

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

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

10:08AM 1 similar namesake.

10:08AM 2 THE COURT: You couldn't get into town without  
10:08AM 3 somebody asking you about that. Very good.

10:08AM 4 Okay. Well, it's your motion if you want to begin.  
10:08AM 5 You can certainly argue from there or come to the  
10:08AM 6 podium, whatever you prefer. Doesn't matter.

10:08AM 7 MR. ST. JOHN: I'll come up, Judge.

10:08AM 8 THE COURT: Sure. No problem.

10:08AM 9 MR. ST. JOHN: Morning, Your Honor. Scott St. John  
10:08AM 10 for the plaintiff state. Attorney General Murrill told  
10:08AM 11 me to give you her regards when I had dinner --

10:08AM 12 THE COURT: She got sworn in yesterday.

10:08AM 13 MR. ST. JOHN: Sunday actually. She took office at  
10:08AM 14 noon yesterday.

10:08AM 15 THE COURT: I saw that, where they all -- the  
10:08AM 16 weather was getting bad and they all had to --

10:08AM 17 MR. ST. JOHN: It was still a chilly one. She said  
10:08AM 18 to give you her regards and that this is the first  
10:08AM 19 hearing of her administration so my instructions were,  
10:08AM 20 politely, don't mess it up.

10:08AM 21 THE COURT: So no pressure, huh.

10:09AM 22 MR. ST. JOHN: No pressure at all, Your Honor. Let  
10:09AM 23 me begin by three framing points, first the facts.  
10:09AM 24 There are five declarations or five declarants in this  
10:09AM 25 case. The key narrative is an assignment declaration.

10:09AM 1 It's essentially undisputed. The facts are pretty  
10:09AM 2 outrageous. EPA thinks that it can manage the State's  
10:09AM 3 Medicaid program and that it has the power to restrict  
10:09AM 4 statements by state cabinet officials to the public.

10:09AM 5 Want to flag the importance for the Court of  
10:09AM 6 distinguishing between the factual record in those  
10:09AM 7 declarations and attorney argument. Twice in the last  
10:09AM 8 week the Fifth Circuit has chastised the Department of  
10:09AM 9 Justice for this. That was in the *Wages & White Lion* en  
10:09AM 10 banc and yesterday in *Louisiana v. Department of Energy*.  
10:09AM 11 So we really need to focus on what is in the  
10:09AM 12 declarations, not what's in the briefs. Also want to  
10:10AM 13 flag the importance of what the defendants do not say.  
10:10AM 14 Mr. Hoang, the decision-maker, filed a declaration and  
10:10AM 15 that declaration notably does not aver that EPA dropped  
10:10AM 16 its investigations for any reason other than this  
10:10AM 17 litigation.

10:10AM 18 The second kind of framing issue is there's a  
10:10AM 19 persistent attempt to blur standing and mootness.  
10:10AM 20 Standing is measured as of the time the complaint was  
10:10AM 21 filed. The EPA subsequently abandoned its  
10:10AM 22 investigations for litigation-driven reasons. Can be  
10:10AM 23 inferred from the circumstances that doesn't affect  
10:10AM 24 standing. That's a mootness question. Inference that  
10:10AM 25 it was a litigation-driven abandonment is unrebutted by

10:10AM 1 declaration. Again, we have Mr. Hoang as a declarant  
10:10AM 2 and that triggers a mandatory adverse inference under  
10:10AM 3 Supreme Court precedent. That's *Interstate Circuit v.*  
10:10AM 4 *United States*. It's evidence "of the most convincing  
10:10AM 5 character."

10:11AM 6 There's an utter failure by defendants to grapple  
10:11AM 7 with the *Fenves* factors. Judge Oldham has told us that  
10:11AM 8 when the *Fenves* factors are satisfied as they are here  
10:11AM 9 the case is not moot, full stop. That was relegated to  
10:11AM 10 a footnote, *Fenves* was, in defendants' reply.

10:11AM 11 The final framing factor, framing issue that I want  
10:11AM 12 to draw the Court's attention to is there's a lot of  
10:11AM 13 tension in the defendants' arguments. It's not  
10:11AM 14 surprising. There's a hundred pages of briefing on each  
10:11AM 15 side, give or take. But the problem when you shotgun  
10:11AM 16 defenses is sometimes the defenses interact in ways that  
10:11AM 17 are not so great for your arguments. We see that with a  
10:11AM 18 challenge to the 180 day rule. Defendants say, oh, we  
10:11AM 19 were just following an injunction but the injunction was  
10:11AM 20 consistent with our regulation; but now that  
10:11AM 21 injunction's not here anymore, it's expired, so the case  
10:11AM 22 is moot or the challenge is moot. Well, if it's  
10:12AM 23 consistent with your regulation and a U.S. District  
10:12AM 24 Court Judge has construed your regulation in that way,  
10:12AM 25 there's a presumption of good faith. EPA is going to

10:12AM 1 keep following its own regulation. There's a tension  
10:12AM 2 there.

10:12AM 3 Defendants argue that Louisiana lacks standing  
10:12AM 4 because it hasn't indicated an intent to violate the  
10:12AM 5 law; but then their reply, Docket 42, ECF Page 19,  
10:12AM 6 "Louisiana has effectively admitted that it failed to  
10:12AM 7 comply" for many years. So whatever Louisiana is doing  
10:12AM 8 violates the law, but Louisiana hasn't indicated an  
10:12AM 9 intent to continue violating the law. A lot of tension  
10:12AM 10 there. It's effectively a concession.

10:12AM 11 The defendants argue for deference. They do so at  
10:12AM 12 Docket 29-1, ECF Page 59. The Fifth Circuit has made  
10:12AM 13 clear, though, if an agency is arguing for deference  
10:12AM 14 that means the statute is ambiguous. The statute's  
10:12AM 15 ambiguous if they're arguing for deference. Under *Texas*  
10:13AM 16 *Education Agency*, the State wins under the spending  
10:13AM 17 clause because you can't have an ambiguous spending  
10:13AM 18 condition.

10:13AM 19 More broadly, in trying to prevail on the merits  
10:13AM 20 the defendants' argument, going to try to summarize  
10:13AM 21 this, is, okay, we have cases over a 40 year period,  
10:13AM 22 give or take, and if you squint closely at one of them  
10:13AM 23 and you cobble together a one justice opinion from the  
10:13AM 24 majority and two dissenting opinions and we ignore the  
10:13AM 25 *Marks* rule, which is controlling, and we ignore the

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

15 Then EPA is asking this Court to do what even  
16 Justice Marshall wouldn't do in *Choate*. So let's turn  
17 to the argument. Judge, I'm here for you so when you  
18 have questions interrupt. Series of activist complaints  
19 led EPA to seek informal resolution about permits that  
20 there's no dispute were entirely lawful under the Clean  
21 Air Act. This was not an environmental engagement per  
22 se. That's EPA's words. Indeed, one of those permits  
23 was a renewal at a facility that had been in that same  
24 location since the 1960s. The permit resulted in an  
25 85 percent reduction in pollution, an unqualified

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

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

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



10:16AM 1 doing. EPA is not because EPA has appointed itself --

10:16AM 2 THE COURT: What's Medicaid got to do with the EPA  
10:16AM 3 in these air permits? How are those two things tied  
10:16AM 4 together?

10:16AM 5 MR. ST. JOHN: The Louisiana Department of Health  
10:17AM 6 accepted an \$80,000 grant from EPA to conduct a study  
10:17AM 7 about the impact of one of the permits and EPA used that  
10:17AM 8 \$80,000 grant as a hook to bring LDH into this and then  
10:17AM 9 said not only did you accept that \$80,000 grant, you  
10:17AM 10 accepted safe drinking water funds, and so we're going  
10:17AM 11 to try to micromanage what Medicaid says because that's  
10:17AM 12 run by LDH. That's the --

10:17AM 13 THE COURT: What's that got to do with this  
10:17AM 14 disparate impact study? How does the Department of --  
10:17AM 15 the Louisiana Department of Health have anything to do  
10:17AM 16 with this? I'm going to be honest with you, these were  
10:17AM 17 some long briefs, convoluted. It's a very convoluted  
10:17AM 18 mess. And so I'm still trying to navigate my way  
10:17AM 19 through some of this, but maybe you can clarify that.

10:17AM 20 MR. ST. JOHN: Absolutely, Judge. So what Title VI  
10:17AM 21 says is that if you -- if a state agency accepts federal  
10:17AM 22 funds --

10:17AM 23 THE COURT: I got all that.

