IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

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| STATE OF LOUISIANA | * | Docket No. 2:23-cv-692 |
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| VERSUS | * | January 9, 2024 |
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| U.S. ENVIRONMENTAL | * | |
| PROTECTION AGENCY, ET AL | * | Lake Charles, Louisiana |

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OFFICIAL TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JAMES D. CAIN, JR.,
UNITED STATES DISTRICT JUDGE

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**A P P E A R A N C E S**

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**COURT PROCEEDINGS**

(Call to Order of the Court.)

THE COURT: Good morning. How y'all doing? Y'all be seated. All right. Sorry I'm running a little bit behind. I'm not too bad. Actually doing okay. Good morning. If I could -- let me call this case up real quick and I'll have y'all make your appearances. It is the State of Louisiana versus the United States Environmental Protection Agency, Civil Docket No. 23-cv-692. If I could have counsel make their appearances, please.

MR. ST. JOHN: Morning, Judge. Joseph Scott St. John, Deputy Solicitor for the State of Louisiana.

MR. RESAR: Good morning, Your Honor. Alexander Resar from the Department of Justice for the defendants.

MS. PHILO: Alisa Philo for the defendants from the Department of Justice.

THE COURT: Okay.

MR. RISING: Andrew Rising for the Department of Justice for defendants.

MR. ZEE: Good morning, Your Honor. Andrew Zee also from the DOJ on behalf of defendants.

THE COURT: We have a Filo attorney here in Lake Charles. You're not related, are you?

MS. PHILO: No. I heard, though, that there's a

similar namesake.

THE COURT: You couldn't get into town without somebody asking you about that. Very good.

Okay. Well, it's your motion if you want to begin. You can certainly argue from there or come to the podium, whatever you prefer. Doesn't matter.

MR. ST. JOHN: I'll come up, Judge.

THE COURT: Sure. No problem.

MR. ST. JOHN: Morning, Your Honor. Scott St. John for the plaintiff state. Attorney General Murrill told me to give you her regards when I had dinner --

THE COURT: She got sworn in yesterday.

MR. ST. JOHN: Sunday actually. She took office at noon yesterday.

THE COURT: I saw that, where they all -- the weather was getting bad and they all had to --

MR. ST. JOHN: It was still a chilly one. She said to give you her regards and that this is the first hearing of her administration so my instructions were, politely, don't mess it up.

THE COURT: So no pressure, huh.

MR. ST. JOHN: No pressure at all, Your Honor. Let me begin by three framing points, first the facts. There are five declarations or five declarants in this case. The key narrative is an assignment declaration.

10:09AM It's essentially undisputed. The facts are pretty outrageous. EPA thinks that it can manage the State's Medicaid program and that it has the power to restrict statements by state cabinet officials to the public.

Want to flag the importance for the Court of distinguishing between the factual record in those declarations and attorney argument. Twice in the last week the Fifth Circuit has chastised the Department of Justice for this. That was in the *Wages & White Lion* en banc and yesterday in *Louisiana v. Department of Energy.* So we really need to focus on what is in the declarations, not what's in the briefs. Also want to flag the importance of what the defendants do not say. Mr. Hoang, the decision-maker, filed a declaration and that declaration notably does not aver that EPA dropped its investigations for any reason other than this litigation.

The second kind of framing issue is there's a persistent attempt to blur standing and mootness. Standing is measured as of the time the complaint was filed. The EPA subsequently abandoned its investigations for litigation-driven reasons. Can be inferred from the circumstances that doesn't affect standing. That's a mootness question. Inference that it was a litigation-driven abandonment is unrebutted by

declaration. Again, we have Mr. Hoang as a declarant and that triggers a mandatory adverse inference under Supreme Court precedent. That's *Interstate Circuit v. United States.* It's evidence "of the most convincing character."

There's an utter failure by defendants to grapple with the *Fenves* factors. Judge Oldham has told us that when the *Fenves* factors are satisfied as they are here the case is not moot, full stop. That was relegated to a footnote, *Fenves* was, in defendants' reply.

The final framing factor, framing issue that I want to draw the Court's attention to is there's a lot of tension in the defendants' arguments. It's not surprising. There's a hundred pages of briefing on each side, give or take. But the problem when you shotgun defenses is sometimes the defenses interact in ways that are not so great for your arguments. We see that with a challenge to the 180 day rule. Defendants say, oh, we were just following an injunction but the injunction was consistent with our regulation; but now that injunction's not here anymore, it's expired, so the case is moot or the challenge is moot. Well, if it's consistent with your regulation and a U.S. District Court Judge has construed your regulation in that way, there's a presumption of good faith. EPA is going to

keep following its own regulation. There's a tension there.

Defendants argue that Louisiana lacks standing because it hasn't indicated an intent to violate the law; but then their reply, Docket 42, ECF Page 19, "Louisiana has effectively admitted that it failed to comply" for many years. So whatever Louisiana is doing violates the law, but Louisiana hasn't indicated an intent to continue violating the law. A lot of tension there. It's effectively a concession.

The defendants argue for deference. They do so at Docket 29-1, ECF Page 59. The Fifth Circuit has made clear, though, if an agency is arguing for deference that means the statute is ambiguous. The statute's ambiguous if they're arguing for deference. Under *Texas Education Agency*, the State wins under the spending clause because you can't have an ambiguous spending condition.

More broadly, in trying to prevail on the merits the defendants' argument, going to try to summarize this, is, okay, we have cases over a 40 year period, give or take, and if you squint closely at one of them and you cobble together a one justice opinion from the majority and two dissenting opinions and we ignore the *Marks* rule, which is controlling, and we ignore the

10:13AM linguistic distinction in the statute and we ignore the
10:13AM Supreme Court castigating this construction as, quote,
10:13AM strange in a subsequent opinion, if we do all that, then
10:13AM the defendants have the authority under Title VI. But
10:13AM if we're have go that far, if we're having to squint
10:14AM like that, if we're having to cobble together dissents
10:14AM with majorities and ignore the *Marks* rule, that's
10:14AM ambiguity. Not only has the Supreme Court not decided
10:14AM what Title VI means, it can't even give a consistent
10:14AM opinion about what it has said about what Title VI
10:14AM means. So how is the State supposed to have the
10:14AM requisite clarity if the Supreme Court can't even agree
10:14AM on not only what the statute means but what it has said
10:14AM about what the statute means.

10:14AM Then EPA is asking this Court to do what even
10:14AM Justice Marshall wouldn't do in *Choate*. So let's turn
10:14AM to the argument. Judge, I'm here for you so when you
10:14AM have questions interrupt. Series of activist complaints
10:14AM led EPA to seek informal resolution about permits that
10:14AM there's no dispute were entirely lawful under the Clean
10:14AM Air Act. This was not an environmental engagement per
10:14AM se. That's EPA's words. Indeed, one of those permits
10:15AM was a renewal at a facility that had been in that same
10:15AM location since the 1960s. The permit resulted in an
10:15AM 85 percent reduction in pollution, an unqualified

10:15AM benefit to everyone. EPA's theory is, well, that
10:15AM renewal can still be a disparate impact because the
10:15AM facility that's been there for 50 years is in an area
10:15AM that has a higher density of African Americans than
10:15AM other parts of the state. No attempt to compare to
10:15AM similarly situated areas, just it's a naked racial
10:15AM balancing.

10:15AM In the discussions EPA repeatedly refused to tell
10:15AM the State what it supposedly did wrong. No actus reus.
10:15AM What did we do wrong. Tell us. We want to fix this.
10:15AM If there's a problem, we want to fix it. We need to
10:15AM know what did we do wrong. That's not helpful. That's
10:16AM what Ms. Dorka said. This is all an assignment
10:16AM declaration and it's in quotation marks for a reason
10:16AM because those are her words and nobody has disputed
10:16AM them.

10:16AM So EPA generally waives its hands about cumulative
10:16AM effects and disparate impacts and defines both to
10:16AM encompass non-pollution related factors like education
10:16AM or traffic. Going back to where Justice Marshall
10:16AM refused to tread, EPA demanded ex ante NEPA-like
10:16AM analyses. EPA even claimed it can regulate the State's
10:16AM Medicaid program. There's an entire agency of the
10:16AM Federal Government, Health and Human Services, that
10:16AM regulate Medicaid. They're happy with what Louisiana is

doing. EPA is not because EPA has appointed itself --

THE COURT: What's Medicaid got to do with the EPA in these air permits? How are those two things tied together?

MR. ST. JOHN: The Louisiana Department of Health accepted an $80,000 grant from EPA to conduct a study about the impact of one of the permits and EPA used that $80,000 grant as a hook to bring LDH into this and then said not only did you accept that $80,000 grant, you accepted safe drinking water funds, and so we're going to try to micromanage what Medicaid says because that's run by LDH. That's the --

THE COURT: What's that got to do with this disparate impact study? How does the Department of -- the Louisiana Department of Health have anything to do with this? I'm going to be honest with you, these were some long briefs, convoluted. It's a very convoluted mess. And so I'm still trying to navigate my way through some of this, but maybe you can clarify that.

MR. ST. JOHN: Absolutely, Judge. So what Title VI says is that if you -- if a state agency accepts federal funds --

THE COURT: I got all that.

MR. ST. JOHN: Okay. LDH accepted federal funds in a variety of ways, hundreds of millions of dollars, from

10:18AM EPA. And so LDH was asked to perform a study. They performed a study. Basically, EPA was unhappy with the results of that study.

THE COURT: Is that true? Y'all were unhappy with the study? It's a yes or no question.

MR. RESAR: I'm not sure what study is being referenced. I apologize.

MR. ST. JOHN: They were asked to perform a study related to permitting. It's in the EPA's jurisdictional --

THE COURT: I'll be honest with you, you know, I grew up in south Louisiana right here, whole industrial complex right across the road. Most of that was built -- maybe y'all can comment. Most of that was built for the war effort. There was nobody living over there. People moved in after the facilities were built. Think about it. Interstate 10 runs right through the middle of multiple chemical refineries. They were there before the interstate. I doubt you'd build an interstate through there today, but it's there. They're not going to move it. We're not going to move it because of that.

MR. ST. JOHN: This facility's been there since the '60s. Same thing.

THE COURT: And Westlake is surrounded, the little

town of Westlake right here, surrounded by Conoco, Phillips 66, Sasol. It's 70 percent white. I don't understand this whole disparate -- I don't understand it. I'm trying to understand what's the end game on all this.

MR. ST. JOHN: Are we shortcutting to --

THE COURT: I'm shortcutting. What's the end game? What's trying to be accomplished?

MR. ST. JOHN: Shut all these facilities down.

THE COURT: It's cheaper to move the people. Why don't the EPA just move the people. You're going to shut the facilities down? I mean --

MR. ST. JOHN: That's the administration --

THE COURT: -- is that what y'all's position is, just shut the facilities down?

MS. PHILO: No, Your Honor. I'm happy to jump in on the merits, but I don't want to interrupt my colleague.

MR. ST. JOHN: I don't know how else to go about it because the conditions that are attempting to be imposed, there's no other way to do it other than shut down the facilities. Yeah, it's in a community that's slightly more African American than the rest of the state. The EPA is, well, you approved a permit there. That's disparate impact. That's straight to the point,

Judge. If you pollute more --

THE COURT: My last check, pollution doesn't really discriminate based on race. It pollutes whoever's, you know, there.

MR. ST. JOHN: I agree, Your Honor. We have -- Congress enacted a program. We have the Clean Air Act that governs pollution, but there's no dispute that the Clean Air Act has been satisfied here. EPA told us that. This is not an environmental engagement. They never disputed that the Clean Air Act had been met. But there's a disparate impact because that entirely lawful pollutant, cumulatively or because it's in a community that supposedly already has health problems, even though the permit is fully legal under the controlling statute, the Clean Air Act, you have to consider Title VI. I disagree with that, Judge. When you have an on-point statute you don't get to look over to the generic. That's a basic specific versus general.

