that such "mistakes" would not be repeated in the future. Not only did Congress fail to take such action, but in some cases it affirmatively indicated that these statutes should be construed in accordance with existing

interpretations of Title VI.[17/] This implicit approval of the agencies' Title VI regulations significantly undermines WMC's claim that the agencies have misinterpreted Title VI. See Red Lion Broadcasting, supra, 395 U.S. at 380-381.

In sum, the language of the statute, its history, amendments to the Act, and subsequent legislation patterned on Title VI all fully support the reasonableness of the agency construction of Title VI. WMC's invitation to invalidate the regulations should be rejected.

2. The agency regulations are also valid because they are reasonably related to the goal of preventing intentional discrimination

Even if this Court concludes that the only reasonable interpretation of Title VI is that it incorporates the constitutional standard, that would not end the matter. An agency that has been delegated rule making power has broad discretion to create new obligations that are not created by the statute itself. The only limitation on this power is that the new obligations must be "reasonably related to the purposes of the enabling legislation." Mourning v. Family Publications Service, 411 U.S. 356, 369 (1973). Because HHS and the other federal agencies enforcing Title VI have been delegated law making power (see page 14, supra), their regulations must be judged by these standards.

17/ For example, "the drafters of Title IX explicitly assumed that it would be interpreted and enforced in the same manner as Title VI." Cannon v. University of Chicago, 441 U.S. 677, 678 (1979). And the Public Works Act expressly provides that it should "be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under title VI of the Civil Rights Acts of 1964." 42 U.S.C. 6709.

The Supreme Court's decision in Mourning illustrates the breadth of this power. Mourning involved the question whether a Federal Reserve Board regulation was consistent with the Truth in Lending Act. The Act requires the disclosure of certain contract information whenever a finance charge is imposed. 15 U.S.C. 1631. The regulation goes beyond the Act and requires disclosure whenever a finance charge is imposed or whenever payment is to be made in more than four installments. 12 C.F.R. 226.2(k). The regulation was designed to discourage creditors from attempting to hide the finance charge in the cash price, a problem that was felt to be particularly acute in transactions involving more than four payments.

Although the lower court thought that the regulation was invalid because it included transactions not covered by the Act, the Supreme Court disagreed. The Court specifically explained that (411 U.S. at 374):

> Where, as here, the transactions or conduct which Congress seeks to administer occur in myriad and changing forms, a requirement that a line be drawn which insures that not one blameless individual will be subject to the provisions of an act would unreasonably encumber effective administration and permit many clear violators to escape regulation entirely.

The same principle applies here. Even assuming Title VI prohibits only acts of intentional discrimination, an agency enforcing Title VI is not limited to conducting a case by case inquiry into the intent of the recipient. Such an approach would allow many violations to escape detection since even

under the best of circumstances, evidence of discriminatory intent may be extremely difficult to uncover. An agency may therefore forego a direct inquiry into intent and establish a rule that is easier to administer and that reduces the danger that violations will escape detection.

HHS's regulations serve this function. Under the agency's regulations the demand for a proper justification is activated by evidence that a practice has a substantially disproportionate impact on a group that has historically been subjected to discrimination. Such evidence is often indicative of discriminatory intent. Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977). When a recipient is unable to show that the practice is manifestly related to the purposes of the program receiving assistance, the danger that discrimination is being practiced increases since normally a recipient will want to choose procedures that effectively carry out the purposes of its program. Finally, the presence of alternatives that would serve these purposes equally well indicates that the purported reason for the practice may be a mask for intentional discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Thus, although the agency regulations do not require a finding of intentional discrimination, they are well adapted to rooting out violations of the Constitution.

As in Mourning, it is no objection that the regulations will apply in some situations in which intentional discrimination is not being practiced. An agency should be free to adopt "prophylactic measure[s] * * * in order to discourage evasion" of the Act's requirements. Mourning, supra, 411 U.S. at 377.