10:17AM 24 MR. ST. JOHN: Okay. LDH accepted federal funds in  
10:18AM 25 a variety of ways, hundreds of millions of dollars, from

10:18AM 1 EPA. And so LDH was asked to perform a study. They  
10:18AM 2 performed a study. Basically, EPA was unhappy with the  
10:18AM 3 results of that study.

10:18AM 4 THE COURT: Is that true? Y'all were unhappy with  
10:18AM 5 the study? It's a yes or no question.

10:18AM 6 MR. RESAR: I'm not sure what study is being  
10:18AM 7 referenced. I apologize.

10:18AM 8 MR. ST. JOHN: They were asked to perform a study  
10:18AM 9 related to permitting. It's in the EPA's  
10:18AM 10 jurisdictional --

10:18AM 11 THE COURT: I'll be honest with you, you know, I  
10:18AM 12 grew up in south Louisiana right here, whole industrial  
10:18AM 13 complex right across the road. Most of that was  
10:18AM 14 built -- maybe y'all can comment. Most of that was  
10:18AM 15 built for the war effort. There was nobody living over  
10:18AM 16 there. People moved in after the facilities were built.  
10:18AM 17 Think about it. Interstate 10 runs right through the  
10:18AM 18 middle of multiple chemical refineries. They were there  
10:18AM 19 before the interstate. I doubt you'd build an  
10:19AM 20 interstate through there today, but it's there. They're  
10:19AM 21 not going to move it. We're not going to move it  
10:19AM 22 because of that.

10:19AM 23 MR. ST. JOHN: This facility's been there since the  
10:19AM 24 '60s. Same thing.

10:19AM 25 THE COURT: And Westlake is surrounded, the little

10:19AM 1 town of Westlake right here, surrounded by Conoco,  
10:19AM 2 Phillips 66, Sasol. It's 70 percent white. I don't  
10:19AM 3 understand this whole disparate -- I don't understand  
10:19AM 4 it. I'm trying to understand what's the end game on all  
10:19AM 5 this.

10:19AM 6 MR. ST. JOHN: Are we shortcutting to --

10:19AM 7 THE COURT: I'm shortcutting. What's the end game?  
10:19AM 8 What's trying to be accomplished?

10:19AM 9 MR. ST. JOHN: Shut all these facilities down.

10:19AM 10 THE COURT: It's cheaper to move the people. Why  
10:19AM 11 don't the EPA just move the people. You're going to  
10:19AM 12 shut the facilities down? I mean --

10:19AM 13 MR. ST. JOHN: That's the administration --

10:19AM 14 THE COURT: -- is that what y'all's position is,  
10:19AM 15 just shut the facilities down?

10:19AM 16 MS. PHILO: No, Your Honor. I'm happy to jump in  
10:19AM 17 on the merits, but I don't want to interrupt my  
10:19AM 18 colleague.

10:19AM 19 MR. ST. JOHN: I don't know how else to go about it  
10:19AM 20 because the conditions that are attempting to be  
10:19AM 21 imposed, there's no other way to do it other than shut  
10:20AM 22 down the facilities. Yeah, it's in a community that's  
10:20AM 23 slightly more African American than the rest of the  
10:20AM 24 state. The EPA is, well, you approved a permit there.  
10:20AM 25 That's disparate impact. That's straight to the point,

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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 1 That's why we're here and that's why the State said no.  
10:21AM 2 It does not work like this. That's a major questions  
10:21AM 3 issue. That's a lack of clarity under the spending  
10:21AM 4 clause. It's outrageous.

10:21AM 5 Yeah, EPA knows it's got a gun. Defendants come in  
10:21AM 6 and they say, hey, we've never had to take one of these  
10:21AM 7 to judgment in 50 something years of Title VI. Well,  
10:21AM 8 yeah, because if you tell a state agency we're going to  
10:21AM 9 recoup \$500 million from you, state agency folds.  
10:21AM 10 That's what happens. So EPA is walking around -- Judge,  
10:21AM 11 you and I are both old enough to remember the '70s and  
10:22AM 12 '80s, mutually assured destruction. You got somebody  
10:22AM 13 with a nuclear bomb, you're going to tread carefully.  
10:22AM 14 That's what EPA is walking around with. They point it  
10:22AM 15 at Louisiana and Louisiana is the first state to say no,  
10:22AM 16 we're not going to play that game, because it went too  
10:22AM 17 far.

10:22AM 18 THE COURT: Well, this thing has been around for a  
10:22AM 19 long time. From my reading of all y'all's briefs, it  
10:22AM 20 really hadn't been utilized in the environmental world  
10:22AM 21 until recently. I mean, what's -- did they just go find  
10:22AM 22 this and pull it out of the closet recently? Had it  
10:22AM 23 been approved through the Administrative Procedures Act?

10:22AM 24 MR. ST. JOHN: The regulations have been in place.

10:22AM 25 THE COURT: I'm talking about the disparate impact.

1 I know the Clean Air Act, Clean Water, all that's been  
2 out there.

3 MR. ST. JOHN: It has -- I would say it has not  
4 been applied. There's been some cognizance of this as a  
5 theory. EPA and DOJ acknowledged, I think we pointed  
6 out in the Federal Register post, *Sandova1*, that the  
7 Supreme Court kind of undercut that, called it into  
8 doubt, I believe was the viability of that. So was it  
9 there as a possibility, yes. Did anybody ever really do  
10 anything with it, no. Did the Supreme Court call it  
11 into doubt, yes. And so nobody wanted to touch it  
12 because it's a weak theory, right. Now you've got the  
13 Biden administration issuing executive orders saying  
14 environmental justice, environmental justice.  
15 Administrator Regan comes down, we have a big showdown  
16 here about how he's going to crack down on this  
17 pollution, and here we are. This is the theory that EPA  
18 went with.

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

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

10:24AM 1 THE COURT: I don't really care about the politics  
10:24AM 2 of it that much. I mean, I don't really care about the  
10:24AM 3 politics of it. What I'm saying is you have facilities  
10:24AM 4 throughout -- I'm going to stick with Louisiana. You  
10:24AM 5 have facilities throughout Louisiana that need air  
10:24AM 6 permits. Are they -- are they requiring the LDEQ to do  
10:24AM 7 disparate impact studies on all air permits or are they  
10:24AM 8 just strategically picking certain ones?

10:24AM 9 MR. ST. JOHN: No, EPA was very clear they expected  
10:24AM 10 this to be done on every single permit. That's why  
10:24AM 11 we're in your court, Judge, why we're in your court,  
10:24AM 12 because EPA may it unequivocally clear --

10:24AM 13 THE COURT: My reading is there were four, y'all  
10:24AM 14 had resolved the four, my reading of the briefs here. I  
10:24AM 15 got Post-It notes. I'm old school. I don't use  
10:24AM 16 computers. I do use computers. I don't want to say  
10:25AM 17 that.

10:25AM 18 MR. ST. JOHN: EPA got sued and they dropped the  
10:25AM 19 claims.

10:25AM 20 THE COURT: Yeah, it says that they -- State cannot  
10:25AM 21 point to a single action undertaken by the EPA against  
10:25AM 22 Louisiana or that, dependent on the disparate impact  
10:25AM 23 regulations, the only actions taken by EPA that are  
10:25AM 24 relevant to this that were investigated were to  
10:25AM 25 investigate complaints, negotiate settlements which

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1 impose no legal actionable effect on anyone. That's  
2 what the EPA says. I guess they investigated some  
3 complaints and didn't find that there were any  
4 violations under the disparate impact regulations. Is  
5 that a fair assessment? You didn't find any violations  
6 under -- utilizing the disparate impact analysis?  
7 MR. RESAR: That's correct, Your Honor. The  
8 complaint investigations were closed without any finding  
9 of disparate impact.  
10 MR. ST. JOHN: They were abandoned, Judge.  
11 THE COURT: Well, at the end of the day I take that  
12 as they didn't find any violations and I guess they  
13 backed off. Right?  
14 MR. ST. JOHN: No. Judge, let's be very clear.  
15 There was no --  
16 THE COURT: That's what I'm trying to get to. I'm  
17 trying to find clarity.  
18 MR. ST. JOHN: This is the difference --  
19 THE COURT: I find a lot of muddy water here.  
20 MR. ST. JOHN: This is the difference between a  
21 jury saying not guilty and finding someone not guilty.  
22 EPA walked away because we called their bluff. We're  
23 here in front of you.  
24 THE COURT: A win's a win.  
25 MR. ST. JOHN: Judge, I'm concerned about all the



10:26AM 1 other permit actions.

10:26AM 2 THE COURT: Well, we're going to talk about that,  
10:26AM 3 too, because what I -- we'll get to that.