But EPA is saying, well, you have to comply with both; and it's not enough that you comply with the Clean Air Act which regulates chemical by chemical by chemical, you have to consider all of them together along with education and health and wealth disparities. This is all in the assignment declaration, Judge, and those facts are undisputed. That's EPA's theory.

10:21AM That's why we're here and that's why the State said no. It does not work like this. That's a major questions issue. That's a lack of clarity under the spending clause. It's outrageous.

Yeah, EPA knows it's got a gun. Defendants come in and they say, hey, we've never had to take one of these to judgment in 50 something years of Title VI. Well, yeah, because if you tell a state agency we're going to recoup $500 million from you, state agency folds. That's what happens. So EPA is walking around -- Judge, you and I are both old enough to remember the '70s and '80s, mutually assured destruction. You got somebody with a nuclear bomb, you're going to tread carefully. That's what EPA is walking around with. They point it at Louisiana and Louisiana is the first state to say no, we're not going to play that game, because it went too far.

THE COURT: Well, this thing has been around for a long time. From my reading of all y'all's briefs, it really hadn't been utilized in the environmental world until recently. I mean, what's -- did they just go find this and pull it out of the closet recently? Had it been approved through the Administrative Procedures Act?

MR. ST. JOHN: The regulations have been in place.

THE COURT: I'm talking about the disparate impact.

10:22AM I know the Clean Air Act, Clean Water, all that's been out there.

MR. ST. JOHN: It has -- I would say it has not been applied. There's been some cognizance of this as a theory. EPA and DOJ acknowledged, I think we pointed out in the Federal Register post, *Sandoval*, that the Supreme Court kind of undercut that, called it into doubt, I believe was the viability of that. So was it there as a possibility, yes. Did anybody ever really do anything with it, no. Did the Supreme Court call it into doubt, yes. And so nobody wanted to touch it because it's a weak theory, right. Now you've got the Biden administration issuing executive orders saying environmental justice, environmental justice. Administrator Regan comes down, we have a big showdown here about how he's going to crack down on this pollution, and here we are. This is the theory that EPA went with.

THE COURT: Are they picking particular permits when they come up strategically, in your review, or are they doing all the permits?

MR. ST. JOHN: There's some strategy to it. There's some strategy to it. This was -- let's cut to the chase, right. It was -- you had an outgoing governor that was sympathetic to the administration.

10:24AM THE COURT: I don't really care about the politics of it that much. I mean, I don't really care about the politics of it. What I'm saying is you have facilities throughout -- I'm going to stick with Louisiana. You have facilities throughout Louisiana that need air permits. Are they -- are they requiring the LDEQ to do disparate impact studies on all air permits or are they just strategically picking certain ones?

10:24AM MR. ST. JOHN: No, EPA was very clear they expected this to be done on every single permit. That's why we're in your court, Judge, why we're in your court, because EPA may it unequivocally clear --

10:24AM THE COURT: My reading is there were four, y'all had resolved the four, my reading of the briefs here. I got Post-It notes. I'm old school. I don't use computers. I do use computers. I don't want to say that.

10:25AM MR. ST. JOHN: EPA got sued and they dropped the claims.

10:25AM THE COURT: Yeah, it says that they -- State cannot point to a single action undertaken by the EPA against Louisiana or that, dependent on the disparate impact regulations, the only actions taken by EPA that are relevant to this that were investigated were to investigate complaints, negotiate settlements which

impose no legal actionable effect on anyone. That's what the EPA says. I guess they investigated some complaints and didn't find that there were any violations under the disparate impact regulations. Is that a fair assessment? You didn't find any violations under -- utilizing the disparate impact analysis?

MR. RESAR: That's correct, Your Honor. The complaint investigations were closed without any finding of disparate impact.

MR. ST. JOHN: They were abandoned, Judge.

THE COURT: Well, at the end of the day I take that as they didn't find any violations and I guess they backed off. Right?

MR. ST. JOHN: No. Judge, let's be very clear. There was no --

THE COURT: That's what I'm trying to get to. I'm trying to find clarity.

MR. ST. JOHN: This is the difference --

THE COURT: I find a lot of muddy water here.

MR. ST. JOHN: This is the difference between a jury saying not guilty and finding someone not guilty. EPA walked away because we called their bluff. We're here in front of you.

THE COURT: A win's a win.

MR. ST. JOHN: Judge, I'm concerned about all the

other permit actions.

THE COURT: Well, we're going to talk about that, too, because what I -- we'll get to that.

MR. ST. JOHN: That's the ultimate issue. EPA's view of the law is that we have to -- we, the State, have to consider disparate impact in every single permitting decision including renewals. So this facility that's been there for 40, 50 years, facilities that have been there since World War II, when their Clean Air Act renewals come up LDEQ has to perform a disparate impact analysis and if the wrong races are affected, got to have a naked consideration of race, wrong races are affected then LDEQ has to take that into account. And if the Federal Government's going to stand up here and say no, you do not have to perform a disparate impact analysis, there's no such thing, Judge, you can enter an order accordingly and we'll take judicial estoppel. I suspect they're not going to do that, though.

Put bluntly, Louisiana doesn't want to discriminate. Under state law, we don't do is there a compelling government interest to justify discrimination. The State of Louisiana does not discriminate on the basis of race, and performing a disparate impact analysis requires the State to

discriminate on the basis of race. That's what *Ricci v. DeStefano* said. If you're doing disparate impact you're required to consider race. So there's a war there.

THE COURT: Is that to be intentional discrimination?

MR. ST. JOHN: No. That's the difference, right, is disparate impact does not require intentional discrimination. The State as a matter of state law cannot consider race, full stop, full stop. We are a color blind state, Judge. We don't want to consider race. We don't think Title VI requires us to consider race. If it did, there's just a straight up conflict with state law. Setting that aside --

THE COURT: Like I said earlier, pollution doesn't discriminate, doesn't care what color you are.

MR. ST. JOHN: Correct, Judge.

THE COURT: Clean water, clean air for everyone to breathe.

MR. ST. JOHN: Correct, Judge. That is the State's position and that's why the State has its Clean Air Act program. We've run these permits through the State's Clean Air Act analysis. The Clean Air Act regulates chemical by chemical. Chemical X, you can have this many parts per million in your ambient air. It doesn't look at things cumulatively. That's not the program

10:29AM Congress set up. The other thing is it gives the State primacy. The EPA has continually lost on this again and again and again. I think the case we cited, the exemplar case, is *Luminant,* primacy. The State is supposed to run these programs. EPA is not supposed to micromanage. But here they're coming in and saying not only are we going to micromanage your air program, we're going to require you to, contrary to the Clean Air Act, consider cumulative impact, contrary to the Clean Air Act, not consider the economic costs, because the Clean Air Act requires us to consider economic costs. EPA was unhappy about that. Quote, we're all environmental agencies. That's not what the Clean Air Act does but that's what EPA thinks Title VI requires, just a pure focus on the environment.

Judge, it's probably helpful to turn to standing. Or do you have any more questions about the facts?

THE COURT: Not now. I may in a minute.

MR. ST. JOHN: We're focussed on Title VI so why don't we keep on that. The standing question is largely resolved by *MedImmune*. That was a patent case. Patent licensee wanted to challenge the underlying patent even though the license provided the licensee a no threat of suit. Supreme Court analogized that the case's holding that a plaintiff doesn't have to expose himself to

liability before bringing suit to challenge the basis of the threat, here that would be the law or regulation, that's because the threat eliminating behavior following the law is effectively coerced. So the plaintiff doesn't have to breach or repudiate the contract before suing to invalidate the underlying issue. There the patent, here the regulations.

There's no contest that if the State has to consider disparate impact there would be an increased regulatory burden. LDH said complying with EPA's request would cost millions of dollars. That's in the record. I don't think -- let's just be practical. If you're having employees do something, that costs money. And we know it costs a lot of money because we see EPA asking for a $50 million addition to its budget to do exactly this on the regulatory side.

This isn't a general threat. The President ordered -- issued two executive orders on this.

THE COURT: They're position I'm assuming --

MR. ST. JOHN: Say again.

THE COURT: I don't want to state your position for you; but I'm assuming their position is, hey, we had four complaints, we investigated them, we found no violations, we walked away, we didn't make you do anything, you got to issue your permits. Right? That's

what they're going to say?

MR. ST. JOHN: That's what they're going to say.

THE COURT: So no harm, no foul, I guess is their position; but you're saying there's more to come.

MR. ST. JOHN: There's more to come.

THE COURT: Is that what you're trying to say?

MR. ST. JOHN: Yes, Judge.

THE COURT: That brings me to a question, then. The State of Louisiana filed another complaint, Docket No. 23-1774, against the EPA --

MR. ST. JOHN: Yes, Judge.

THE COURT: -- on December 19th regarding a FOIA request.

MR. ST. JOHN: Yes, Judge.

THE COURT: Are y'all familiar with this?

MR. RESAR: We're not the attorneys representing EPA in that case.

THE COURT: You're representing EPA today --

MR. RESAR: We know it exists.

THE COURT: -- and you're here and this is relevant to me. And I know they -- I don't think they've been served but I know --

MR. ST. JOHN: They have been served and they've acknowledged --

THE COURT: My question to you is what are you

digging for in this FOIA request to EPA. Is this going to -- are you looking for something?

MR. ST. JOHN: Yeah.

THE COURT: Obviously. You sent a FOIA request. That's kind of a -- but my point is what are you looking for, because I'm assuming it might be relevant to this issue.

MR. ST. JOHN: So, Judge, we asked --

THE COURT: You don't really say what you're looking for in here. You just say they hadn't responded as required by the statute.

MR. ST. JOHN: So --

THE COURT: And if it's not relevant to this, tell me it's not relevant and I'll let it go.

MR. ST. JOHN: Judge, one of my items today was to ask you to take judicial notice of the pendency of that litigation.

THE COURT: I got that right here.

MR. ST. JOHN: The FOIA request or appended to it as one of the letters, we asked for their -- for EPA's communications with the activists.

THE COURT: With who?

MR. ST. JOHN: The activists, the folks that filed the complaints.

THE COURT: Oh, you want the correspondence

between --

MR. ST. JOHN: Between them --

THE COURT: -- and the people who filed the complaints.

MR. ST. JOHN: Should be -- as someone who's been involved a little bit in the state of FOIA, that's an easy ask because when something leaves the sandbox, your in-house sandbox, going to known e-mail addresses you can have your tech folks say, okay, I'm going to pull everything going to SierraClub.com. That is a super easy ask. Here we are six, seven months down the road and --

THE COURT: I'll be quite honest with you, you did say that in here. I had not really read this complaint. I just knew it was out there.

MR. ST. JOHN: That's what we asked for.

THE COURT: It does say the initial response letter. How is that relevant? Maybe it's not. I just wanted to know because I don't typically get multiple lawsuits against the EPA here.

MR. ST. JOHN: So part of the challenge here is the EPA's 180-day action requirement. Okay. They've been blowing that off for years. EPA has admitted that it's impracticable, arbitrary. That was when they reconsidered in 2016. It's all in the Federal Register.

10:35AM We cited to it in the brief. EPA can't meet the 180 days. They got sued by Sierra Club. Sierra Club got an injunction saying you will meet the 180 days unless Sierra Club agrees to grant you an extension. The problem with that is twofold. One, that makes clear that the 180 days is arbitrary. Two, for purposes here, that's a delegation to a private litigant, a delegation of Government power. Are we going to continue this investigation? Let me ask Sierra Club for permission. So the State as a sovereign in its interaction with EPA was subject to permission from Sierra Club.

10:35AM So we just asked for -- the Government's coming in here and saying oh, it was merely conferring. Well, you had an injunction. That's not voluntarily conferring when a judge tells you to do something via an injunction. But okay, if you're going to say you were merely conferring, it was all on the up-and-up, just give us your e-mail. Easy ask again. Give me the e-mail leaving the sandbox going to or from SierraClub.com or .org. But here we are six, seven months later, they haven't coughed them up. That's an easy ask. This is another item, Judge, where you can take an adverse inference.