Congressional legislation enforcing the Civil Rights Amendments strongly supports the reasonableness of the agency's approach here. For example, the Voting Rights Act of 1965 prohibits covered jurisdictions from making any change that will have a disparate effect on minority voters, although the Fifteenth Amendment may prohibit only intentional discrimination. Similarly, Title VII prohibits public employers from using employment practices with a discriminatory effect, unless justified by business necessity, while the Fourteenth Amendment prohibits only intentional discrimination. The Supreme Court expressly upheld the Voting Rights Act on the ground that Congress could reasonably conclude that changes with a disparate effect created a sufficient risk of purposeful discrimination to warrant prophylactic relief. City of Rome v. United States, 48 U.S.L.W. 4463, 4469 (U.S. April 22, 1980). The lower courts have sustained Title VII on similar grounds. E.g., United States v. City of Chicago, 573 F.2d 416, 420-424 (7th Cir. 1978). As the Court's decision in Mourning makes clear, the principle involved in these cases "applies to administrative agencies as well as to legislatures." 411 U.S. at 374.

II

A VIOLATION OF SECTION 504 CAN BE ESTABLISHED WITHOUT PROOF OF DISCRIMINATORY INTENT

WMC also argues that a violation of Section 504 of the Rehabilitation Act of 1973 cannot be established without proof of intentional discrimination against handicapped individuals. This argument is incorrect.

Section 504 provides that

> [n]o otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The language of the statute thus prohibits all discrimination against qualified handicapped individuals, without limitation. Nothing in the language of Section 504 suggests that it reaches only intentional discrimination.

Moreover, there is no evidence in the legislative history that Congress was concerned only with intentional discrimination against the handicapped. To the contrary, the legislative history reflects that Congress was aware that intentional discrimination was only a small part of the problem that the handicapped encounter. Congress knew that the more widespread and intransigent problem was that decisions had been made, facilities had been constructed and programs had been designed without any consideration of the handicapped.

Thus, in a report calling for a White House Conference on the Handicapped, issued the same day as the Senate Report accompanying the 1973 Act, the Senate Committee on Labor and Public Welfare emphasized that the handicapped suffer not only from intentional discrimination but also from indifference to their needs. S. Rep. No. 93-319, 93d Cong., 1st Sess. (1973). The report specifically explained that handicapped persons are (id. at 2-3)

> all too often excluded from schools and educational programs, barred from employment or * * * underemployed because of archaic attitudes toward the handicapped, denied access to transportation, buildings and housing because of architectural barriers and lack of planning, and * * * discriminated against by our public laws. * * * Too often our programing for, and thinking about, the handicapped fails because of lack of knowledge. Too often we find that we automatically make the assumption that nothing can be done.

The Senate report accompanying the 1973 Act likewise makes clear that Congress' primary concern in enacting Section 504 was to insure that handicapped persons would have access to federally assisted programs. That report specifically "proclaims a policy of non-discrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." S. Rep. No. 93-318, 93d Cong., 1st Sess. 50 (1973).

Consistent with Congress' overriding concern that the handicapped not be denied access to federally assisted programs, HEW, the agency charged with responsibility for coordinating federal enforcement of Section 504, adopted regulations that describe the nature of the recipients' obligations under Section 504. These regulations require recipients to "operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons." 45 C.F.R. 84.22(a). In addition, the regulations provide specific examples of the kinds of modifications recipients must undertake in order to make their programs accessible to the handicapped. 45 C.F.R. 84.22(b). A recipient may not avoid its obligations under these sections by showing that it does not intend to discriminate against handicapped persons. The obligation to insure program accessibility applies irrespective of the intent of the recipient. Indeed, in addition to the specific requirement of program accessibility, the regulations contain a general prohibition against any practice that has "the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap" or that has "the purpose or effect of defeating or substantially impairing accomplishment of

the objectives of the recipient's program." 45 C.F.R. 84.4(4). These regulations provide an authoritative guide in construing Section 504. See page 14, supra.[18/]

Nothing in the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), undercuts the force of these regulations or indicates that Section 504 reaches only intentional discrimination. To the contrary, the Court expressly relied upon the agency regulations in resolving the issue before it and indicated that HEW (now HHS) would have broad latitute to go beyond prohibiting intentional discrimination in enforcing Section 504. Id. at 406-407, 412-413.