10:26AM 4 MR. ST. JOHN: That's the ultimate issue. EPA's  
10:26AM 5 view of the law is that we have to -- we, the State,  
10:26AM 6 have to consider disparate impact in every single  
10:26AM 7 permitting decision including renewals. So this  
10:26AM 8 facility that's been there for 40, 50 years, facilities  
10:26AM 9 that have been there since World War II, when their  
10:27AM 10 Clean Air Act renewals come up LDEQ has to perform a  
10:27AM 11 disparate impact analysis and if the wrong races are  
10:27AM 12 affected, got to have a naked consideration of race,  
10:27AM 13 wrong races are affected then LDEQ has to take that into  
10:27AM 14 account. And if the Federal Government's going to stand  
10:27AM 15 up here and say no, you do not have to perform a  
10:27AM 16 disparate impact analysis, there's no such thing, Judge,  
10:27AM 17 you can enter an order accordingly and we'll take  
10:27AM 18 judicial estoppel. I suspect they're not going to do  
10:27AM 19 that, though.

10:27AM 20 Put bluntly, Louisiana doesn't want to  
10:27AM 21 discriminate. Under state law, we don't do is there a  
10:27AM 22 compelling government interest to justify  
10:27AM 23 discrimination. The State of Louisiana does not  
10:27AM 24 discriminate on the basis of race, and performing a  
10:27AM 25 disparate impact analysis requires the State to

10:27AM 1 discriminate on the basis of race. That's what *Ricci v.*  
10:27AM 2 *DeStefano* said. If you're doing disparate impact you're  
10:28AM 3 required to consider race. So there's a war there.

10:28AM 4 THE COURT: Is that to be intentional  
10:28AM 5 discrimination?

10:28AM 6 MR. ST. JOHN: No. That's the difference, right,  
10:28AM 7 is disparate impact does not require intentional  
10:28AM 8 discrimination. The State as a matter of state law  
10:28AM 9 cannot consider race, full stop, full stop. We are a  
10:28AM 10 color blind state, Judge. We don't want to consider  
10:28AM 11 race. We don't think Title VI requires us to consider  
10:28AM 12 race. If it did, there's just a straight up conflict  
10:28AM 13 with state law. Setting that aside --

10:28AM 14 THE COURT: Like I said earlier, pollution doesn't  
10:28AM 15 discriminate, doesn't care what color you are.

10:28AM 16 MR. ST. JOHN: Correct, Judge.

10:28AM 17 THE COURT: Clean water, clean air for everyone to  
10:28AM 18 breathe.

10:28AM 19 MR. ST. JOHN: Correct, Judge. That is the State's  
10:28AM 20 position and that's why the State has its Clean Air Act  
10:28AM 21 program. We've run these permits through the State's  
10:28AM 22 Clean Air Act analysis. The Clean Air Act regulates  
10:29AM 23 chemical by chemical. Chemical X, you can have this  
10:29AM 24 many parts per million in your ambient air. It doesn't  
10:29AM 25 look at things cumulatively. That's not the program

10:29AM 1 Congress set up. The other thing is it gives the State  
10:29AM 2 primacy. The EPA has continually lost on this again and  
10:29AM 3 again and again. I think the case we cited, the  
10:29AM 4 exemplar case, is *Luminant*, primacy. The State is  
10:29AM 5 supposed to run these programs. EPA is not supposed to  
10:29AM 6 micromanage. But here they're coming in and saying not  
10:29AM 7 only are we going to micromanage your air program, we're  
10:29AM 8 going to require you to, contrary to the Clean Air Act,  
10:29AM 9 consider cumulative impact, contrary to the Clean Air  
10:29AM 10 Act, not consider the economic costs, because the Clean  
10:29AM 11 Air Act requires us to consider economic costs. EPA was  
10:29AM 12 unhappy about that. Quote, we're all environmental  
10:29AM 13 agencies. That's not what the Clean Air Act does but  
10:29AM 14 that's what EPA thinks Title VI requires, just a pure  
10:30AM 15 focus on the environment.

10:30AM 16 Judge, it's probably helpful to turn to standing.  
10:30AM 17 Or do you have any more questions about the facts?

10:30AM 18 THE COURT: Not now. I may in a minute.

10:30AM 19 MR. ST. JOHN: We're focussed on Title VI so why  
10:30AM 20 don't we keep on that. The standing question is largely  
10:30AM 21 resolved by *MedImmune*. That was a patent case. Patent  
10:30AM 22 licensee wanted to challenge the underlying patent even  
10:30AM 23 though the license provided the licensee a no threat of  
10:30AM 24 suit. Supreme Court analogized that the case's holding  
10:30AM 25 that a plaintiff doesn't have to expose himself to

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

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

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

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

20 MR. ST. JOHN: Say again.

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

10:32AM 1 what they're going to say?

10:32AM 2 MR. ST. JOHN: That's what they're going to say.

10:32AM 3 THE COURT: So no harm, no foul, I guess is their  
10:32AM 4 position; but you're saying there's more to come.

10:32AM 5 MR. ST. JOHN: There's more to come.

10:32AM 6 THE COURT: Is that what you're trying to say?

10:32AM 7 MR. ST. JOHN: Yes, Judge.

10:32AM 8 THE COURT: That brings me to a question, then.

10:32AM 9 The State of Louisiana filed another complaint, Docket  
10:32AM 10 No. 23-1774, against the EPA --

10:32AM 11 MR. ST. JOHN: Yes, Judge.

10:32AM 12 THE COURT: -- on December 19th regarding a FOIA  
10:32AM 13 request.

10:32AM 14 MR. ST. JOHN: Yes, Judge.

10:32AM 15 THE COURT: Are y'all familiar with this?

10:32AM 16 MR. RESAR: We're not the attorneys representing  
10:32AM 17 EPA in that case.

10:32AM 18 THE COURT: You're representing EPA today --

10:32AM 19 MR. RESAR: We know it exists.

10:32AM 20 THE COURT: -- and you're here and this is relevant  
10:32AM 21 to me. And I know they -- I don't think they've been  
10:32AM 22 served but I know --

10:33AM 23 MR. ST. JOHN: They have been served and they've  
10:33AM 24 acknowledged --

10:33AM 25 THE COURT: My question to you is what are you

10:33AM 1 digging for in this FOIA request to EPA. Is this going  
10:33AM 2 to -- are you looking for something?

10:33AM 3 MR. ST. JOHN: Yeah.

10:33AM 4 THE COURT: Obviously. You sent a FOIA request.  
10:33AM 5 That's kind of a -- but my point is what are you looking  
10:33AM 6 for, because I'm assuming it might be relevant to this  
10:33AM 7 issue.

10:33AM 8 MR. ST. JOHN: So, Judge, we asked --

10:33AM 9 THE COURT: You don't really say what you're  
10:33AM 10 looking for in here. You just say they hadn't responded  
10:33AM 11 as required by the statute.

10:33AM 12 MR. ST. JOHN: So --

10:33AM 13 THE COURT: And if it's not relevant to this, tell  
10:33AM 14 me it's not relevant and I'll let it go.

10:33AM 15 MR. ST. JOHN: Judge, one of my items today was to  
10:33AM 16 ask you to take judicial notice of the pendency of that  
10:33AM 17 litigation.

10:33AM 18 THE COURT: I got that right here.

10:33AM 19 MR. ST. JOHN: The FOIA request or appended to it  
10:33AM 20 as one of the letters, we asked for their -- for EPA's  
10:33AM 21 communications with the activists.

10:33AM 22 THE COURT: With who?

10:33AM 23 MR. ST. JOHN: The activists, the folks that filed  
10:34AM 24 the complaints.

10:34AM 25 THE COURT: Oh, you want the correspondence

10:34AM 1 between --

10:34AM 2 MR. ST. JOHN: Between them --

10:34AM 3 THE COURT: -- and the people who filed the  
10:34AM 4 complaints.

10:34AM 5 MR. ST. JOHN: Should be -- as someone who's been  
10:34AM 6 involved a little bit in the state of FOIA, that's an  
10:34AM 7 easy ask because when something leaves the sandbox, your  
10:34AM 8 in-house sandbox, going to known e-mail addresses you  
10:34AM 9 can have your tech folks say, okay, I'm going to pull  
10:34AM 10 everything going to SierraClub.com. That is a super  
10:34AM 11 easy ask. Here we are six, seven months down the road  
10:34AM 12 and --

10:34AM 13 THE COURT: I'll be quite honest with you, you did  
10:34AM 14 say that in here. I had not really read this complaint.  
10:34AM 15 I just knew it was out there.

10:34AM 16 MR. ST. JOHN: That's what we asked for.

10:34AM 17 THE COURT: It does say the initial response  
10:34AM 18 letter. How is that relevant? Maybe it's not. I just  
10:34AM 19 wanted to know because I don't typically get multiple  
10:34AM 20 lawsuits against the EPA here.