10:36AM THE COURT: Well, I'm not ruling on that today.

10:36AM MR. ST. JOHN: You're not ruling on that but --

10:36AM THE COURT: I mean, they haven't even been served. Well, I guess they have been served but they haven't --

MR. ST. JOHN: Hadn't responded.

THE COURT: Their time to respond to that -- I just bring it up only to ask if there's something there that's going to support your standing argument, something you're looking for that's relevant that you don't have. That's the reason I -- that's the only reason I brought it up.

MR. ST. JOHN: What was the back and forth between the EPA and folks that were --

THE COURT: Filing the complaints.

MR. ST. JOHN: Filing the complaints and having to give EPA permission to continue the investigation rather than make findings.

THE COURT: You mean EPA was asking them, in your theory -- your theory is EPA's asking them if they can continue or discontinue their investigation?

MR. ST. JOHN: Judge --

THE COURT: Or you don't know.

MR. ST. JOHN: No, we know. It's not a theory. One of the documents in the record is the three-way signed contractual agreement agreeing to extend the period. So EPA couldn't, even if it wanted to, continue investigating beyond 180 days.

10:37AM THE COURT: Well, let's jump to your judicial notice to see if that helps, too, because I'm trying to get clarity on this. I have one motion for request for judicial notice that's Docket No. 23-cv-692 where you, the State, asks the Court to take judicial notice of EPA's October 3rd, 2023 acceptance for investigation of a Title VI complaint alleging only disparate impact by facility -- by a facially non-discriminatory policy. What facility is this? That's one thing I asked my law clerk, what facility. I mean, you're giving the date; but what facility are we talking about?

MR. ST. JOHN: I believe these are scattered across the country. EPA is saying we're not going to do this or we're not -- you in Louisiana have nothing to fear. At the same time they're commencing these investigations against Alabama, Michigan, all these other states on disparate impact theory so --

THE COURT: But what do you care if it's Alabama? It's not Louisiana.

MR. ST. JOHN: The law is the law, Judge.

THE COURT: I hear you. Alabama's not in this case, huh?

MR. ST. JOHN: Alabama is not in this case.

THE COURT: I'm just saying, I mean, I understand if they're over there doing it in Alabama but they're

not doing it here --

MR. ST. JOHN: That goes to mootness, Judge. It's not moot. The fact that EPA got sued and dropped this case like a hot potato doesn't moot the case, particularly when they're continuing to do the same things conveniently avoiding Louisiana while this case is pending right now. And the minute -- if you were to dismiss this case, I have very little doubt a couple months later we'd see another one of these investigations.

What it boils down to is EPA -- or Louisiana does not want to -- let me back up. Louisiana does not believe that the disparate impact regulations are lawful. EPA's disparate impact regulations are not lawful, ultra vires, arbitrary and capricious. Louisiana needs to know --

THE COURT: Give me in a nutshell why you say it's not lawful.

MR. ST. JOHN: Section -- the Supreme Court has said Title VI only directly reaches intentional discrimination. I don't think either side disputes that. That is clear. The question is what does Section 602, which is the regulatory authority, authorize. And it says agencies can, quote, effectuate Section 601. It's a disparate impact regulation within

10:40AM that authority to effectuate.

THE COURT: And your answer is no.

MR. ST. JOHN: No. That's what five justices of the Supreme Court said.

THE COURT: Stop right there.

MR. ST. JOHN: Yeah.

THE COURT: What's your response to that?

MS. PHILO: It does effectuate Section 601. I'm happy to --

THE COURT: Let's stop right there for a minute. I want to hear -- because we can run over -- I want to address -- because I think this is, you know, the issue in a nutshell right here. Go ahead.

MS. PHILO: So yes, the defendants' disparate impact regulations are pursuant to that direct statutory authority in Section 602 to effectuate the antidiscrimination mandate in Section 601.

THE COURT: But does it have to be intentional?

MS. PHILO: The disparate impact regulations do not require intentional discrimination.

THE COURT: He says it does. No, you said no. You said the Supreme Court --

MR. ST. JOHN: The difference -- Section 601, what Title VI reaches independently is intentional discrimination. The statute says no intentional

discrimination. I think we agree on that.

MS. PHILO: We agree that the Court has interpreted Section 601 to directly reach only intentional discrimination, yes, Your Honor.

MR. ST. JOHN: Both sides are yes on that.

THE COURT: Both sides are yes on that. Let's move on to 602.

MR. ST. JOHN: 602 is the effectuate 601, effectuate being the key word. It gives agencies granting funds the power to issue regulations that, quote, effectuate 601. So can an entirely different theory of discrimination effectuate a ban on intentional discrimination.

THE COURT: Let me hear from you on that.

MS. PHILO: It can.

THE COURT: And how and why?

MS. PHILO: So we agree that the regulations prohibit a broader array of conduct in reaching disparate impact, unlawful disparate impact within the statute itself. The Supreme Court has already recognized the validity of that. In *Guardians* seven justices recognized that the statute was limited to directly reach only intentional discrimination, but five justices still formed a majority to recognize the validity of the disparate impact regulations. And I

know my colleague is going to say that three of them were in the dissent, but the same is true for the *Guardians* proposition --

THE COURT: Not a majority if three of them dissented, you know. That's first year law school stuff right there.

MR. ST. JOHN: Judgments, not opinions, Judge.

MS. PHILO: The Court itself said that five justices are forming a majority. Two years later a unanimous court in *Choate* characterized that as a holding. I would stress, Your Honor, that --

THE COURT: What's the cases again? Because I want to really zero in on --

MR. ST. JOHN: *Choate* was a -- okay. You have *Guardians* which is split. We can agree it's split.

MS. PHILO: It's a fractured decision.

MR. ST. JOHN: It's a fractured opinion. The next case is *Choate*.

MS. PHILO: *Alexander v. Choate*.

MR. ST. JOHN: *Alexander v. Choate.* That was Justice Marshall. It was a Rehabilitation Act case. And he said in *Guardians* we held and then he cobbles together the dissent. And then the next case is *Sandoval*.

THE COURT: You agree with that?

10:43AM MS. PHILO: Yes.

10:43AM MR. ST. JOHN: *Sandoval*.

10:43AM THE COURT: Try to find what we can agree on.

10:44AM MS. PHILO: Of course, Your Honor.

10:44AM MR. ST. JOHN: This is good, Judge. I appreciate this.

10:44AM THE COURT: I want to find what we can agree on to try to get it boiled down.

10:44AM MR. ST. JOHN: *Sandoval* says it was the majority. Justice Scalia wrote, five justices, we have never held that disparate impact -- that Title VI permits disparate impact regulations. Never held.

10:44AM THE COURT: You agree with that?

10:44AM MS. PHILO: He says no opinion has held. There is no one opinion. Of course, it's a fractured decision. But Justice Scalia goes on to do the same math that five justices voiced that view of the law and that *Choate* has to the same effect.

10:44AM MR. ST. JOHN: And then he says that would be a strange -- and there's footnote, we note that that would be a very strange, his word, majority's word, actually five votes for that --

10:44AM THE COURT: This sounds like some kind of mean, cruel Bar exam question that they would put on the constitutional law part of the Bar where there's really

10:44AM no answer right now.

10:44AM MR. ST. JOHN: Judge, it does actually get to the answer. So we've been discussing the merits of what does 602 authorize. That's this we've got a fractured opinion and then we've got -- well, *Sandoval* explicitly calls *Choate* dictum. So you have a majority saying we've never held that and that was dictum and then you've got *Sandoval.*

10:45AM So, Judge, yeah it's fractured all the way around on the question of, one, what does title -- Section 602 of Title VI authorize. Can we agree on that? There are conflicting -- you have a -- *Guardians* is split and then *Choate* and *Sandoval* make opposite statements. Can we agree on that?

10:45AM MS. PHILO: *Choate* makes clear that it's a holding, and I would say that Scalia in *Sandoval* never disavows that holding. He recognizes the tension. He does not hold differently.

10:45AM MR. ST. JOHN: We would disagree because he assumes without finding. He says no opinion has ever held this so we assume without finding because nobody challenged that. If an opinion's held --

10:46AM THE COURT: So wasn't before the Court at that point.

10:46AM MR. ST. JOHN: Wasn't before the Court. And courts

don't assume without finding --

THE COURT: I agree.

MR. ST. JOHN: -- finding precedent.

MS. PHILO: Your Honor, before we move on --

THE COURT: No, no, no, please, go ahead.

MS. PHILO: I want to make --

THE COURT: No, I'm glad you're -- I'm just really trying to cull this out.

MS. PHILO: It's complicated. So in the *Marks* principle it does state that when you have these fractured opinions which are very complicated you look for the assent of five justices who are concurring in the result, but the Supreme Court itself has said that that is often more easily stated than applied in these cases. And here we have the Supreme Court, a unanimous decision. My colleague doesn't disagree that *Choate* puts forth the two-pronged holding. It does the analysis for us regarding *Guardians*, and there's two parts of that holding. The first one, which my colleague and I agree on, is that the statute itself only intentionally reaches -- sorry, only itself reaches intentional discrimination. That holding also relies on three justices in dissent. If seven justices reach that conclusion, three of them are in dissent. So if we're applying *Marks* formalistically, then that holding is

10:47AM also in contention. The second holding is the one at issue here, that's that the disparate impact regulations are valid even if the statute itself only directly reaches intentional discrimination. And those are both characterized as holdings of *Guardians*.

And I agree *Sandoval* expressed some concern with the tension, but it does not hold differently. So this Court is left with *Guardians* as described by *Choate* until the Supreme Court decides differently, and the Fifth Circuit recognized that in *Rollerson.* Judge Haynes in *Rollerson* said *Choate* left untouched -- sorry, *Sandoval* left untouched *Choate*'s apparent approval of these regulations. And even if it's dicta, even if you disagree with the math on that, it's Supreme Court dicta which is entitled to a different weight.

MR. ST. JOHN: And *Rollerson* then, as with the Supreme Court, assumed without deciding because, as Your Honor is being confronted, it's what a fighter pilot would call a furball where it's pointing in a lot of different directions. But I can make life easier for you, Judge.

THE COURT: I'm always open to that.

MR. ST. JOHN: This is a discussion of what does 602 actually authorize.

THE COURT: Yeah. It's a great intellectual

discussion for sure.

MR. ST. JOHN: It's a great intellectual discussion but --

THE COURT: But I need help getting to an answer, which I'm sure one of you are going to go ahead and take it on up to the U.S. Fifth Circuit. That's fine with me.

MR. ST. JOHN: This will probably go higher than that, Judge.

THE COURT: I'll do exactly what they tell me.

MR. ST. JOHN: There are two underlying -- two answers here. Going back to what does 602 mean, the particular regulation -- are you familiar with the term general article, Judge?

THE COURT: Uh-huh.

MR. ST. JOHN: The Title VI has this very reticulated scheme for regulations. It's not a traditional APA. The President has to approve the regulations. They have this whole process. Someone once upon a time was like, aha, we can write a general article and so the regulation is effectively a general article and then we don't have to tell you exactly what it means, we don't have to go through this reticulated process, we don't have to go ask the President for approval on specific regulations, we have a general

article. So that's what EPA's disparate impact regulation is, is a general article.

THE COURT: You agree with that?

MS. PHILO: I may be missing quite the import of why this is a general article, but the statute was passed in 1964 almost contemporaneously with the passage of the statute of presidential task force and DOJ promulgated regulations that included the prohibition on unlawful disparate impact. DOJ passed its -- promulgated its regulation in 1966, EPA promulgated their regulation in 1973, both with presidential approval. I disagree that it doesn't tell people what to do. It very clearly unambiguously prohibits unlawful disparate impact.