In Davis, a professional nursing school rejected an applicant for its program whose hearing disability prevented her from safely participating in the clinical part of the program. In holding that the school had not violated Section 504, the Court derived support from HEW's regulations which provide that an "otherwise qualified" handicapped person is one who is able to meet all essential qualifications. Id. at 406-407.

18/ Because the regulations require recipients to make modifications that may be costly, HEW submitted them to Congress with an explicit request that Congress evaluate them to make sure that they were consistent with congressional intent. Congress did not express any disatisfaction with the agency's approach. Instead, it sought to assist recipients by assuming some of the costs of compliance. Thus, the 1978 amendments to the Rehabilitation Act of 1973 include a provision that authorizes grants to state units for the purpose of providing "such information and technical assistance (including support personnel such as interpreters for the deaf) as may be necessary to assist those entities in complying with the Act, particularly the requirements of Section 504." 29 U.S.C. (Supp. II) 775.

Although the applicant argued that HEW's regulations required the school to modify its program to enable her to participate, the Court concluded that the regulations did not mandate the kind of modifications she sought. Thus, the evidence in the record indicated that the applicant could safely participate in the clinical program only by receiving close individual attention from a nursing instructor, yet the regulations exclude such "personalized services" from the kinds of auxiliary aids a school must provide. Id. at 409.

The Court also rejected the suggestion that the college was required to eliminate clinical training as a prerequisite to completion of its program. The Court found that a clinical program was an essential part of the curriculum and that without it a student would not receive even a rough equivalent of the training a nurse normally receives. Id. at 409-410. The Court held that the agency regulations do not require a recipient to waive such essential requirements. Ibid.

This does not mean that under Section 504 and the regulations a recipient may simply adopt a neutral stance and fail to consider ways to make its program accessible to the handicapped. The Court in Davis expressly indicated that recipients must adopt program modifications when that is necessary to prevent discrimination against the handicapped and that HEW (now HHS) would continue to have a significant role in identifying when "a refusal to accommodate

the needs of a disabled person amounts to discrimination against the handicapped." Id. at 413. Nothing in Davis suggests that HHS may require accommodations only in cases of intentional discrimination.

The Fifth Circuit's recent decision in Camenish v. University of Texas, 616 F.2d 127 (1980), demonstrates the importance of the agency regulations in construing Section 504 and confirms that Section 504 does not require proof of discriminatory intent. In that case, the defendant university refused to provide a deaf graduate student with a sign language interpreter. The plaintiff did not claim that the university's refusal to provide an interpreter reflected an intent to exclude handicapped persons from its program. Indeed, since the university was willing to allow the plaintiff to continue in its program if he provided his own interpreter, and would have provided an interpreter itself if plaintiff met the established criteria for financial assistance, any such claim would have been difficult to sustain. Nonetheless, the court held that the university's failure to provide an interpreter violated Section 504.

The University had argued that under Davis, its failure to provide an interpreter could not constitute discrimination under Section 504. The Fifth Circuit disagreed. The court pointed out that unlike the situation in Davis, where the applicant was not "otherwise qualified" because her handicap prevented her from ever

realizing the principle benefits of the program, Camenish could "obviously perform well in his profession." Id. at 133. Moreover, the court emphasized that while Davis had sought personalized services not contemplated by the regulations, the interpretive services requested by Camenisch were expressly required by HEW's regulation.

Thus, Camenish fully supports the agency's view that a recipient must adopt appropriate modifications to permit participation by otherwise qualified handicapped persons and that such modifications must be undertaken, whether or not the recipient's failure to include the handicapped is motivated by discriminatory intent.

In sum, the issue under Section 504 is whether the recipient has taken appropriate steps to make its program accessible to the handicapped. In making this determination, a court should be guided by the regulations adopted by HEW. WMC's effort to limit the issue to whether its decisions are infected with an intent to discriminate against handicapped persons should be rejected.

CONCLUSION

This Court should hold that a violation of Title VI and Section 504 can be established without proof of discriminatory purpose.

Respectfully submitted,

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