10:34AM 21 MR. ST. JOHN: So part of the challenge here is the  
10:34AM 22 EPA's 180-day action requirement. Okay. They've been  
10:35AM 23 blowing that off for years. EPA has admitted that it's  
10:35AM 24 impracticable, arbitrary. That was when they  
10:35AM 25 reconsidered in 2016. It's all in the Federal Register.

10:35AM 1 We cited to it in the brief. EPA can't meet the 180  
10:35AM 2 days. They got sued by Sierra Club. Sierra Club got an  
10:35AM 3 injunction saying you will meet the 180 days unless  
10:35AM 4 Sierra Club agrees to grant you an extension. The  
10:35AM 5 problem with that is twofold. One, that makes clear  
10:35AM 6 that the 180 days is arbitrary. Two, for purposes here,  
10:35AM 7 that's a delegation to a private litigant, a delegation  
10:35AM 8 of Government power. Are we going to continue this  
10:35AM 9 investigation? Let me ask Sierra Club for permission.  
10:35AM 10 So the State as a sovereign in its interaction with EPA  
10:35AM 11 was subject to permission from Sierra Club.

10:35AM 12 So we just asked for -- the Government's coming in  
10:35AM 13 here and saying oh, it was merely conferring. Well, you  
10:36AM 14 had an injunction. That's not voluntarily conferring  
10:36AM 15 when a judge tells you to do something via an  
10:36AM 16 injunction. But okay, if you're going to say you were  
10:36AM 17 merely conferring, it was all on the up-and-up, just  
10:36AM 18 give us your e-mail. Easy ask again. Give me the  
10:36AM 19 e-mail leaving the sandbox going to or from  
10:36AM 20 SierraClub.com or .org. But here we are six, seven  
10:36AM 21 months later, they haven't coughed them up. That's an  
10:36AM 22 easy ask. This is another item, Judge, where you can  
10:36AM 23 take an adverse inference.

10:36AM 24 THE COURT: Well, I'm not ruling on that today.

10:36AM 25 MR. ST. JOHN: You're not ruling on that but --



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1 THE COURT: I mean, they haven't even been served.  
2 Well, I guess they have been served but they haven't --  
3 MR. ST. JOHN: Hadn't responded.  
4 THE COURT: Their time to respond to that -- I just  
5 bring it up only to ask if there's something there  
6 that's going to support your standing argument,  
7 something you're looking for that's relevant that you  
8 don't have. That's the reason I -- that's the only  
9 reason I brought it up.  
10 MR. ST. JOHN: What was the back and forth between  
11 the EPA and folks that were --  
12 THE COURT: Filing the complaints.  
13 MR. ST. JOHN: Filing the complaints and having to  
14 give EPA permission to continue the investigation rather  
15 than make findings.  
16 THE COURT: You mean EPA was asking them, in your  
17 theory -- your theory is EPA's asking them if they can  
18 continue or discontinue their investigation?  
19 MR. ST. JOHN: Judge --  
20 THE COURT: Or you don't know.  
21 MR. ST. JOHN: No, we know. It's not a theory.  
22 One of the documents in the record is the three-way  
23 signed contractual agreement agreeing to extend the  
24 period. So EPA couldn't, even if it wanted to, continue  
25 investigating beyond 180 days.

10:37AM 1 THE COURT: Well, let's jump to your judicial  
10:37AM 2 notice to see if that helps, too, because I'm trying to  
10:37AM 3 get clarity on this. I have one motion for request for  
10:37AM 4 judicial notice that's Docket No. 23-cv-692 where you,  
10:37AM 5 the State, asks the Court to take judicial notice of  
10:38AM 6 EPA's October 3rd, 2023 acceptance for investigation of  
10:38AM 7 a Title VI complaint alleging only disparate impact by  
10:38AM 8 facility -- by a facially non-discriminatory policy.  
10:38AM 9 What facility is this? That's one thing I asked my law  
10:38AM 10 clerk, what facility. I mean, you're giving the date;  
10:38AM 11 but what facility are we talking about?

10:38AM 12 MR. ST. JOHN: I believe these are scattered across  
10:38AM 13 the country. EPA is saying we're not going to do this  
10:38AM 14 or we're not -- you in Louisiana have nothing to fear.  
10:38AM 15 At the same time they're commencing these investigations  
10:38AM 16 against Alabama, Michigan, all these other states on  
10:38AM 17 disparate impact theory so --

10:38AM 18 THE COURT: But what do you care if it's Alabama?  
10:38AM 19 It's not Louisiana.

10:38AM 20 MR. ST. JOHN: The law is the law, Judge.

10:38AM 21 THE COURT: I hear you. Alabama's not in this  
10:38AM 22 case, huh?

10:38AM 23 MR. ST. JOHN: Alabama is not in this case.

10:38AM 24 THE COURT: I'm just saying, I mean, I understand  
10:38AM 25 if they're over there doing it in Alabama but they're

10:39AM 1 not doing it here --

10:39AM 2 MR. ST. JOHN: That goes to mootness, Judge. It's  
10:39AM 3 not moot. The fact that EPA got sued and dropped this  
10:39AM 4 case like a hot potato doesn't moot the case,  
10:39AM 5 particularly when they're continuing to do the same  
10:39AM 6 things conveniently avoiding Louisiana while this case  
10:39AM 7 is pending right now. And the minute -- if you were to  
10:39AM 8 dismiss this case, I have very little doubt a couple  
10:39AM 9 months later we'd see another one of these  
10:39AM 10 investigations.

10:39AM 11 What it boils down to is EPA -- or Louisiana does  
10:39AM 12 not want to -- let me back up. Louisiana does not  
10:39AM 13 believe that the disparate impact regulations are  
10:39AM 14 lawful. EPA's disparate impact regulations are not  
10:39AM 15 lawful, ultra vires, arbitrary and capricious.  
10:39AM 16 Louisiana needs to know --

10:39AM 17 THE COURT: Give me in a nutshell why you say it's  
10:40AM 18 not lawful.

10:40AM 19 MR. ST. JOHN: Section -- the Supreme Court has  
10:40AM 20 said Title VI only directly reaches intentional  
10:40AM 21 discrimination. I don't think either side disputes  
10:40AM 22 that. That is clear. The question is what does  
10:40AM 23 Section 602, which is the regulatory authority,  
10:40AM 24 authorize. And it says agencies can, quote, effectuate  
10:40AM 25 Section 601. It's a disparate impact regulation within

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1           that authority to effectuate.

2           THE COURT: And your answer is no.

3           MR. ST. JOHN: No. That's what five justices of

4           the Supreme Court said.

5           THE COURT: Stop right there.

6           MR. ST. JOHN: Yeah.

7           THE COURT: What's your response to that?

8           MS. PHILO: It does effectuate Section 601. I'm

9           happy to --

10          THE COURT: Let's stop right there for a minute. I

11          want to hear -- because we can run over -- I want to

12          address -- because I think this is, you know, the issue

13          in a nutshell right here. Go ahead.

14          MS. PHILO: So yes, the defendants' disparate

15          impact regulations are pursuant to that direct statutory

16          authority in Section 602 to effectuate the

17          antidiscrimination mandate in Section 601.

18          THE COURT: But does it have to be intentional?

19          MS. PHILO: The disparate impact regulations do not

20          require intentional discrimination.

21          THE COURT: He says it does. No, you said no. You

22          said the Supreme Court --

23          MR. ST. JOHN: The difference -- Section 601, what

24          Title VI reaches independently is intentional

25          discrimination. The statute says no intentional

10:41AM 1 discrimination. I think we agree on that.

10:41AM 2 MS. PHILO: We agree that the Court has interpreted  
10:41AM 3 Section 601 to directly reach only intentional  
10:41AM 4 discrimination, yes, Your Honor.

10:41AM 5 MR. ST. JOHN: Both sides are yes on that.

10:41AM 6 THE COURT: Both sides are yes on that. Let's move  
10:41AM 7 on to 602.

10:41AM 8 MR. ST. JOHN: 602 is the effectuate 601,  
10:42AM 9 effectuate being the key word. It gives agencies  
10:42AM 10 granting funds the power to issue regulations that,  
10:42AM 11 quote, effectuate 601. So can an entirely different  
10:42AM 12 theory of discrimination effectuate a ban on intentional  
10:42AM 13 discrimination.

10:42AM 14 THE COURT: Let me hear from you on that.

10:42AM 15 MS. PHILO: It can.

10:42AM 16 THE COURT: And how and why?

