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July 2, 2001

## COURT URGED TO REJECT "DISPARATE IMPACT" STANDARD IN CIVIL RIGHTS CASES

*(South Camden Citizens in Action v. NJDEP)*

The Washington Legal Foundation (WLF) has urged the U.S. Court of Appeals for the Third Circuit to overturn a decision in which the State of New Jersey was found to have violated federal civil rights laws even though it never intended to discriminate against any protected class of citizens. WLF filed the brief on behalf of itself and two clients: the National Black Chamber of Commerce and the Allied Educational Foundation.

The result of the lower court decision was to block operation of a \$50 million cement factory in Camden, New Jersey. The factory would have provided much needed jobs and tax revenue in an economically depressed area.

The lower court held that a plaintiff can make out a violation of Title VI of the Civil Rights Act of 1964 (which prohibits discrimination on the basis of race, color, or national origin by recipients of federal funding) merely by showing that the defendant's policy has a more severe impact on a protected class than on the general population -- even if the defendant did not intend to discriminate against anyone. The plaintiff, an activist environmental group, convinced the trial judge that allowing a cement factory to operate in Camden instead of in a predominantly white suburb constituted racial discrimination against Camden's largely minority population.

In a brief filed in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, WLF argued that the lower court erred in permitting Title VI plaintiffs to proceed without evidence of discriminatory intent. WLF argued that the debates surrounding adoption of the Civil Rights Act of 1964 demonstrate unequivocally that Congress did not intend to permit such suits.

"Our civil rights laws were enacted to prevent intentional discrimination against minority groups, not to ensure equal outcomes," said WLF Chief Counsel Richard Samp after filing WLF's brief. "The lower-court decision threatens a broad range of business and educational practices that have stood the test of time but which could be shown not to affect all racial and ethnic groups equally," Samp said.

Among those placed at risk by the lower-court decision are companies seeking

discharge permits from the Environmental Protection Agency. EPA has recently announced an "environmental justice" policy under which permits may be denied for locations with nearby minority populations, if local residents can demonstrate that discharges from the permit applicant's facility would have a disparate impact on their community. Also at risk are colleges and universities that rely heavily on standardized tests (such as the SAT) in their admissions process, since test takers from some racial minority groups on average score lower on standardized tests than do test takers from other racial groups.

In the Camden case, the cement factory operator was found to be in compliance with the Clean Air Act and thus received all necessary operating permits from New Jersey environmental officials. The trial judge ruled that those officials violated the civil rights laws by issuing the permits without first determining whether Camden already had more than its "fair share" of industrial facilities.

WLF made two principal arguments in its Third Circuit brief. First, WLF argued that the EPA regulations at issue (which purport to impose a "disparate impact" standard on recipients of federal funds) are invalid because a federal agency has no authority to expand the scope of a law drawn up by Congress. Second, WLF argued that even if Congress did intend to adopt a disparate impact standard for Title VI, it did not extend a private right of action to enforce that standard; i.e., Title VI regulations can be enforced only by the federal agency that wrote the regulations, not by those allegedly injured by violation of the regulations.

WLF also filed a brief last year in the Supreme Court in *Alexander v. Sandoval*, urging the Supreme Court to rule that private parties could not sue to enforce Title VI disparate impact regulations. WLF received a tremendous victory in that case in April, when the Court ruled 5-4 that Title VI itself does not grant private litigants the right to sue for alleged violations of those regulations. But the New Jersey plaintiffs have argued that a separate federal law, 42 U.S.C. § 1983, provides them with the right to sue to enforce the regulations. WLF argues that the Supreme Court's *Sandoval* decision bars suits under § 1983 as well.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to combatting unwarranted expansion of federal civil rights laws.

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