MR. ST. JOHN: We disagree on that point. Let me continue the easy out for you, Judge. We're in this furball of what does 602 mean, and I think we can agree the Supreme Court has given decisions their intention. Can we say that? There's some tension there.

MS. PHILO: There is a holding and Scalia recognizes some tension but doesn't hold otherwise.

MR. ST. JOHN: We disagree there's a holding. You're in a furball, Judge. You're in a furball. And if we have to disregard the *Marks* rule and say, okay, we're going to cobble together two dissents with a

majority opinion followed by dicta that a subsequent Supreme Court opinion has, EPA's words in the Federal Register, called it into doubt, if that's what we're having to do to say that 602's effectuate authority, can cover disparate impact, then that runs squarely afoul of the clear and -- the requirement for clarity and lack of ambiguity in the spending clause and under the major questions doctrine. If we're having to disregard the *Marks* rule and we're having all these questions because the Supreme Court not only apparently can't agree on what 602 means but can't even agree about what it has said about what 602 means, how can the State have the requisite lack of ambiguity and the requisite clarity to make an informed decision about accepting funds.

MS. PHILO: So the spending clause issue is a kind of different merits issue before we get to whether or not this exceeded the authority under Title VI. I'm happy to move to the spending clause or stick with the statutory issue first, whichever Your Honor would prefer.

THE COURT: Let's wait on the spending clause.

MR. ST. JOHN: I just want to tie it to the merits because it's complicated.

THE COURT: I understand your point on that. I just want to hear her response to that. I find it a

10:52AM little easier for me to kind of jump back and forth because these are a lot of issues.

MR. ST. JOHN: Absolutely.

THE COURT: And I used to hate sitting there having to listen to other lawyers talk and I'd go, God, I need to say something right now.

MS. PHILO: I appreciate that, Your Honor. So on the question of whether or not it exceeds the statutory authority under Title VI, we think the easy answer is that this is governed by precedent. You can't read the tea leaves unless and until the Supreme Court holds differently. But if you disagree on the precedent, even looking at this issue anew, this is the right outcome based on this is -- the defendants promulgated their regulations pursuant to a direct statutory authority as confirmed by legislative history, the consistent and widespread agency interpretation, and congressional ratification since.

So to start with the text, effectuate is clearly the most important word but you also have Congress clearly directing and authorizing the agencies to do so. As my colleague mentioned, there's a requirement that the President approve these regulations. That's an unusual requirement, and the legislative history shows that it was put in place precisely because this is an

10:53AM exceptionally broad grant of rule making to the agencies to determine how best to effectuate that antidiscrimination mandate. Now, the legislative history confirms that this is this broad grant meant to give the agencies that discretion to decide which actions to prohibit; but agencies -- since basically the statute was passed, it's unusual to have agency action almost contemporaneous with the statute; but here you have consistent and widespread agency interpretation.

10:54AM And lastly, you have that congressional ratification piece. In 1987 Congress returned Title VI under the Civil Rights Restoration Act, and all of the legislative history makes clear that the courts have upheld the use of an effects standard. Congress didn't rein in any of that power in Section 602. In addition, you've got that series of statutes, I think we cited eight in our brief, in the '70s and '80s where Congress directed agencies to promulgate regulations similar to those under Title VI again knowing that that included a disparate impact prohibition. And then as recently as 2010 in the Affordable Care Act it ensured that nothing limits the rights, remedies, procedures, or standards of Title VI including those disparate impact regulations. So you have this consistent preservation and ratification of the disparate impact standards.

I want to be clear in response to some of what my colleague said. These disparate impact regulations were not dusted off from a closet. These have been around since the very beginning of the statute. The EPA started doing these investigations, I believe, in 1993. From 1993 to 1998 I believe there were 50 investigations against state and local governments about permitting decisions. One of those I'm surprised to hear my colleague suggest this is completely new. One of those was against LDEQ. There was a big Shintech investigation in the 1990s under Title VI. This is not a new program and is not unique to the EPA. It's across the Federal Government.

To clear up any misunderstanding about how disparate impact works, this is not triggered based on a bare statistical disparity alone. There is a very clear paradigm that courts follow and that agencies use to guide their investigations. It starts with establishing a prima facia case of a significant and adverse disparate impact. You're looking for them to identify a facially neutral policy or practice, a significant and adverse disparate impact on the basis of race, color, or national origin. And that applies to all races. It isn't just particular communities. And then, lastly, that causation aspect that you have to prove. If all of

10:56AM that is shown, the recipient still has a chance to show
10:56AM that that significant and adverse impact is justified,
10:56AM so, for example, the economic benefits to the community.
10:56AM And, lastly, the question is was that justification
10:56AM pretext or are there less discriminatory alternatives
10:56AM that would mitigate that adverse impact.
10:56AM So, for example, as you said, pollution doesn't
10:56AM discriminate. If there's a facility in a particular
10:56AM community and it is shown to have a significant and
10:56AM adverse disparate impact, can we put air scrubbers in it
10:56AM to reduce the disparate impact. Putting air scrubbers
10:56AM in that facility doesn't discriminate against another
10:56AM community. Or, for example, if there's a school next to
10:57AM a power plant that has a significant disparate impact
10:57AM that's caused by a particular facially neutral policy,
10:57AM can we modify the permit conditions to reduce that
10:57AM impact by, for example, limiting the hours of when
10:57AM emissions are let go to not be the same as the school
10:57AM hours. So that's -- those are the ways that you can use
10:57AM race neutral measures to mitigate or eliminate this
10:57AM disparate impact.
10:57AM And my understanding based on the letter of concern
10:57AM is that EPA was asking these state agencies to just do
10:57AM that analysis, to know the impact, the burdens of the
10:57AM environmental decisions they were having, to hire, I

10:57AM believe it was, a risk information kind of to better
10:57AM inform the public and to redo a health assessment as
10:57AM well to, again, understand the impact of these
10:57AM decisions. Once you understand the impact of those
10:57AM decisions, then you have to justify it and ask if there
10:57AM are less discriminatory ways to accomplish the same
10:58AM goal.

10:58AM THE COURT: I understand. Thank you. Do you have
10:58AM a comment on that?

10:58AM MR. ST. JOHN: Several. If that's what EPA is
10:58AM demanding and that's what the regulations require, I
10:58AM thank you for the concession on standing because that's
10:58AM spending a whole ton of money to do that.

10:58AM THE COURT: What's that?

10:58AM MR. ST. JOHN: That the analysis that my colleague
10:58AM just described, if that is what the regulation requires,
10:58AM that is requiring us to do things and spend money. That
10:58AM is standing. That is standing.

10:58AM Let's turn back to the -- we got here on what does
10:58AM the statute say. Justice Scalia --

10:58AM THE COURT: I understand what you said. I
10:58AM understand what your point is by talking about standing,
10:58AM but it was a good explanation of --

10:58AM MR. ST. JOHN: The holistic what's going on.

10:58AM THE COURT: Yeah, of what's going on, which I'll be

honest with you, wasn't really clear in the briefs.

MR. ST. JOHN: We'll get back to that because there's a little more to it.

THE COURT: Not that y'all's briefs weren't good, there was just -- you know, it's a lot.

MR. ST. JOHN: This is a fed courts exam, Judge. This is a law school fed courts exam.

THE COURT: I hope not. Poor law students are going to fail. We all got a lot of experience and we're still grappling with it, you know.

MR. ST. JOHN: Going back to what does the statute authorize --

THE COURT: Yeah.

MR. ST. JOHN: -- Section 601 does not ban disparate impact, it bans intentional discrimination. It's perfectly okay with a disparate impact. And that was Justice Scalia's point in saying this is a strange interpretation to say you can effectuate something that 601 is okay with, that you can effectuate 601 by banning something that 601 is okay with. That's what Justice Scalia called strange.

On the text, the very same statute, Civil Rights Act of 1964, Title VII bans disparate impact, includes effects language. You can't do -- you can't undertake an action that causes a disparate impact. So you have

11:00AM one statute with two different bans. One very clearly, Title VII, bans disparate impact. Then you've got Title VI. There is a distinction there. In the ordinary canons of textual construction, when Congress says different things in different places it has a different meaning. The Fifth Circuit reached that same conclusion in *Kamps*, K-A-M-P-S. We cite it in our brief.

THE COURT: You agree with that, Title VII and Title VI really say two different things?

MS. PHILO: They're meant to. Title VII directly prohibits disparate impact. Whereas Title VI, Congress left it explicitly to the agencies to decide how to do so. The fact that they're different just shows that they're different schemes, and for that reason *Kamps* is inapposite.

MR. ST. JOHN: *Kamps* says the Fifth Circuit looks for effects language, something in the statute allowing the regulation of effects, and that's what's absent here. There's no language in 601 or 602 authorizing regulation of effects, and that's that distinction with Title VII. And so we go back to EPA is saying, well, effectuate means that we can ban something that 601 is okay with and that's just not effectuate. That was Justice Scalia's opinion.

11:01AM THE COURT: What's your comment on that?

11:01AM MS. PHILO: It wasn't Justice Scalia's opinion. It's Justice Scalia's concern. He doesn't get into the merits because he assumes that they're valid because of *Guardians* and *Choate* and that it wasn't raised.

11:01AM To the extent my colleague is addressing the concurrence in *Ricci*, I'm happy to explain why that's a little bit different than the circumstances here; but I don't want to interrupt.

11:01AM THE COURT: No, no, that's fine. We'll come back to you. I just was on that point. I was trying to find again --

11:01AM MR. ST. JOHN: Trying to find --

11:02AM THE COURT: -- where we're on the same page.

11:02AM MR. ST. JOHN: Yes, Judge.

11:02AM THE COURT: And that helps me narrow where we're not on the same page.

11:02AM MR. ST. JOHN: Going back to the -- what the disparate impact analysis requires. My colleague said you look for an adverse impact. Well, the clean -- if something is legal under the Clean Air Act, how can you call that an adverse impact? The Clean Air Act regulates emissions. Emissions that violate the Clean Air Act you won't grant a permit for, LDEQ. Those are illegal emissions. Emissions that don't violate the

11:02AM Clean Air Act you can grant a permit for. Those are
11:02AM okay emissions. So we have a statute on point. And how
11:02AM can we come over here with Title VI and say even though
11:02AM the on point statute says this permit is okay, these
11:03AM emissions are okay, that's an adverse impact and we're
11:03AM still going to regulate through Title VI that Clean Air
11:03AM Act permitting. That's completely rewriting the Clean
11:03AM Air Act, the on point statute. And that is what even
11:03AM Justice Marshall in *Choate*, that's a bridge he wasn't
11:03AM willing to cross.

11:03AM THE COURT: Stop right there. Comment on that.

11:03AM MS. PHILO: So the environmental laws and the civil
11:03AM rights laws are simply different. The Clean Air Act is
11:03AM not the only on point statute. So is Title VI and the
11:03AM regulations promulgated to effectuate them. And you can
11:03AM have a statistically significant disparate effect. I
11:03AM don't pretend to be a statistician. But looking at
11:03AM these, the burdens of these environmental decisions, if
11:03AM you can show that there is a significant impact on a
11:03AM particular community on the basis of race, color, or
11:04AM national origin, then the question is is it justified or
11:04AM can we do this with less discriminatory effects, like
11:04AM that air scrubber I was mentioning or reducing the hours
11:04AM or putting in additional monitors. Those are all race
11:04AM neutral ways to reduce what is that impact but is

11:04AM disproportionally felt.

THE COURT: Yeah. Thank you. Go ahead. I'm stopping and starting with you. Now I made you lose your train of thought.

MR. ST. JOHN: You did, Judge. Let's go to the next question.

THE COURT: Go ahead and gather your thoughts. I'm sorry. I made you lose your train of thought. While you're gaining your thoughts, let me ask you. So you had the four complaints.