10:42AM 17 MS. PHILO: So we agree that the regulations  
10:42AM 18 prohibit a broader array of conduct in reaching  
10:42AM 19 disparate impact, unlawful disparate impact within the  
10:42AM 20 statute itself. The Supreme Court has already  
10:42AM 21 recognized the validity of that. In *Guardians* seven  
10:42AM 22 justices recognized that the statute was limited to  
10:42AM 23 directly reach only intentional discrimination, but five  
10:42AM 24 justices still formed a majority to recognize the  
10:42AM 25 validity of the disparate impact regulations. And I

10:42AM 1 know my colleague is going to say that three of them  
10:42AM 2 were in the dissent, but the same is true for the  
10:43AM 3 *Guardians* proposition --

10:43AM 4 THE COURT: Not a majority if three of them  
10:43AM 5 dissented, you know. That's first year law school stuff  
10:43AM 6 right there.

10:43AM 7 MR. ST. JOHN: Judgments, not opinions, Judge.

10:43AM 8 MS. PHILO: The Court itself said that five  
10:43AM 9 justices are forming a majority. Two years later a  
10:43AM 10 unanimous court in *Choate* characterized that as a  
10:43AM 11 holding. I would stress, Your Honor, that --

10:43AM 12 THE COURT: What's the cases again? Because I want  
10:43AM 13 to really zero in on --

10:43AM 14 MR. ST. JOHN: *Choate* was a -- okay. You have  
10:43AM 15 *Guardians* which is split. We can agree it's split.

10:43AM 16 MS. PHILO: It's a fractured decision.

10:43AM 17 MR. ST. JOHN: It's a fractured opinion. The next  
10:43AM 18 case is *Choate*.

10:43AM 19 MS. PHILO: *Alexander v. Choate*.

10:43AM 20 MR. ST. JOHN: *Alexander v. Choate*. That was  
10:43AM 21 Justice Marshall. It was a Rehabilitation Act case.  
10:43AM 22 And he said in *Guardians* we held and then he cobbles  
10:43AM 23 together the dissent. And then the next case is  
10:43AM 24 *Sandoval*.

10:43AM 25 THE COURT: You agree with that?

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MS. PHILO: Yes.

MR. ST. JOHN: *Sandova1*.

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

MS. PHILO: Of course, Your Honor.

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

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

MR. ST. JOHN: *Sandova1* 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.

THE COURT: You agree with that?

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.

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 --

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 1 no answer right now.

10:44AM 2 MR. ST. JOHN: Judge, it does actually get to the  
10:45AM 3 answer. So we've been discussing the merits of what  
10:45AM 4 does 602 authorize. That's this we've got a fractured  
10:45AM 5 opinion and then we've got -- well, *Sandoval* explicitly  
10:45AM 6 calls *Choate* dictum. So you have a majority saying  
10:45AM 7 we've never held that and that was dictum and then  
10:45AM 8 you've got *Sandoval*.

10:45AM 9 So, Judge, yeah it's fractured all the way around  
10:45AM 10 on the question of, one, what does title -- Section 602  
10:45AM 11 of Title VI authorize. Can we agree on that? There are  
10:45AM 12 conflicting -- you have a -- *Guardians* is split and then  
10:45AM 13 *Choate* and *Sandoval* make opposite statements. Can we  
10:45AM 14 agree on that?

10:45AM 15 MS. PHILO: *Choate* makes clear that it's a holding,  
10:45AM 16 and I would say that Scalia in *Sandoval* never disavows  
10:45AM 17 that holding. He recognizes the tension. He does not  
10:45AM 18 hold differently.

10:45AM 19 MR. ST. JOHN: We would disagree because he assumes  
10:45AM 20 without finding. He says no opinion has ever held this  
10:46AM 21 so we assume without finding because nobody challenged  
10:46AM 22 that. If an opinion's held --

10:46AM 23 THE COURT: So wasn't before the Court at that  
10:46AM 24 point.

10:46AM 25 MR. ST. JOHN: Wasn't before the Court. And courts



10:46AM 1 don't assume without finding --

10:46AM 2 THE COURT: I agree.

10:46AM 3 MR. ST. JOHN: -- finding precedent.

10:46AM 4 MS. PHILO: Your Honor, before we move on --

10:46AM 5 THE COURT: No, no, no, please, go ahead.

10:46AM 6 MS. PHILO: I want to make --

10:46AM 7 THE COURT: No, I'm glad you're -- I'm just really  
10:46AM 8 trying to cull this out.

10:46AM 9 MS. PHILO: It's complicated. So in the *Marks*  
10:46AM 10 principle it does state that when you have these  
10:46AM 11 fractured opinions which are very complicated you look  
10:46AM 12 for the assent of five justices who are concurring in  
10:46AM 13 the result, but the Supreme Court itself has said that  
10:46AM 14 that is often more easily stated than applied in these  
10:46AM 15 cases. And here we have the Supreme Court, a unanimous  
10:46AM 16 decision. My colleague doesn't disagree that *Choate*  
10:46AM 17 puts forth the two-pronged holding. It does the  
10:46AM 18 analysis for us regarding *Guardians*, and there's two  
10:46AM 19 parts of that holding. The first one, which my  
10:46AM 20 colleague and I agree on, is that the statute itself  
10:46AM 21 only intentionally reaches -- sorry, only itself reaches  
10:47AM 22 intentional discrimination. That holding also relies on  
10:47AM 23 three justices in dissent. If seven justices reach that  
10:47AM 24 conclusion, three of them are in dissent. So if we're  
10:47AM 25 applying *Marks* formalistically, then that holding is

10:47AM 1 also in contention. The second holding is the one at  
10:47AM 2 issue here, that's that the disparate impact regulations  
10:47AM 3 are valid even if the statute itself only directly  
10:47AM 4 reaches intentional discrimination. And those are both  
10:47AM 5 characterized as holdings of *Guardians*.

10:47AM 6 And I agree *Sandoval* expressed some concern with  
10:47AM 7 the tension, but it does not hold differently. So this  
10:47AM 8 Court is left with *Guardians* as described by *Choate*  
10:47AM 9 until the Supreme Court decides differently, and the  
10:47AM 10 Fifth Circuit recognized that in *Rollerson*. Judge  
10:47AM 11 Haynes in *Rollerson* said *Choate* left untouched -- sorry,  
10:47AM 12 *Sandoval* left untouched *Choate's* apparent approval of  
10:47AM 13 these regulations. And even if it's dicta, even if you  
10:47AM 14 disagree with the math on that, it's Supreme Court dicta  
10:47AM 15 which is entitled to a different weight.

10:47AM 16 MR. ST. JOHN: And *Rollerson* then, as with the  
10:48AM 17 Supreme Court, assumed without deciding because, as Your  
10:48AM 18 Honor is being confronted, it's what a fighter pilot  
10:48AM 19 would call a furball where it's pointing in a lot of  
10:48AM 20 different directions. But I can make life easier for  
10:48AM 21 you, Judge.

10:48AM 22 THE COURT: I'm always open to that.

10:48AM 23 MR. ST. JOHN: This is a discussion of what does  
10:48AM 24 602 actually authorize.

10:48AM 25 THE COURT: Yeah. It's a great intellectual

10:48AM 1 discussion for sure.

10:48AM 2 MR. ST. JOHN: It's a great intellectual discussion  
10:48AM 3 but --

10:48AM 4 THE COURT: But I need help getting to an answer,  
10:48AM 5 which I'm sure one of you are going to go ahead and take  
10:48AM 6 it on up to the U.S. Fifth Circuit. That's fine with  
10:48AM 7 me.

10:48AM 8 MR. ST. JOHN: This will probably go higher than  
10:48AM 9 that, Judge.

10:48AM 10 THE COURT: I'll do exactly what they tell me.

10:48AM 11 MR. ST. JOHN: There are two underlying -- two  
10:48AM 12 answers here. Going back to what does 602 mean, the  
10:48AM 13 particular regulation -- are you familiar with the term  
10:48AM 14 general article, Judge?

10:49AM 15 THE COURT: Uh-huh.

10:49AM 16 MR. ST. JOHN: The Title VI has this very  
10:49AM 17 reticulated scheme for regulations. It's not a  
10:49AM 18 traditional APA. The President has to approve the  
10:49AM 19 regulations. They have this whole process. Someone  
10:49AM 20 once upon a time was like, aha, we can write a general  
10:49AM 21 article and so the regulation is effectively a general  
10:49AM 22 article and then we don't have to tell you exactly what  
10:49AM 23 it means, we don't have to go through this reticulated  
10:49AM 24 process, we don't have to go ask the President for  
10:49AM 25 approval on specific regulations, we have a general

10:49AM 1 article. So that's what EPA's disparate impact  
10:49AM 2 regulation is, is a general article.

