S T A T E O F T E N N E S S E E
OFFICE OF THE ATTORNEY GENERAL
P. O. BOX 20207
NASHVILLE, TENNESSEE 37202

August 17, 2005

Opinion No. 05-125

English-only Driver's License Tests

QUESTIONS

1. Does SB 303, as amended to require all driver's license tests to be administered in English, violate Title VI of the 1964 Civil Rights Act?

2. Does the Tennessee Department of Safety risk losing its federal funding if SB 303 is passed and implemented?

OPINIONS

1. SB 303 may be vulnerable to challenge on the grounds that it violates Title VI of the 1964 Act.

2. Assuming such a challenge to SB 303 were successful, the Tennessee Department of Safety risks losing a portion of its Federal funding.

ANALYSIS

1. Section 601 of Title VI, codified at 42 U.S.C. § 2000d, provides that "no person 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" that Title VI covers. Because a covered Title VI "program or activity" includes "all of the operations of a department . . . of a State . . . government," the subject matter of SB 303, driver's license testing conducted within the Tennessee Department of Safety (TDOS), falls within Title VI's scope. *See* 42 U.S.C. 2000d-4a(1)(A). But § 601 only prohibits intentional discrimination within a covered program or activity. *Alexander v. Choate*, 469 U.S. 287 (1985). Thus, to challenge SB 303 under Section 601 of Title VI successfully, a plaintiff's principal burden would be to show that the State intended to discriminate on the basis of race or national origin.[1]

[1]This Opinion assumes that a federal court would apply the same analytical framework for ascertaining intentional discrimination under Title VI as it would under the 14th Amendment of the U.S. Constitution. This assumption flows from the Supreme Court's assertion in *Sandoval v. Alexander* that "§ 601 prohibits only intentional discrimination." 532 U.S. 275, 280 (2001). It grounded this assertion, which the *Sandoval* court characterized as "beyond dispute," *id*., on a key holding of *Regents of Univ. of Cal. v. Bakke*: "[i]n view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the

First, the plaintiff would have to establish that "a discriminatory purpose [was] a motivating factor in the decision." *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 426 U.S. 252, 266 (1977). If a plaintiff could do so, the burden would then shift to the state to show that some other permissible purpose for the action exists. *Washington v. Davis*, 429 U.S. 229, 241 (1976). When a state's action does not, on its face, discriminate on the basis of race, color, or national origin, a reviewing court must conduct "a sensitive inquiry into such circumstantial and direct evidence as may be available" to determine if the state has carried its burden to show a permissible purpose for the legislation. *Arlington Heights*, 426 U.S. at 266. After completing such an inquiry, which can include a consideration of the broad historical context which gave rise to a bill, a bill's legislative history, and the care with which the legislature followed its typical decision-making process while considering and passing a bill, *id*. at 267-68, a court may only find the intent to discriminate when the evidence tends to show that a bill "was promulgated . . . because of, not merely in spite of, its adverse impact" on a disadvantaged group. *Horner v. Kentucky High School Athletic Association*, 43 F. 3d 265, 276 (6th Cir. 1994).

In short, a challenger would have the onerous task of proving that the legislature chose to pass SB 303 for the sole purpose of targeting driver's license applicants because of their race, color, or national origin. Assuming, *arguendo*, that no prohibited discriminatory purpose motivated the passage of SB 303, a plaintiff would, as a threshold matter, have no evidence with which to meet its initial burden. If a plaintiff did manage to convince a court that such a prohibited purpose existed, the State could likely carry its burden by showing its non-discriminatory, permissible purposes, including: (1) the public's safety demands that all drivers understand English-language traffic signs and enforcement; (2) administrative coherence in the Department of Safety mitigating in favor of only one testing language; and (3) and the cost savings that result from avoiding periodically translating and updating multiple tests. A reviewing court would then inquire into the bill's historical and procedural underpinnings, and if it found no prohibited discrimination, would uphold the legislation. Ultimately, the burden to prove intentional discrimination would be very difficult for a plaintiff to bear, making it unlikely that SB 303 would be found to violate § 601 of Title VI.[2]

Fifth Amendment." 438 U.S. 265, 287 (1978).

[2] It should be noted, however, that Federal cases have found language-restrictive statutes invalid in other contexts. For example, in *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), the Eleventh Circuit upheld the district court's finding that a state statute very similar to SB 303 violated Title VI. The Supreme Court subsequently reversed the decision but did so on a procedural, rather than substantive, basis. *See Alexander v. Sandoval*, 532 U.S. 275, 281 (2000). Similarly, in *Yniguez v. Mofford*, 730 F.Supp. 309 (U.S.D.C. Ariz. 1990), a federal district court invalidated a state constitutional provision establishing English as the only official language for state employees. *See also Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) (in the employment context, a rule which requires only English to be spoken can give rise to a Title VII violation); 29 C.F.R. § 1606.7(b, c) (the primary language of an individual is often an essential national origin characteristic, and rules which require employees to only speak English at all times are presumed to be in violation of Title VII).