MS. PHILO: I believe there were three. I'm not the factual expert, my colleague is, but I think there were --

MR. ST. JOHN: There were three complaints that were the subject of --

MS. PHILO: Of two --

MR. ST. JOHN: -- of two investigations, one of which -- one of those complaints was by Sierra Club which was subject to the *CARE* injunction. And then after those there was an additional complaint filed which EPA rejected. I think you are correct, Judge. I believe there were four.

THE COURT: That's what I read somewhere, there were four at one point. So those four were investigated, right?

11:05AM MR. RESAR: No, Your Honor. There were two investigations and those two investigations pertained to three different complaints. There was one filed after the complaint in this action was filed, and that complaint was rejected without an investigation ensuing.

MR. ST. JOHN: Correct.

THE COURT: So the EPA said we're not investigating that one.

MR. RESAR: Correct.

THE COURT: Is that the one, I've got it written on my folder here because -- I have one written here, June 17th, 2023, EPA objected to Clean Air Act on disparate impact. Well, that was when they dropped, I guess, after suit was filed; is that right?

MR. ST. JOHN: So that was a separate issue, Judge.

THE COURT: Separate issue.

MR. ST. JOHN: So EPA -- under the Clean Air Act the State has primacy and the State does the permitting. The State has to give EPA notice of the permit and EPA can file or submit an objection to the State, which is a legally effective document.

THE COURT: They objected to this one. Again, I couldn't find what facility it was or where it was at. It just says EPA objected to Clean Air Act permit on disparate impact grounds after this suit was filed,

June 17th.

MR. ST. JOHN: Correct. And they sent a letter. It was a Louisiana facility.

THE COURT: Is that one still pending?

MR. RESAR: A complaint was not opened or an investigation was not opened pursuant to that objection, Your Honor, and it is no longer still pending. In fact, the permit was issued. We submitted -- I believe it's Exhibit A and B to our final papers that the permit was issued, the plant is operating.

And I just want to reject, respectfully, a characterization made by my colleague there about this being an objection based on disparate impact grounds. That is not at all accurate. If you look at the June 16th objection, it is based on five technical grounds under the Clean Air Act. The cover letter, yes, the cover letter mentions disparate impact and it notes we encourage, the verb is encourage, you to conduct a disparate impact analysis; but that is not the substance of the objection. The substance of the objection is purely technical grounds under the Clean Air Act.

MR. ST. JOHN: Judge, when we have a legally operative document, and that's what this objection is, it halts a permit.

THE COURT: Sounds like that permit eventually got

11:08AM issued.

MR. ST. JOHN: The permit did eventually issue.

THE COURT: So this really -- let's go back to our moot issue. You know, is that really -- that one's been done. It's moot.

MR. ST. JOHN: You still have a continuing -- you know, this is an ordinary course of events that these permits are considered by EPA and LDEQ is subject to the regulations.

THE COURT: Is there a pending EPA investigation based on disparate impact in Louisiana.

MR. ST. JOHN: Not an investigation. There are --

THE COURT: Is there an objection?

MR. ST. JOHN: There are pending permits that in the ordinary course of events that will be run by EPA for EPA to object to.

THE COURT: But we don't know yet if they will object or not.

MR. ST. JOHN: Correct.

THE COURT: I'm not going to put you on the spot and ask you that because I doubt you know right now, unless you do know. Do you know that?

MR. RESAR: I don't know of any pending objections.

MR. ST. JOHN: Rewinding, you'd asked about -- when I lost my train of thought, Judge. What my colleague is

11:09AM arguing is that Title VI can alter the standards of a substantive statute. That is what Thurgood Marshall rejected. They're shrinking violets on civil rights in *Choate*. That was a Rehabilitation Act case where the issue was a change to the number of days that the State's -- Tennessee Medicaid would cover. The plaintiffs were making the argument that my colleague's making here that Title VI -- or the Rehabilitation Act, apologies, provide this overarching law that you have to follow. Thurgood Marshall said no, we take the program as it is. So we don't alter the substance of the program via the disparate impact analysis. You take the program as is. That is a point of dispute here, I think, that EPA believes Title VI would impose additional substantive requirements on, for example, a Clean Air Act permitting whereas --

THE COURT: Do you agree with that, that Title VI requires a disparate impact analysis on every air permit?

MS. PHILO: The regulations require the recipients not to engage in disparate impact, that paradigm that I laid out for you.

THE COURT: So, basically, an analysis on every air permit would have to be conducted to see if that's happening.

11:10AM MS. PHILO: I don't believe they would have to engage in that sort of analysis let alone a cumulative impact analysis. Doing so would help them ensure that they were complying with the Title VI regulations to ensure that there wasn't a significant and adverse impact.

11:10AM THE COURT: So it's not a requirement EPA is putting on the LDEQ in every air permit to be sure that there's a disparate impact analysis done.

11:10AM MS. PHILO: The requirement under the regulation is that there is no unlawful disparate impact, going back to -- and I define that to mean a significant and adverse disparate impact that is either --

11:11AM THE COURT: Only way they would know that is they'd have to do an analysis or a study.

11:11AM MS. PHILO: They would do an analysis or study to ensure --

11:11AM THE COURT: So that is required by EPA on every air permit issued in the state, that they do that analysis.

11:11AM MS. PHILO: Theoretically, the EPA could do that analysis to see if there was a problem. The State is required not to engage in unlawful disparate impact. To ensure that they are not, it is certainly best practices to engage in a type of statistical analysis to see the significant disparate impact and to ensure that any are

11:11AM either justified or if there are alternative less discriminatory measures to mitigate that impact.

THE COURT: So the answer is yes, they would have -- to ensure that they're not, they would have to do the analysis.

MS. PHILO: It's certainly --

THE COURT: As you say, I like your verbiage, best practices.

MS. PHILO: Best practices.

THE COURT: That basically means do it or else.

MS. PHILO: What the regulation requires is that they don't engage in unlawful disparate impact.

THE COURT: Right, but the only way they can evidence that to the EPA is by doing the analysis and showing it to the EPA.

MS. PHILO: The EPA --

THE COURT: Or y'all are just going to take their word for it?

MS. PHILO: The EPA would do its own investigation and would look for that significant disparate impact.

THE COURT: Y'all are only going to do that if there's a complaint, it sounds to me like.

MS. PHILO: I believe --

THE COURT: It sounds to me like that's the only time y'all have come into Louisiana and done this, is

when you've had complaints.

MS. PHILO: In response --

THE COURT: It doesn't seem like it's been an across-the-board audit of every air permit in the state of Louisiana. That's not the way I read it. Fill me in here.

MR. ST. JOHN: EPA's demand, what we see in the assignment declaration, is they were expecting this not only ex ante for every permit going forward but for the best practices, as my colleague euphemistically puts the gun to our head, is to do it free ranging. You know, have the permits that have been issued in the past imposed a disparate impact. We should look at this affirmatively and go out and try to find if that's the case. And again, best practices. And if you mess it up we're going to seek recoupment of $500 million or $200 million from the State. So saying it's best practices as a euphemism when if you mess it up or we disagree with you we're going to seek --

THE COURT: I don't know about messing up. What I was really trying to get at is are they requiring you --

MR. ST. JOHN: Effectively.

THE COURT: -- are they requiring the state LDEQ to do it.

MR. ST. JOHN: Effectively, effectively, because

that's the only way to avoid liability.

THE COURT: You rise. Let me hear what your comment is on this.

MR. RESAR: Yes, Your Honor. The EPA is historically only here if there is an ongoing investigation. There are two ways in which an investigation could be opened. One would be a complaint filed by some third party. That's historically been the reason why EPA has come here, as evidenced by this case and the Shintech investigation that my colleague referenced. To be clear, it is possible the EPA could open an investigation on its own. I'm not aware of any being opened into Louisiana on EPA's own initiative. That's not what's happened here.

MR. ST. JOHN: Respectfully disagree. We had the administrator of the EPA come on a Journey to Justice tour through Cancer Alley and --

THE COURT: Well, I mean, he wasn't down here doing an investigation. He was down here doing the political thing.

MR. ST. JOHN: And making promises that his subordinates then --

THE COURT: That's what politicians do. I shouldn't say that on the record probably, but that's what politicians do.

11:14AM MR. ST. JOHN: In this capacity, Judge, he's not a politician.

THE COURT: Every political appointee almost is a politician to some extent. Let's be realistic here.

MR. ST. JOHN: In this capacity --

THE COURT: Go ahead. You rise.

MR. RESAR: Yes. I just want to be clear. When the EPA administrator is, as Your Honor is suggesting, taking a tour throughout the country he is not acting as an investigator. He's giving speeches --

THE COURT: I know what he's talking about. It made the news down here, I mean, you know, that he was down here and he said -- you know, he talked about this very issue to a great extent and he did comment that we're going to look into it. But I think a director of an agency saying things doesn't always lead to the followup action either, you know. They were talking about tearing down overpasses, the transportation secretary. Doesn't mean they're going around tearing them down. He said they would, they might consider tearing them down, but they haven't torn any down that I know of. So do we go ask the Court to file an injunction not to let them tear down the Pontchartrain Expressway.

MR. ST. JOHN: If it's a regulation we can, Judge.

11:15AM THE COURT: I understand. But just for -- because the EPA administrator or the Department of Transportation says these things, that alone, to me, is not enough for the Court to do something. We have to see the actual action. Now, I understand you've had some investigations.

11:16AM MR. ST. JOHN: And they were pending when the complaint was filed so that's the standing, and then the question becomes whether those were mooted by the dismissal of the investigations.

11:16AM THE COURT: I understand and that's what I was asking, are there any pending ones at this moment. I don't think there are. And my next question was is this a requirement on all air permits at this time; and what I heard was, well, it would be best practices if you did it.

11:16AM MR. ST. JOHN: Just like that's a nice restaurant, be a shame if something were to happen.

11:16AM THE COURT: Look, I mean, I'm not knocking -- I mean, you got to be truthful to the Court. At the same time, you know, I understand you got to kind of characterize it in the best light for your client. But the standing issue and the mootness issue, you know, is a threshold issue that we have to get -- that I have to get past and then we get to the next level. I mean,

11:17AM this is a multilayered issue here. I haven't decided.
11:17AM I mean, that's why I had the argument and the briefs.
11:17AM Continue. I'm not trying to cut anyone off. Good Lord,
11:17AM they hadn't even gotten to the podium yet. But we've
11:17AM been talking. We've been talking.
11:17AM MS. PHILO: Yeah. I don't need the podium.
11:17AM THE COURT: The podium's overrated.
11:17AM MR. ST. JOHN: I regret coming up here now, Judge.
11:17AM Might have been easier to sit at the table.
11:17AM THE COURT: Taxpayers paid good money for that
11:17AM podium. I'm glad somebody's using it.
11:17AM MR. ST. JOHN: Taxpayers paying good money for
11:18AM everybody's time in here, Judge. So the standing
11:18AM investigations were pending when the complaint --
11:18AM THE COURT: I understand they are pending.
11:18AM MR. ST. JOHN: So we really are in the mootness --
11:18AM the question of mootness. There's a strong inference
11:18AM that the investigations were dropped as a result of
11:18AM litigation, and that does not moot. You had a bird in
11:18AM the hand, EPA or --
11:18AM THE COURT: I'm sure the EPA's position, and they
11:18AM can comment on it, is -- your position is they had the
11:18AM investigations, they were dropped once y'all filed this
11:18AM suit. They're going to tell me what they say in the
11:18AM brief, well, we just didn't find any disparate impact so

11:18AM we didn't need to go forward with them any further. That's fair enough?

MR. RESAR: That's fair, Your Honor. I would add two things to that.

THE COURT: Please do.

MR. RESAR: First, the EPA determined, and this is in the closure letters, ECF 18, 1 and 2, believed that it could accomplish the goal's pursuit through the investigation through other means. For example, EPA opened a Clean Air Act. I believe plaintiff has suggested throughout this action that some of the aims of the disparate impact investigation could be best accomplished through the environmental statutes. EPA took that onboard and said yes, we will open a Clean Air Act complaint, and that's pending. They believe they can resolve some of the pollutions through that mechanism.