10:49AM 3 THE COURT: You agree with that?

10:49AM 4 MS. PHILO: I may be missing quite the import of  
10:49AM 5 why this is a general article, but the statute was  
10:49AM 6 passed in 1964 almost contemporaneously with the passage  
10:49AM 7 of the statute of presidential task force and DOJ  
10:49AM 8 promulgated regulations that included the prohibition on  
10:50AM 9 unlawful disparate impact. DOJ passed its --  
10:50AM 10 promulgated its regulation in 1966, EPA promulgated  
10:50AM 11 their regulation in 1973, both with presidential  
10:50AM 12 approval. I disagree that it doesn't tell people what  
10:50AM 13 to do. It very clearly unambiguously prohibits unlawful  
10:50AM 14 disparate impact.

10:50AM 15 MR. ST. JOHN: We disagree on that point. Let me  
10:50AM 16 continue the easy out for you, Judge. We're in this  
10:50AM 17 furball of what does 602 mean, and I think we can agree  
10:50AM 18 the Supreme Court has given decisions their intention.  
10:50AM 19 Can we say that? There's some tension there.

10:50AM 20 MS. PHILO: There is a holding and Scalia  
10:50AM 21 recognizes some tension but doesn't hold otherwise.

10:50AM 22 MR. ST. JOHN: We disagree there's a holding.  
10:50AM 23 You're in a furball, Judge. You're in a furball. And  
10:50AM 24 if we have to disregard the *Marks* rule and say, okay,  
10:51AM 25 we're going to cobble together two dissents with a

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

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

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

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

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

10:52AM 1 little easier for me to kind of jump back and forth  
10:52AM 2 because these are a lot of issues.

10:52AM 3 MR. ST. JOHN: Absolutely.

10:52AM 4 THE COURT: And I used to hate sitting there having  
10:52AM 5 to listen to other lawyers talk and I'd go, God, I need  
10:52AM 6 to say something right now.

10:52AM 7 MS. PHILO: I appreciate that, Your Honor. So on  
10:52AM 8 the question of whether or not it exceeds the statutory  
10:52AM 9 authority under Title VI, we think the easy answer is  
10:52AM 10 that this is governed by precedent. You can't read the  
10:52AM 11 tea leaves unless and until the Supreme Court holds  
10:52AM 12 differently. But if you disagree on the precedent, even  
10:53AM 13 looking at this issue anew, this is the right outcome  
10:53AM 14 based on this is -- the defendants promulgated their  
10:53AM 15 regulations pursuant to a direct statutory authority as  
10:53AM 16 confirmed by legislative history, the consistent and  
10:53AM 17 widespread agency interpretation, and congressional  
10:53AM 18 ratification since.

10:53AM 19 So to start with the text, effectuate is clearly  
10:53AM 20 the most important word but you also have Congress  
10:53AM 21 clearly directing and authorizing the agencies to do so.  
10:53AM 22 As my colleague mentioned, there's a requirement that  
10:53AM 23 the President approve these regulations. That's an  
10:53AM 24 unusual requirement, and the legislative history shows  
10:53AM 25 that it was put in place precisely because this is an

10:53AM 1 exceptionally broad grant of rule making to the agencies  
10:53AM 2 to determine how best to effectuate that  
10:53AM 3 antidiscrimination mandate. Now, the legislative  
10:53AM 4 history confirms that this is this broad grant meant to  
10:53AM 5 give the agencies that discretion to decide which  
10:53AM 6 actions to prohibit; but agencies -- since basically the  
10:53AM 7 statute was passed, it's unusual to have agency action  
10:53AM 8 almost contemporaneous with the statute; but here you  
10:54AM 9 have consistent and widespread agency interpretation.

10:54AM 10 And lastly, you have that congressional  
10:54AM 11 ratification piece. In 1987 Congress returned Title VI  
10:54AM 12 under the Civil Rights Restoration Act, and all of the  
10:54AM 13 legislative history makes clear that the courts have  
10:54AM 14 upheld the use of an effects standard. Congress didn't  
10:54AM 15 rein in any of that power in Section 602. In addition,  
10:54AM 16 you've got that series of statutes, I think we cited  
10:54AM 17 eight in our brief, in the '70s and '80s where Congress  
10:54AM 18 directed agencies to promulgate regulations similar to  
10:54AM 19 those under Title VI again knowing that that included a  
10:54AM 20 disparate impact prohibition. And then as recently as  
10:54AM 21 2010 in the Affordable Care Act it ensured that nothing  
10:54AM 22 limits the rights, remedies, procedures, or standards of  
10:54AM 23 Title VI including those disparate impact regulations.  
10:54AM 24 So you have this consistent preservation and  
10:54AM 25 ratification of the disparate impact standards.

10:54AM 1 I want to be clear in response to some of what my  
10:55AM 2 colleague said. These disparate impact regulations were  
10:55AM 3 not dusted off from a closet. These have been around  
10:55AM 4 since the very beginning of the statute. The EPA  
10:55AM 5 started doing these investigations, I believe, in 1993.  
10:55AM 6 From 1993 to 1998 I believe there were 50 investigations  
10:55AM 7 against state and local governments about permitting  
10:55AM 8 decisions. One of those I'm surprised to hear my  
10:55AM 9 colleague suggest this is completely new. One of those  
10:55AM 10 was against LDEQ. There was a big Shintech  
10:55AM 11 investigation in the 1990s under Title VI. This is not  
10:55AM 12 a new program and is not unique to the EPA. It's across  
10:55AM 13 the Federal Government.

10:55AM 14 To clear up any misunderstanding about how  
10:55AM 15 disparate impact works, this is not triggered based on a  
10:55AM 16 bare statistical disparity alone. There is a very clear  
10:55AM 17 paradigm that courts follow and that agencies use to  
10:55AM 18 guide their investigations. It starts with establishing  
10:55AM 19 a prima facie case of a significant and adverse  
10:55AM 20 disparate impact. You're looking for them to identify a  
10:56AM 21 facially neutral policy or practice, a significant and  
10:56AM 22 adverse disparate impact on the basis of race, color, or  
10:56AM 23 national origin. And that applies to all races. It  
10:56AM 24 isn't just particular communities. And then, lastly,  
10:56AM 25 that causation aspect that you have to prove. If all of



10:56AM 1 that is shown, the recipient still has a chance to show  
10:56AM 2 that that significant and adverse impact is justified,  
10:56AM 3 so, for example, the economic benefits to the community.  
10:56AM 4 And, lastly, the question is was that justification  
10:56AM 5 pretext or are there less discriminatory alternatives  
10:56AM 6 that would mitigate that adverse impact.

10:56AM 7 So, for example, as you said, pollution doesn't  
10:56AM 8 discriminate. If there's a facility in a particular  
10:56AM 9 community and it is shown to have a significant and  
10:56AM 10 adverse disparate impact, can we put air scrubbers in it  
10:56AM 11 to reduce the disparate impact. Putting air scrubbers  
10:56AM 12 in that facility doesn't discriminate against another  
10:56AM 13 community. Or, for example, if there's a school next to  
10:57AM 14 a power plant that has a significant disparate impact  
10:57AM 15 that's caused by a particular facially neutral policy,  
10:57AM 16 can we modify the permit conditions to reduce that  
10:57AM 17 impact by, for example, limiting the hours of when  
10:57AM 18 emissions are let go to not be the same as the school  
10:57AM 19 hours. So that's -- those are the ways that you can use  
10:57AM 20 race neutral measures to mitigate or eliminate this  
10:57AM 21 disparate impact.

10:57AM 22 And my understanding based on the letter of concern  
10:57AM 23 is that EPA was asking these state agencies to just do  
10:57AM 24 that analysis, to know the impact, the burdens of the  
10:57AM 25 environmental decisions they were having, to hire, I

10:57AM 1 believe it was, a risk information kind of to better  
10:57AM 2 inform the public and to redo a health assessment as  
10:57AM 3 well to, again, understand the impact of these  
10:57AM 4 decisions. Once you understand the impact of those  
10:57AM 5 decisions, then you have to justify it and ask if there  
10:57AM 6 are less discriminatory ways to accomplish the same  
10:58AM 7 goal.

10:58AM 8 THE COURT: I understand. Thank you. Do you have  
10:58AM 9 a comment on that?

10:58AM 10 MR. ST. JOHN: Several. If that's what EPA is  
10:58AM 11 demanding and that's what the regulations require, I  
10:58AM 12 thank you for the concession on standing because that's  
10:58AM 13 spending a whole ton of money to do that.

10:58AM 14 THE COURT: What's that?