Nevertheless, SB 303 could be invalidated if a federal court determined, in response to a challenge by a federal agency, that the legislation had a discriminatory effect. Section 602 of Title VI, codified at 42 U.S.C. § 2000d-1, authorizes executive agencies of the Federal government to promulgate administrative rules "to effectuate the provisions of § [601]." The Department of Justice (DOJ) has issued a regulation pursuant to this authority forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ." 28 CFR § 42.104(b)(2). By prohibiting discrimination on the basis of disparate impact, these regulations extend Title VI's possible reach much further that the intentional discrimination prohibited under § 601. Accordingly, SB 303 would be susceptible to an attack on this basis.

However, the regulatory basis for sustaining a violation is itself susceptible to a legal challenge. The Supreme Court's reversal of the Eleventh Circuit in *Alexander v. Sandoval*, 532 U.S. 275 (2000), though based on the much more limited question of whether a private right of action existed under § 602, called into serious question the validity of the § 602 disparate impact regulations. At the outset of the analysis, the Court assumed the validity of the disparate impact regulations. *Sandoval*, 532 U.S. at 281. At the same time, the Court noted that previous decisions indicating that the regulations might be valid "were at considerable tension" with prior holdings of the Court. *Id.* The Court ultimately concluded that regulations promulgated pursuant to § 602 could not provide for a private right of action. *Id.* at 286. Its reasoning, if applied to the question of whether the disparate impact regulations exceed the scope of an agency's authority under § 602, potentially leads to the conclusion that they do. It could thus be argued that, if § 601 prohibits only intentional discrimination, then § 602 regulations can go no further.[3] This office is aware of no case in which a set of § 602 regulations have been challenged; notwithstanding, it is the opinion of this office that if SB 303 were enacted and challenged, a court would likely determine that the regulations do exceed Congress' grant of authority.

2. Under Title VI, both private parties and federal funding agencies could take action to challenge SB 303 and suspend at least some of TDOS' federal funding. Pursuant to § 601, a private party or the funding agency may bring an action to challenge SB 303. *Sandoval*, 532 U.S. at 279. Either would bear the burden of proving intentional discrimination. *Id*. at 280. Given the low probability of such a case's success, it is unlikely that a court would order any limitation of TDOS' federal funding under § 601.

Since the Supreme Court's *Sandoval* opinion, a private party may no longer bring an action to enforce regulations promulgated under § 602, including the disparate impact regulations. *Sandoval*, 532 U.S. at 293. Thus, even if an argument in favor of maintaining the disparate impact regulations could prevail, the probable plaintiffs in such a suit, private individuals, have no standing

---

[3] Commentators agree that *Sandoval* may have sounded the death knell for § 602 disparate impact regulations. *See generally* Bradford Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517 (2002); David J. Galilees, Note, *Environmental Justice and Title VI in the Wake of Alexander v. Sandoval*: Disparate-Impact Regulations Still Valid Under Chevron, 31 BRIT. COLUM. ENVTL. AFF. L. REV. 61, 92-98 (2004).

to do so. In practical terms, a federal agency itself is the only likely challenger to SB 303, and the most likely avenue to mount such a challenge would be pursuant to § 602 regulations.

Section 602 grants federal agencies the power to remove funding through their own administrative processes and describes the process an agency must follow to enforce regulations promulgated under the section. First, it must: (1) "advise the appropriate person or persons of the failure to comply;" and (2) be convinced "that compliance cannot be secured by voluntary means." If informal means do not work, then the agency must: (1) establish "an express finding on the record" of a violation; and (2) give the recipient an opportunity for a hearing. If the agency finds against the recipient, then it may proceed to discontinue funding. But if it does discontinue funding, the agency must: (1) limit the termination to the particular program of the "political entity or part thereof" in which the violation occurred; (2) file a report with the respective House and Senate committees that have jurisdiction over the program or activity affected; and (3) stay the termination of funding until 30 days after the agency has filed the required report with the appropriate Congressional committees.[4]

CONCLUSION

For the reasons stated above, SB 303 may be vulnerable to a challenge on the grounds that it violates Title VI, though defenses to such an action exist. One of those defenses would likely be an attack upon the the disparate impact regulations that provide the most plausible ground for a challenge to the validity of SB 303. If such a challenge were ultimately successful, TDOS would be at risk of losing a portion of its Federal funding.

[4] Even if an agency completed the process and the results were in its favor, §602 provides that the agency could only remove funding from the particular program of the "political entity or part thereof" in which the violation occurred.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

MICHAEL MARKHAM
Assistant Attorney General

Requested by:

Senator Ward Crutchfield
Tennessee General Assembly
13 Legislative Plaza
Nashville, TN 37243