The second thing is that there was an impending deadline of July 11th to resolve the complaints and EPA determined in part that it couldn't make the findings within that timeline as required. Plaintiffs seem to be challenging the existence of that deadline. But given how it worked out for them, I'm slightly confused by that because it meant a closure of the investigations without any adverse findings for plaintiffs.

11:19AM MR. ST. JOHN: The litigation was referenced in the negotiating documents. The final redlines that were exchanged are in the record, makes express reference to the litigation that my colleague is talking about. So this was not some sudden thing that nobody had considered. It was in the discussion. EPA could have taken the bird in the hand, had had counteroffers that the activist community thought would have been transformational. Our briefing goes through the language that was used by the complainants. Huge bird in the hand, huge win was the perception of the community of what EPA would have had just by saying yes, just by saying yes. Offers were on the table. EPA could have said yes. Instead, they dropped it and ran like a hot potato or dropped it like a hot potato and ran.

There is no grappling. The defendants don't grapple with the *Fenves* factors. That's kind of the controlling thing here. And Judge Oldham has said when the *Fenves* factors are satisfied the case is not moot, full stop. That's the controlling authority. *Fenves* was relegated to a footnote in defendants' reply saying, well, the case is moot so the *Fenves* factors don't apply. No, the *Fenves* factors are whether the case is moot or not and the *Fenves* factors all point to

mootness.

We haven't talked about the Department of Justice regulation which is a facial challenge. USDOJ applying *Sandoval* in late 2020, going to a direct final rule repealing its disparate impact regulations and the standard for reopening is a serious substantive reconsideration. That's Page 15 of the defendants' reply. There's no dispute that the regulation and the proposed repeal was finalized by the U.S. Department of Justice, sent to OMB for review, and then pulled. It is incredible, I'd go so far as to say farcical, to say that a regulation signed off on and sent to OMB is not at the stage of a serious substantive reconsideration.

So defendants fall back and say, well, it was never published and cite to a DC Circuit case. Thankfully we're in the Fifth Circuit and in the Fifth Circuit publication's not required. That very argument was rejected in a case called *Arlington Oil Mills v. Knebel,* K-N-E-B-E-L, 543 F.2d 1092 at 1099 to 1100. "The failure of APA required Federal Register publication is without consequence to a person having actual knowledge of the agency's actions" and "accordingly, neither the department's failure to publish its March 19th announcement in the Federal Register nor its failure to publish a basis and purpose statement render the

11:22AM announcement ineffective as to the parties in this
11:22AM litigation." Here the State had knowledge. The
11:23AM regulation sent to OMB was published in the Washington
11:23AM Post. So the fact it didn't make the Federal Register
11:23AM doesn't mean we didn't have notice. USDOJ reopened.
11:23AM They did serious reconsideration. This is timely.
11:23AM That's just a plain, easy APA facial challenge.
11:23AM MR. RESAR: Want to step back, Your Honor, and make
11:23AM it sort of clear what we're talking about here. DOJ
11:23AM issued its disparate impact regulation in 1966.
11:23AM Plaintiffs just characterized the claim they're bringing
11:23AM as a facial challenge to that regulation. There's no
11:23AM dispute here that there is a six year statute of
11:23AM limitations for a facial challenge to a regulation. So
11:23AM the question that plaintiffs pose is whether or not DOJ
11:23AM sending to the office of management for -- the office
11:23AM for budgetary management a potential new regulation to
11:23AM replace the disparate impact regulation at some point in
11:23AM 2021 and then two weeks later withdrawing that e-mail
11:24AM without ever alerting the public that they were
11:24AM considering retracting the disparate impact regulation
11:24AM amounts to a reopening. And if you look at the caselaw
11:24AM that governs the reopening doctrine, the answer is clear
11:24AM no and that's because the reopening doctrine, to the
11:24AM extent it even exists -- and I would direct Your Honor,

11:24AM I think it's to *Biden v. Texas*, Footnote 8, the Supreme Court has called into question whether or not the reopening doctrine even exists at all. But assuming that it does exist, the purpose of the doctrine is to allow the public -- if the public has been informed by the agency that the agency is reconsidering a potential decision, a long-standing regulation, then the public would have knowledge of that and know that the regulation may not be applied anymore and essentially would have forewarning that the regulation is no longer in effect. Here the DOJ never held out to the public that they were reconsidering the investigation so the logic that underpins the reopening doctrine simply doesn't apply here at all.

MR. ST. JOHN: There's no dispute that reopening resets the statute of limitations. I hear that the United States is disputing whether the reopening doctrine is a valid doctrine. It is.

THE COURT: Let's assume for the sake of argument it is. They withdrew it. Does that trigger it?

MR. ST. JOHN: The standard, as my colleagues have reticulated, is a serious --

THE COURT: Did they get far enough down the road to trigger it?

MR. ST. JOHN: So ordinarily I'd say most

regulations you'd have a proposed regulation that would then be published for comment and then a final regulation that may make some tweaks around the edges. Once it's published -- as my colleagues have reticulated, once it's published as proposed regulation following the reopening caselaw, that would be enough. Okay. Here, because USDOJ said *Sandoval* effectively undermines this regulation, they weren't opening up for comment, they were going for a direct final rule where you say the law has changed, we don't need comment on this thing, direct the publication. The decision-maker -- and that's the way the Fifth Circuit looks at it. The decision-maker has made up his mind. They sent the final rule to OMB. That's just the process. And then I believe OMB review is completed and they just never publish it. Well, the Fifth Circuit does not require publication. The decision-maker, here the U.S. Department of Justice, the Attorney General, decided. That's reopening. That has to be in the case of a direct final rule or --

THE COURT: Even if they withdrew it.

MR. ST. JOHN: Even if they withdrew it because the decision was made and the regulated party, here Louisiana, was aware of that. It was in the Washington Post. They withdrew it, but it was in the Washington

Post.

MR. RESAR: Respectfully, Your Honor, the decision was not made because the rule had never been published. It had never been formally announced that there was a new rule coming into effect. It was an internal -- entirely internal to the DOJ process that somehow it got leaked. And I acknowledge that there weren't publications, but DOJ did not publically announce to the world that it was considering withdrawing this rule or that it had reached a decision as to whether or not to withdraw this rule. Instead, within a two-week spell DOJ sent a proposed new rule to OMB for review and then two weeks later said we've changed our mind, we're withdrawing it, the old regulation will remain in effect. And that is simply not enough to satisfy the reopening doctrine because DOJ never held out to the public that it was reconsidering the existing rule.

MR. ST. JOHN: I think we've now fully teed up the issue on that. You've got to decide is the reopening rule viable and, two, was this a reopening. I think those are the issues.

MR. RESAR: Yes. I just want to add one thing that I neglected which is that OMB never actually completed its review of the rule. So that characterization is not correct.

11:28AM THE COURT: I gotcha. I understand.

11:28AM MR. ST. JOHN: Judge, I've been up here for a while.

11:28AM THE COURT: No, that's fine.

11:28AM MR. ST. JOHN: And we've covered, not in the order I'd planned to cover it, but we've covered --

11:28AM THE COURT: Never goes that way.

11:28AM MR. ST. JOHN: Never goes that way.

11:28AM THE COURT: If you've argued to the Fifth Circuit, you know it never goes that way.

11:28AM MR. ST. JOHN: I have, Judge, and I have been surprised.

11:28AM I keep coming back to this, that -- the fact that we're having this discussion this way. Justice Scalia I think was pretty accurate when he said our opinions have not eliminated the uncertainty or resolved the uncertainty in what Section 601 says or what Title VI says. That was in *Sandoval*. And the fact that we just had this back and forth, the State wins on spending clause and major questions because it's just not clear. That's the easy out for you, Judge. You don't -- we think that 602 clearly does not authorize disparate impact, but what is abundantly clear is that it does not clearly authorize it. And so the State then wins under spending clause and major questions.

11:29AM If the Court has no other questions, I'll hand the podium to my colleague and she can be the target for a few minutes.

MS. PHILO: I've gotten quite comfortable here.

THE COURT: You can stay there if you prefer.

MS. PHILO: So I wanted to -- I rose to address the major questions doctrine and the spending clause. I don't want to glide over their other jurisdictional issues that my colleague is well prepared to address but just to touch on these for right now. I'll start with the major questions doctrine because I think that's particularly easy. I think the major questions doctrine doesn't apply here. The major questions doctrine is concerned with new assertions of agency power that are of great political or economic significance. This is not a new assertion of power. As we talked about when I first rose, this has been on the books since basically -- the model regulation was promulgated almost contemporaneously with the statute. EPA promulgated its regulation almost at its inception in 1973. So this is simply not a case where you're concerned like in --

THE COURT: *West Virginia*.

MS. PHILO: -- *West Virginia* or *Alabama Association of Realtors* or *OSHA v. NFIB*. Those are all new assertions looking to these ancillary provisions of the

11:30AM statute where the agency is taking on this new power, and that's not the case here so it doesn't apply. Even if it does apply, there's a sufficiently clear statement. You can look at the factors in Justice Gorsuch's concurrence for that. So this case is much closer to the *Alliance For Fair Board Recruitment* that the Fifth Circuit decided where it doesn't apply but if it does there's a sufficiently clear statement.

MR. ST. JOHN: Judge, we would disagree. This is not a -- the fact that EPA may have tiptoed around this over four decades and then suddenly finds in the word effectuate the power for EPA to regulate the State's Medicaid program, talk about a fundamental transformation of society. That is exactly the kind of newfound power or new analysis of a provision that the major questions doctrine targets. Doesn't have to be, oh, we've never done this before, we're going to do it now. It's, okay, they tiptoed around but this is a radical, radical new writing and understanding of both 602 and EPA's own disparate impact regulations.

MS. PHILO: I don't think we've tiptoed around this in the past. As I talked about, we have those investigations in the 1990s. There are certainly guidance documents, I believe, from 1998 and 2000. This isn't new in any sense. It's not like those cases like

*West Virginia v. EPA*, and that's just a fundamental disagreement.

Turning to the spending clause, unless my colleague -- turning to the spending clause, Congress can put conditions on the receipt of federal funds subject to certain limitations. *Dole* sets out five of those limitations. The one at issue here is that the conditions attached to federal funds must be unambiguous. And what that's really concerned with in this quasi-contract analysis when you're talking about did the recipient accept this contract knowingly and voluntarily, it's concerned about knowing aspect. So the issue is notice, and the Supreme Court has made clear when you do this analysis you put yourself in the shoes of the state official deciding whether or not to accept funds and would he or she know that there were strings attached to those funds.

You don't need to do that analysis here because the Supreme Court has already suggested approval of substantively identical disparate impact regulations. In *Lau* the Supreme Court said whatever the limits of the spending clause are, they have not been reached here. That was cited approvingly in *Dole*, that fundamental spending clause case for the proposition that Congress can require funding recipients to comply with statutory

or administrative directives.

But if you do do the analysis, then I would say there are three critical ways that plaintiff had notice here. First, Section 601 is unambiguous in that it prohibits discrimination. Second, Section 602 is unambiguous it directly authorizes the agencies to promulgate regulations with which the recipients must comply. And those regulations which are themselves unambiguous preexisted the receipt of federal funds. And we know that the plaintiff had notice because they signed assurances about complying with the statute and regulations for decades. And if you look at *Gruver*, although that's a coercion case, the plaintiff's kind of continual acceptance of funds has to come in somewhere in the contract life analysis and we would argue that it shows they indeed had notice.

Now, my colleague is about to stand up and say that the disparate impact regulations are contained in the regulations and that that doesn't satisfy the spending clause. I would respectfully point Your Honor to *Bennett*, the Supreme Court case which makes clear that recipients must comply with the legal requirements in place when the grants were made. It doesn't decide about regulations that might come later, but regulations -- pre-existing regulations are part of that

notice analysis.