10:58AM 15 MR. ST. JOHN: That the analysis that my colleague  
10:58AM 16 just described, if that is what the regulation requires,  
10:58AM 17 that is requiring us to do things and spend money. That  
10:58AM 18 is standing. That is standing.

10:58AM 19 Let's turn back to the -- we got here on what does  
10:58AM 20 the statute say. Justice Scalia --

10:58AM 21 THE COURT: I understand what you said. I  
10:58AM 22 understand what your point is by talking about standing,  
10:58AM 23 but it was a good explanation of --

10:58AM 24 MR. ST. JOHN: The holistic what's going on.

10:58AM 25 THE COURT: Yeah, of what's going on, which I'll be

10:58AM 1 honest with you, wasn't really clear in the briefs.

10:58AM 2 MR. ST. JOHN: We'll get back to that because  
10:58AM 3 there's a little more to it.

10:58AM 4 THE COURT: Not that y'all's briefs weren't good,  
10:59AM 5 there was just -- you know, it's a lot.

10:59AM 6 MR. ST. JOHN: This is a fed courts exam, Judge.  
10:59AM 7 This is a law school fed courts exam.

10:59AM 8 THE COURT: I hope not. Poor law students are  
10:59AM 9 going to fail. We all got a lot of experience and we're  
10:59AM 10 still grappling with it, you know.

10:59AM 11 MR. ST. JOHN: Going back to what does the statute  
10:59AM 12 authorize --

10:59AM 13 THE COURT: Yeah.

10:59AM 14 MR. ST. JOHN: -- Section 601 does not ban  
10:59AM 15 disparate impact, it bans intentional discrimination.  
10:59AM 16 It's perfectly okay with a disparate impact. And that  
10:59AM 17 was Justice Scalia's point in saying this is a strange  
10:59AM 18 interpretation to say you can effectuate something that  
10:59AM 19 601 is okay with, that you can effectuate 601 by banning  
10:59AM 20 something that 601 is okay with. That's what Justice  
10:59AM 21 Scalia called strange.

10:59AM 22 On the text, the very same statute, Civil Rights  
10:59AM 23 Act of 1964, Title VII bans disparate impact, includes  
11:00AM 24 effects language. You can't do -- you can't undertake  
11:00AM 25 an action that causes a disparate impact. So you have

11:00AM 1 one statute with two different bans. One very clearly,  
11:00AM 2 Title VII, bans disparate impact. Then you've got  
11:00AM 3 Title VI. There is a distinction there. In the  
11:00AM 4 ordinary canons of textual construction, when Congress  
11:00AM 5 says different things in different places it has a  
11:00AM 6 different meaning. The Fifth Circuit reached that same  
11:00AM 7 conclusion in *Kamps*, K-A-M-P-S. We cite it in our  
11:00AM 8 brief.

11:00AM 9 THE COURT: You agree with that, Title VII and  
11:00AM 10 Title VI really say two different things?

11:00AM 11 MS. PHILO: They're meant to. Title VII directly  
11:00AM 12 prohibits disparate impact. Whereas Title VI, Congress  
11:00AM 13 left it explicitly to the agencies to decide how to do  
11:00AM 14 so. The fact that they're different just shows that  
11:00AM 15 they're different schemes, and for that reason *Kamps* is  
11:00AM 16 inapposite.

11:00AM 17 MR. ST. JOHN: *Kamps* says the Fifth Circuit looks  
11:00AM 18 for effects language, something in the statute allowing  
11:01AM 19 the regulation of effects, and that's what's absent  
11:01AM 20 here. There's no language in 601 or 602 authorizing  
11:01AM 21 regulation of effects, and that's that distinction with  
11:01AM 22 Title VII. And so we go back to EPA is saying, well,  
11:01AM 23 effectuate means that we can ban something that 601 is  
11:01AM 24 okay with and that's just not effectuate. That was  
11:01AM 25 Justice Scalia's opinion.

11:01AM 1 THE COURT: What's your comment on that?

11:01AM 2 MS. PHILO: It wasn't Justice Scalia's opinion.

11:01AM 3 It's Justice Scalia's concern. He doesn't get into the  
11:01AM 4 merits because he assumes that they're valid because of  
11:01AM 5 *Guardians and Choate* and that it wasn't raised.

11:01AM 6 To the extent my colleague is addressing the  
11:01AM 7 concurrence in *Ricci*, I'm happy to explain why that's a  
11:01AM 8 little bit different than the circumstances here; but I  
11:01AM 9 don't want to interrupt.

11:01AM 10 THE COURT: No, no, that's fine. We'll come back  
11:01AM 11 to you. I just was on that point. I was trying to find  
11:01AM 12 again --

11:01AM 13 MR. ST. JOHN: Trying to find --

11:02AM 14 THE COURT: -- where we're on the same page.

11:02AM 15 MR. ST. JOHN: Yes, Judge.

11:02AM 16 THE COURT: And that helps me narrow where we're  
11:02AM 17 not on the same page.

11:02AM 18 MR. ST. JOHN: Going back to the -- what the  
11:02AM 19 disparate impact analysis requires. My colleague said  
11:02AM 20 you look for an adverse impact. Well, the clean -- if  
11:02AM 21 something is legal under the Clean Air Act, how can you  
11:02AM 22 call that an adverse impact? The Clean Air Act  
11:02AM 23 regulates emissions. Emissions that violate the Clean  
11:02AM 24 Air Act you won't grant a permit for, LDEQ. Those are  
11:02AM 25 illegal emissions. Emissions that don't violate the

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

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

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

11:04AM 1 disproportionately felt.

11:04AM 2 THE COURT: Yeah. Thank you. Go ahead. I'm  
11:04AM 3 stopping and starting with you. Now I made you lose  
11:04AM 4 your train of thought.

11:04AM 5 MR. ST. JOHN: You did, Judge. Let's go to the  
11:04AM 6 next question.

11:04AM 7 THE COURT: Go ahead and gather your thoughts. I'm  
11:04AM 8 sorry. I made you lose your train of thought. While  
11:04AM 9 you're gaining your thoughts, let me ask you. So you  
11:04AM 10 had the four complaints.

11:04AM 11 MS. PHILO: I believe there were three. I'm not  
11:04AM 12 the factual expert, my colleague is, but I think there  
11:05AM 13 were --

11:05AM 14 MR. ST. JOHN: There were three complaints that  
11:05AM 15 were the subject of --

11:05AM 16 MS. PHILO: Of two --

11:05AM 17 MR. ST. JOHN: -- of two investigations, one of  
11:05AM 18 which -- one of those complaints was by Sierra Club  
11:05AM 19 which was subject to the *CARE* injunction. And then  
11:05AM 20 after those there was an additional complaint filed  
11:05AM 21 which EPA rejected. I think you are correct, Judge. I  
11:05AM 22 believe there were four.

11:05AM 23 THE COURT: That's what I read somewhere, there  
11:05AM 24 were four at one point. So those four were  
11:05AM 25 investigated, right?

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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,



11:06AM 1 June 17th.

11:06AM 2 MR. ST. JOHN: Correct. And they sent a letter.  
11:06AM 3 It was a Louisiana facility.

11:06AM 4 THE COURT: Is that one still pending?

11:06AM 5 MR. RESAR: A complaint was not opened or an  
11:06AM 6 investigation was not opened pursuant to that objection,  
11:07AM 7 Your Honor, and it is no longer still pending. In fact,  
11:07AM 8 the permit was issued. We submitted -- I believe it's  
11:07AM 9 Exhibit A and B to our final papers that the permit was  
11:07AM 10 issued, the plant is operating.

11:07AM 11 And I just want to reject, respectfully, a  
11:07AM 12 characterization made by my colleague there about this  
11:07AM 13 being an objection based on disparate impact grounds.  
11:07AM 14 That is not at all accurate. If you look at the  
11:07AM 15 June 16th objection, it is based on five technical  
11:07AM 16 grounds under the Clean Air Act. The cover letter, yes,  
11:07AM 17 the cover letter mentions disparate impact and it notes  
11:07AM 18 we encourage, the verb is encourage, you to conduct a  
11:07AM 19 disparate impact analysis; but that is not the substance  
11:07AM 20 of the objection. The substance of the objection is  
11:07AM 21 purely technical grounds under the Clean Air Act.

11:07AM 22 MR. ST. JOHN: Judge, when we have a legally  
11:07AM 23 operative document, and that's what this objection is,  
11:08AM 24 it halts a permit.

11:08AM 25 THE COURT: Sounds like that permit eventually got

11:08AM 1 issued.

11:08AM 2 MR. ST. JOHN: The permit did eventually issue.

11:08AM 3 THE COURT: So this really -- let's go back to our  
11:08AM 4 moot issue. You know, is that really -- that one's been  
11:08AM 5 done. It's moot.