And *Texas Education Agency* does not hold differently. I would make two points to distinguish *TEA, Texas Education Agency*. One is that it's a sovereign immunity case. Although the analysis for the waiver of sovereign immunity and the unambiguous requirements for spending clause conditions overlap, they're not identical. There's a particular specificity required for the waiver of sovereign immunity. But regardless, the Fifth Circuit makes clear that regulations can be one of two flavors. One is pursuant to a direct statutory command and the other is clarifying an ambiguous statute, and *Texas Education Agency* dealt with a regulation in that second bucket clarifying an ambiguous statute. We're dealing with something in the first bucket pursuant to Congress's command because these regulations were promulgated pursuant to that direct command to effectuate the antidiscrimination mandate in Section 602. So just with all of that, with those three provisions in the pre-existing regulations, plaintiff had notice and that state official when deciding whether to accept funds had notice of those disparate impact obligations.

MR. ST. JOHN: Turning to my colleague's reliance on *Lau*. I saw this in a brief. I'm a little bit

11:36AM shocked by it. The abrogation of *Lau* was recognized by the Fifth Circuit, *Castaneda v. Pickard*, 648 F.2d 989, 1007, in 1981, recognized -- the abrogation was further recognized by *Sandoval* by the Supreme Court, 532 U.S. 275, and *Rollerson*, again the Fifth Circuit in 2021, 6 F.4th 633. *Lau* was a 601 case where 6 -- before 601 was limited to intentional discrimination, *Lau* was fully abrogated. And this has been a continuous concern. When we look through EPA's guidance there's *Lau*, *Lau*, *Lau*, *Lau*, *Lau*. We've got four decades of cases, subsequent Supreme Court and Fifth Circuit caselaw, including that *Lau* was abrogated five years after it was entered.

Two, my colleague is correct. *Texas Education Agency.* The statute cannot narrowly specify a condition. It must specify the condition, the condition. That is Fifth Circuit law that's simply controlling, and the Fifth Circuit -- my colleague tries to spin Texas Education -- tries to spin *Texas Education Agency* a little bit, but part of its holding was constitutional. The spending power belongs to Congress. Congress cannot delegate that power to the Executive. Executive power cannot extend to adding conditions on spending. That would make the delegation itself unconstitutional. There's a plain separation of powers

problem there, and *TEA* relied on that. You see the Supreme Court in *Cummings* and *Arlington Central*, they too focussed on the delegation has to be -- or the condition has to be in the statute itself. It can't merely be a condition.

My colleague is essentially arguing, well, you, the State, Louisiana, had notice there was a condition. No, that's not correct. The condition. And I see nothing in 602 about cumulative impact. I see nothing about disparate impact. I see effectuate 601. And to the degree my colleague is reading 602 to authorize spending clause restrictions beyond the scope of 601, that calls the statute itself into question, the constitutionality of the statute under *Texas Education Agency*. That's pretty plain. So how do you avoid that doctrine of constitutional avoidance? 602 is limited to regulations effectuating 601 which means intentional discrimination.

MS. PHILO: So I have a couple comments, as you might expect. So the first is that my colleague characterized *Lau* as fully abrogated. I want to respectfully push back on that idea. I agree that you'll see a red flag when you look up that case. It has been abrogated to the extent that it relied on Section 601 for disparate impact and two later cases overruled that part of the holding because Section 601

was later interpreted to only directly reach intentional discrimination. But the discussion of the spending clause has been subsequently cited by *Dole*, that pivotal case which made clear that you can put conditions on federal statutes on the receipt of federal funds to comply with statutory or administrative directives citing *Lau* in a string cite. And that also comports with *Bennett* which my colleague fails to address, the Supreme Court case that made clear that recipients of federal funds have to comply with the legal requirements in place when the grants were made and that includes, according to the Supreme Court, pre-existing regulations.

Just checking my notes to make sure I don't miss anything. And I would just -- on the *Cummings* point, both *Arlington Central* and *Cummings* again stress this idea of notice which has been kind of the core of did they have notice, and I explained how they did. And *Cummings* looks beyond the statute itself to basic background principles of contract law to ask whether or not the recipients would have had notice.

MR. ST. JOHN: What I hear from my colleague is frankly shocking, that the Executive can issue a nakedly unlawful spending clause regulation. Oh, you had notice of it, you can't attack illegality. We're attacking the

11:41AM illegality here, Judge. That's a flavor of *MedImmune* where we can say, look, we're not going to breach the contract just yet because the stakes are too high, although my colleague has conceded in their briefs that Louisiana is -- or they've argued that we are breaching the contract, but we don't have to breach the contract to have standing. We can attack the underlying illegality. The contract is a license for a patent. I can attack the validity of the patent. That's exactly what the State is doing here.

MS. PHILO: I'm not making a standing argument. My colleague was happy to rise, I'm sure, and make that.

MR. ST. JOHN: It's the condition point, though. I can still attack the underlying condition. It's a naked illegality. That's the State's position.

MS. PHILO: And the question is was the State on notice of that condition, was it unambiguous. And here again, I don't want to gloss over the fact that Section 602 unambiguously tells recipients that the agencies not only could promulgate regulations but that they would be promulgating regulations with which they must comply. And those regulations, which no one has contested that they are unambiguous, pre-existed the receipt of funds as the State signed assurances to for decades.

11:42AM *Texas Education Agency* is not a spending clause case. It is about that waiver of sovereign immunity and again just distinguishable.

11:42AM THE COURT: Well, what about the intentional part found in 601? I mean, you're not -- from earlier argument, you weren't -- it sounds to me like the EPA's not demanding investigations based on intentional discrimination, but that's what that statute says so that is a little ambiguous to me on what you're asking the State to do. Did they have notice. They had notice of maybe the intentional part but what about the non-intentional part.

11:43AM MS. PHILO: So Section 601 doesn't explicitly use the words intentional discrimination. That's the gloss that the courts have put on it.

11:43AM THE COURT: That's right.

11:43AM MS. PHILO: And then --

11:43AM THE COURT: So how did the State have notice of that, of the non-intentional disparate analysis they'd have to do? How would they have notice of that?

11:43AM MS. PHILO: Based on the unambiguous delegation in Section 602 that made clear that the recipients would have to comply with those regulations, and those regulations were in place when they accepted the funds and signed assurances that they would comply with them.

Those regulations made clear that the disparate -- the prohibition on disparate impact would apply to the receipt of federal funds.

MR. ST. JOHN: Clarity cannot come from the regulations. The condition must be in the statute. That's *Texas Education Agency*. And my colleague is about to say we get that the agency is entitled to deference. *Texas Education Agency* also makes clear that by asserting deference, which they did in the brief, that's a concession that the statute is insufficiently clear because you only get deference if the statute is ambiguous. We're back in the State wins on spending clause.

THE COURT: It's an interesting issue.

MS. PHILO: I think we disagree on whether or not the regulation can provide that clarity and whether or not *TEA* is controlling. It's just distinguishable both on the sovereign immunity grounds and the fact that this is not clarifying an ambiguous statute. That delegation is clear in Section 602, and those regulations pre-existed the acceptance of federal funds.

THE COURT: Anything else on that? I think we've covered the spending clause.

MS. PHILO: Not on the spending clause. I believe my colleague has plenty to say on jurisdiction. And the

11:45AM only other thing that I had planned to address was proposed relief, but I imagine that can wait for a minute.

THE COURT: Sure.

MR. RESAR: Thank you, Your Honor. I would just briefly like to address, I think, the main jurisdictional/threshold issues with each bucket of claim and hopefully this will -- what I endeavor to do at least is give you a way to resolve this action without having to get into these very interesting but thorny constitutional issues.

Now, there are three buckets of claims at issue in this action. First are the claims challenging EPA and DOJ's disparate impact regulations which we've been discussing today for most of the hearing. These can most simply be dismissed as untimely facial challenges to regulations which were promulgated over 50 years ago. We discussed earlier the reopening doctrine. I want to be crystal clear that plaintiffs have not claimed the reopening doctrine applies to the challenges to EPA's regulations so at most that could resuscitate the claim to DOJ's regulations, although I think I explained earlier why I don't believe the reopening doctrine actually applies. And to the extent there is some residual as-applied challenges, Louisiana has selected

the wrong forum at the wrong time to bring those challenges.

The second bucket of claims are the non-delegation claims which challenge what really amounts to an insignificant procedural mechanism by which EPA can extend the 180-day deadline it has to conduct a Title VI investigation. These claims can most simply be dismissed for lack of standing because Louisiana has not and will not incur any injury as a result of this 180-day deadline. In fact, Louisiana has benefitted immensely from the existence of this 180-day deadline because it was one of the reasons why the complaints were closed when they were.

And then third bucket of claims is actually just one claim and it's the extra regulatory requirement claim which primarily challenges negotiating positions that EPA took during the informal resolution process. Again, this can most simply be dismissed for lack of standing. Merely hearing a negotiating position in an informal resolution process is not itself an injury, and that's clear from the fact that EPA never actually imposed any of its negotiating positions on the State of Louisiana. Louisiana walked away, said no, we're not going to accept that, and then no agreement was reached. So there's simply no injury to support this Court

11:48AM reaching the question of whether the extra regulatory
11:48AM requirements which, in fact, are not requirements are
11:48AM legal.
11:48AM I want to go a little bit into more detail on the
11:48AM timeliness challenge because, as I've tried to emphasize
11:48AM throughout, these are regulations that are over 50 years
11:48AM old. There is a six year statute of limitations under
11:48AM the EPA for challenges to -- for facial challenges to
11:48AM regulations. I don't think there's any dispute that
11:48AM what plaintiff is primarily bringing here is a facial
11:48AM challenge to the EPA and DOJ's regulations. They say as
11:48AM much at Footnote 7 on Page 16 of their opposition brief.
11:48AM They've said repeatedly today that it's a facial
11:48AM challenge. And the prayer for relief at Page 55 in
11:48AM their complaint makes clear that what they're asking for
11:49AM is the disparate impact regulations to be held unlawful
11:49AM as a whole, and under clear Fifth Circuit precedent in
11:49AM *Turtle Island Foods* that means this is a facial
11:49AM challenge. And the problem for Louisiana with bringing
11:49AM a facial challenge is that the statute of limitations
11:49AM ran in 1979 for -- or expired in 1979 for EPA's
11:49AM regulations because that's when the -- six years after
11:49AM the disparate impact regulations were promulgated by the
11:49AM EPA in 1973. And DOJ's were promulgated in 1966. Six
11:49AM years after that is still about half a century ago. So

they're simply too late.

Louisiana makes three arguments as to EPA's regulations for why they're not too late. None of those are supported by caselaw or should be availing here. First they say there's a credible threat of future enforcement which somehow makes their APA claims timely. There's no caselaw to support this proposition. If there was a future enforcement action, then Louisiana sure could bring an as-applied challenge; but they have to wait for that to actually happen. They don't get to reset the statute of limitations merely by claiming there's the possibility of a future enforcement action.

Second, Louisiana argues every time a new grant is issued the statute of limitations restarts. That's not correct if the grants do not change or extend the period of time in which those obligations are legally binding. And Louisiana, who bears the burden of establishing jurisdiction, does not identify a single existing grant in this case that extended the already existing Title VI obligations further into the future than already existed and nor could they.

We in our reply brief identify funding for real property construction grants. Those are detailed in Exhibits G and F of that. And funds accepted for real property construction grants require compliance with

11:51AM Title VI for as long as the real property is used for
11:51AM the funded purpose. That's laid out in 40 CFR
11:51AM Section 70.80(a)(2). And Louisiana has not disputed
11:51AM that and, therefore, they are bound by Title VI
11:51AM obligations for accepting those real property grants
11:51AM indefinitely and, therefore, there's no new extension of
11:51AM the time period in which they're bound by Title VI
11:51AM obligations and they do not have a timely claim.
11:51AM Lastly, they argue that the current presidential
11:51AM administration has somehow prioritized disparate impact
11:51AM regulations in a way that previous administrations did
11:51AM not. This in and of itself is insufficient to restart
11:51AM the statute of limitations. Effectively, the result of
11:52AM this argument would be every time a new political party
11:52AM comes into power you have a complete restart on all
11:52AM statute of limitations for all regulations in the Code
11:52AM of Federal Register. That's simply not how the law
11:52AM works. And the sole case they cite in support of that
11:52AM proposition is *Mendosa v. Perez*. In that case there was
11:52AM a guidance letter that changed substantive obligations,
11:52AM and here there has been no change in substantive
11:52AM obligations because the disparate impact regulations
11:52AM have existed for 50 years.
11:52AM Unless Your Honor has further questions on the
11:52AM threshold challenges to the disparate impact claims, I

think those can just be disposed on statute of limitations grounds so I'll skip over standing and mootness and rest on our briefs which I think lay out the reason why the argument -- why plaintiff lacks standing or its claims are moot.

If I could briefly address separately the DOJ disparate impact regulations just because I think there actually is a separate standing issue here that's worth highlighting. We agree that the State has adduced sufficient evidence or has adduced some evidence of Louisiana incurring costs to comply with EPA's regulations. They haven't done that for DOJ. The sole evidence they provide is the Sinquefield declaration that's ECF 34-32. And what that declaration says, I quote at Paragraph 6, is Louisiana does not conduct a disparate impact analysis before engaging in law enforcement activities and intends to engage in the same law enforcement activities it traditionally has without conducting a disparate impact analysis. So Louisiana isn't incurring costs to conduct an injury -- or to conduct a disparate impact analysis, they're not going to in the future, and they haven't suffered any injury as a result of that. They don't identify any investigations brought against Louisiana DOJ. So they simply haven't carried their burden to show that DOJ's

regulations are causing the State of Louisiana any harm or that those regulations will cause the State of Louisiana any harm so there is simply no standing to assert those claims.

Turning to the non-delegation claims which I think can also be disposed of for lack of standing, most simply, plaintiffs haven't established any sort of injury. As I said earlier, they benefitted from the existence of the 180-day deadline. That deadline contributed to the closure of the complaints, and that was to Louisiana's benefit. There were no adverse findings. There were no obligations imposed through those investigation processes. So they basically haven't suffered the injury necessary to bring the non-delegation claims. Unless Your Honor has questions on that point, I think we can just rest on our briefs which have laid it out clearly.

THE COURT: I don't have any questions. Thank you. Quick response.

MR. ST. JOHN: Starting at the back and working up, *Axon* Enterprises -- or *Axon* and *Free Enterprise Board* make clear that being subject to an unlawful decision-maker is a here and now injury. There is no dispute that Louisiana's ability to continue its negotiations with EPA was subject to a veto by the private activists.

They were in an injunction to give the activists that veto. Louisiana was injured when, worse than a private individual like an *Axon* or *Free Enterprise*, a state, a sovereign state in its relations with the Federal Government was subject to a veto by private individuals.

Two, regarding Louisiana Department of Justice, we take money. I agree the State does not want to engage in a disparate impact analysis on law enforcement. It kind of highlights the practical import. I'm sure Your Honor's aware the new Governor and the new Attorney General -- the Governor is deploying the state police to New Orleans. The Attorney General will prosecute cases involving state police arrests. What's the disparate impact analysis? New Orleans is a disproportionately minority community. Is there an adverse disparate impact because we are deploying more law enforcement resources that are going to result in more arrests? Is that the adverse disparate impact? Are we dammed if we don't deploy those law enforcement resources and leave higher crime rates in a more minority community? We're damned if we do, dammed if we don't. And the State is entitled to clarity on that. Louisiana Department of Justice does not look at race. That is Mr. Sinquefield's declaration. We do not want to look at race. We do not make law enforcement decisions on

11:57AM the basis of race. We do not want to make law enforcement decisions on the basis of race. It should have no role whatsoever. But best practices, best practices, that gun to the head, is that the Louisiana Department of Justice and Louisiana State Police need to do a disparate impact analysis. I don't know even know which way it comes out because this disparate impact thing depends on what you consider adverse impact.

THE COURT: You rise to comment on that.

MR. RESAR: I did, Your Honor. I guess just responding briefly to the most recent point, the EPA's best practices for conducting disparate impact analysis are not binding on -- they're not the same as DOJ's best practices. Plaintiffs haven't identified anything in any document from DOJ sort of compelling this type of analysis.

MR. ST. JOHN: Not binding on Medicaid either, Judge, but it turns out somebody somewhere accepted some money from EPA so now EPA is claiming the right to regulate Medicaid. Now then, he may have a point that Louisiana DOJ hasn't accepted that money. I don't know.

MR. RESAR: My response to him not knowing, Your Honor, is that at the summary judgment stage it is plaintiffs' burden to adduce sufficient evidence of standing. It is not enough for him to stand up here and

11:58AM say I don't know, we could be subject to DOJ's disparate impact regulations. They have to identify specific evidence. Pleadings are no longer enough with a summary judgment case to show --

MR. ST. JOHN: This is a game, Judge. This is a game. This is a game. I can't say I'm thrilled with it. We're playing musical agencies here. The Department of Justice identify -- Louisiana Department of Justice is taking money from the United States Department of Justice. Louisiana Department of Justice challenged that regulation. We have standing to do that. Then we have this problem of EPA's making where state agencies can't have a clear who is my regulator if I take this money. Because I can tell you the then Secretary of LDH, Mr. Russo, was shocked that his Medicaid program was being regulated by EPA. And if that's a negotiating position, I hear the Federal Government, oh, it was just a negotiating position. Well, this is an unusual --

THE COURT: I do have a concern with EPA meddling around with Louisiana Department of Health and Hospitals. What's your comment on that? I mean, that is some crossover strong-arm tactics.

MR. RESAR: The response, Your Honor, is that LDH accepted EPA funds and when they accept EPA funds they

sign a terms and conditions agreement in which they agreed to be bound by the conditions on those funds. Those conditions include Title VI regulations. If they didn't want to be bound by those terms and conditions, they could either object to those terms and conditions, in our brief we outline a process the State of Louisiana should have taken but did not to object to those terms and conditions, they didn't, or they could have not accepted the funding. But once they do, it is true you're bound by what you sign. And they signed the terms and conditions and those terms and conditions include express statements that they will abide by EPA's regulations.

MR. ST. JOHN: So we have a concession that EPA's saying, okay, you accepted a grant to perform a study to help LDEQ. That was what the trigger was here. It's an $80,000 grant for LDH to perform a study to help LDEQ --

THE COURT: Maybe you should give the 80,000 back.

MR. ST. JOHN: We tried.

THE COURT: They wouldn't take it?

MR. ST. JOHN: They wouldn't take it. Mr. Russo was very upset about that.

THE COURT: Why wouldn't you take the money back? They don't want your money. Take it back.

MR. RESAR: I have not seen any evidence in the

record about them offering to give the money back so this is an entirely new factual allegation that I'd have to look into. If plaintiffs adduce evidence on that, I'm sure we could respond; but I'm not prepared to today. I apologize for that.

MR. ST. JOHN: Mr. Russo was, "Can I give my $80,000 back and get out of this?" The answer was no. But that's the practical problem with this, Judge. That's the practical problem. Health and Human Services that actually knows something about Medicaid is perfectly content with what LDH is doing; but you get an activist at EPA, she thinks she knows better than Health and Human Services how Medicaid should operate. There's a very pragmatic problem with this general article.

Winding back further, going back up the list, my colleague makes a lot of claims about the regulations being out there for 40, 50 years. Fine. Not all the claims are APA claims. They are nonstatutory review claims, and those accrued when the problem arose. The as-applied APA challenges accrued when the problem arose, so within the last 18 months, give or take. Louisiana did not walk away. Louisiana put offers on the table. EPA walked away. And that's an important -- let's focus on the record, not the attorney argument.

The uncontroverted facts are that Louisiana, LDEQ

12:02PM and LDH, had redline offers on the table that they responded to EPA with. I think it was LDEQ after EPA continued cancelling the calls said, hey, still wanting to negotiate, got an offer on the table, and this case was dropped like a hot potato.

THE COURT: His position is 180 days ran on it so they were done.

MR. ST. JOHN: A very convenient 180 days, but it doesn't halt or doesn't undermine the problem of Louisiana being subject to this 180 days. That's standing. That's Louisiana standing for the as-applied challenge. It's Louisiana standing for the nondelegation.

The final thing that I kind of want to hit on is this negotiating positions idea. Title VI and EPA's regulations are both somewhat unique here. The reticulated scheme that Title VI sets outs talks about compliance, and there's a statutory obligation for the agency to seek voluntary compliance before enforcement. That's in 602. The EPA's regulations say that EPA will informally resolve complaints whenever possible. That's a mandatory obligation. The negotiations themselves were all about EPA's view of what it's regulations require, what disparate impact requires. But if my colleagues are coming here now with attorney argument

saying, hey, that was just negotiating positions, that's just another form of illegality by EPA. That's not seeking voluntary compliance. That's seeking something more than compliance. That's not resolving informally, quote, whenever possible when you're asking for the moon and somebody says not going to give you the moon. And that's not seeking that voluntary compliance. That's not resolving informally.

THE COURT: In other words, you take it they're strong-arming --

MR. ST. JOHN: They're strong-arming.

THE COURT: -- the State.

MR. ST. JOHN: They're strong-arming the State, and that's what the statute forbids and that's what the regulation forbids. So if that's what they're relying on, they're just confessing that EPA was operating illegally in yet another form.

MR. RESAR: Your Honor, I don't think that a negotiating position is strong-arm because Louisiana obviously doesn't have to accept the negotiation position. And in this case they, in fact, didn't accept many of these negotiation positions and they suffered no adverse consequences. So it's sort of confusing to me how that the State of Louisiana can claim a strong-arm on this factual record given the factual record shows

they refused to comply and didn't suffer adverse consequences.

MR. ST. JOHN: Mr. Seidemann's declaration includes, quote, Dorka, it's not just $80,000, it's millions and millions and millions of dollars. I think she said $200 million. That's a gun to the head, Judge. That is a gun to the head.

THE COURT: The declaration does say that.

MR. ST. JOHN: And for a state --

THE COURT: Do you disagree? I mean, that's what it says.

MR. RESAR: I understand the declaration says that.

THE COURT: That's what it says. That's strong-arming. You know, I didn't go -- I went to public school, but that's strong-arming.

MR. RESAR: Respectfully, Your Honor, the factual record just refutes this suggestion that it's strong-arming because the investigations were closed. Louisiana never was forced to --

THE COURT: So it's a bluff, is what you're telling me. You were bluffing them at the negotiating table by telling them that you were going to make them pay back hundreds of million dollars, which you probably know the State of Louisiana probably can't pay. So it was a bluff.

MR. RESAR: Respectfully, I don't know for sure what was going on in the EPA individual's mind when they were making that statement; but it sounds plausible that it was a bluff to extract a more favorable settlement, possibly. I don't know. But the point is that no settlement was extracted, no strong-arm was ever imposed. It was just a negotiating position that was rejected without consequence to the State.

THE COURT: It does put the State in a very peculiar predicament when they're threatened with having to pay back hundreds of million dollars if they don't comply. No comment on that one? Okay. I gotcha.

All right. Well, thank you all very much. I appreciate the arguments and the briefs. Court's going to take it under advisement and rule in due course. Thank you all. Have safe travels back home.

(Proceedings adjourned.)

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**CERTIFICATE**

I hereby certify this 12th day of January, 2024 that the foregoing is, to the best of my ability and understanding, a true and correct transcript of the proceedings in the above-entitled matter.

Deidre D. Juranka

Deidre D. Juranka, CRR
Official Court Reporter