11:08AM 6 MR. ST. JOHN: You still have a continuing -- you  
11:08AM 7 know, this is an ordinary course of events that these  
11:08AM 8 permits are considered by EPA and LDEQ is subject to the  
11:08AM 9 regulations.

11:08AM 10 THE COURT: Is there a pending EPA investigation  
11:08AM 11 based on disparate impact in Louisiana.

11:08AM 12 MR. ST. JOHN: Not an investigation. There are --

11:08AM 13 THE COURT: Is there an objection?

11:08AM 14 MR. ST. JOHN: There are pending permits that in  
11:08AM 15 the ordinary course of events that will be run by EPA  
11:08AM 16 for EPA to object to.

11:08AM 17 THE COURT: But we don't know yet if they will  
11:08AM 18 object or not.

11:08AM 19 MR. ST. JOHN: Correct.

11:08AM 20 THE COURT: I'm not going to put you on the spot  
11:08AM 21 and ask you that because I doubt you know right now,  
11:08AM 22 unless you do know. Do you know that?

11:08AM 23 MR. RESAR: I don't know of any pending objections.

11:09AM 24 MR. ST. JOHN: Rewinding, you'd asked about -- when  
11:09AM 25 I lost my train of thought, Judge. What my colleague is

11:09AM 1 arguing is that Title VI can alter the standards of a  
11:09AM 2 substantive statute. That is what Thurgood Marshall  
11:09AM 3 rejected. They're shrinking violets on civil rights in  
11:09AM 4 *Choate*. That was a Rehabilitation Act case where the  
11:09AM 5 issue was a change to the number of days that the  
11:09AM 6 State's -- Tennessee Medicaid would cover. The  
11:09AM 7 plaintiffs were making the argument that my colleague's  
11:09AM 8 making here that Title VI -- or the Rehabilitation Act,  
11:09AM 9 apologies, provide this overarching law that you have to  
11:09AM 10 follow. Thurgood Marshall said no, we take the program  
11:09AM 11 as it is. So we don't alter the substance of the  
11:09AM 12 program via the disparate impact analysis. You take the  
11:09AM 13 program as is. That is a point of dispute here, I  
11:10AM 14 think, that EPA believes Title VI would impose  
11:10AM 15 additional substantive requirements on, for example, a  
11:10AM 16 Clean Air Act permitting whereas --

11:10AM 17 THE COURT: Do you agree with that, that Title VI  
11:10AM 18 requires a disparate impact analysis on every air  
11:10AM 19 permit?

11:10AM 20 MS. PHILO: The regulations require the recipients  
11:10AM 21 not to engage in disparate impact, that paradigm that I  
11:10AM 22 laid out for you.

11:10AM 23 THE COURT: So, basically, an analysis on every air  
11:10AM 24 permit would have to be conducted to see if that's  
11:10AM 25 happening.

11:10AM 1 MS. PHILO: I don't believe they would have to  
11:10AM 2 engage in that sort of analysis let alone a cumulative  
11:10AM 3 impact analysis. Doing so would help them ensure that  
11:10AM 4 they were complying with the Title VI regulations to  
11:10AM 5 ensure that there wasn't a significant and adverse  
11:10AM 6 impact.

11:10AM 7 THE COURT: So it's not a requirement EPA is  
11:10AM 8 putting on the LDEQ in every air permit to be sure that  
11:10AM 9 there's a disparate impact analysis done.

11:10AM 10 MS. PHILO: The requirement under the regulation is  
11:10AM 11 that there is no unlawful disparate impact, going back  
11:11AM 12 to -- and I define that to mean a significant and  
11:11AM 13 adverse disparate impact that is either --

11:11AM 14 THE COURT: Only way they would know that is they'd  
11:11AM 15 have to do an analysis or a study.

11:11AM 16 MS. PHILO: They would do an analysis or study to  
11:11AM 17 ensure --

11:11AM 18 THE COURT: So that is required by EPA on every air  
11:11AM 19 permit issued in the state, that they do that analysis.

11:11AM 20 MS. PHILO: Theoretically, the EPA could do that  
11:11AM 21 analysis to see if there was a problem. The State is  
11:11AM 22 required not to engage in unlawful disparate impact. To  
11:11AM 23 ensure that they are not, it is certainly best practices  
11:11AM 24 to engage in a type of statistical analysis to see the  
11:11AM 25 significant disparate impact and to ensure that any are

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1 either justified or if there are alternative less  
2 discriminatory measures to mitigate that impact.  
3 THE COURT: So the answer is yes, they would  
4 have -- to ensure that they're not, they would have to  
5 do the analysis.  
6 MS. PHILO: It's certainly --  
7 THE COURT: As you say, I like your verbiage, best  
8 practices.  
9 MS. PHILO: Best practices.  
10 THE COURT: That basically means do it or else.  
11 MS. PHILO: What the regulation requires is that  
12 they don't engage in unlawful disparate impact.  
13 THE COURT: Right, but the only way they can  
14 evidence that to the EPA is by doing the analysis and  
15 showing it to the EPA.  
16 MS. PHILO: The EPA --  
17 THE COURT: Or y'all are just going to take their  
18 word for it?  
19 MS. PHILO: The EPA would do its own investigation  
20 and would look for that significant disparate impact.  
21 THE COURT: Y'all are only going to do that if  
22 there's a complaint, it sounds to me like.  
23 MS. PHILO: I believe --  
24 THE COURT: It sounds to me like that's the only  
25 time y'all have come into Louisiana and done this, is

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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

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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 1 MR. ST. JOHN: In this capacity, Judge, he's not a  
11:14AM 2 politician.

11:14AM 3 THE COURT: Every political appointee almost is a  
11:14AM 4 politician to some extent. Let's be realistic here.

11:14AM 5 MR. ST. JOHN: In this capacity --

11:14AM 6 THE COURT: Go ahead. You rise.

11:14AM 7 MR. RESAR: Yes. I just want to be clear. When  
11:14AM 8 the EPA administrator is, as Your Honor is suggesting,  
11:14AM 9 taking a tour throughout the country he is not acting as  
11:15AM 10 an investigator. He's giving speeches --

11:15AM 11 THE COURT: I know what he's talking about. It  
11:15AM 12 made the news down here, I mean, you know, that he was  
11:15AM 13 down here and he said -- you know, he talked about this  
11:15AM 14 very issue to a great extent and he did comment that  
11:15AM 15 we're going to look into it. But I think a director of  
11:15AM 16 an agency saying things doesn't always lead to the  
11:15AM 17 followup action either, you know. They were talking  
11:15AM 18 about tearing down overpasses, the transportation  
11:15AM 19 secretary. Doesn't mean they're going around tearing  
11:15AM 20 them down. He said they would, they might consider  
11:15AM 21 tearing them down, but they haven't torn any down that I  
11:15AM 22 know of. So do we go ask the Court to file an  
11:15AM 23 injunction not to let them tear down the Pontchartrain  
11:15AM 24 Expressway.

11:15AM 25 MR. ST. JOHN: If it's a regulation we can, Judge.



11:15AM 1 THE COURT: I understand. But just for -- because  
11:15AM 2 the EPA administrator or the Department of  
11:16AM 3 Transportation says these things, that alone, to me, is  
11:16AM 4 not enough for the Court to do something. We have to  
11:16AM 5 see the actual action. Now, I understand you've had  
11:16AM 6 some investigations.

11:16AM 7 MR. ST. JOHN: And they were pending when the  
11:16AM 8 complaint was filed so that's the standing, and then the  
11:16AM 9 question becomes whether those were mooted by the  
11:16AM 10 dismissal of the investigations.

11:16AM 11 THE COURT: I understand and that's what I was  
11:16AM 12 asking, are there any pending ones at this moment. I  
11:16AM 13 don't think there are. And my next question was is this  
11:16AM 14 a requirement on all air permits at this time; and what  
11:16AM 15 I heard was, well, it would be best practices if you did  
11:16AM 16 it.

11:16AM 17 MR. ST. JOHN: Just like that's a nice restaurant,  
11:16AM 18 be a shame if something were to happen.

11:16AM 19 THE COURT: Look, I mean, I'm not knocking -- I  
11:16AM 20 mean, you got to be truthful to the Court. At the same  
11:16AM 21 time, you know, I understand you got to kind of  
11:16AM 22 characterize it in the best light for your client. But  
11:17AM 23 the standing issue and the mootness issue, you know, is  
11:17AM 24 a threshold issue that we have to get -- that I have to  
11:17AM 25 get past and then we get to the next level. I mean,

11:17AM 1 this is a multilayered issue here. I haven't decided.  
11:17AM 2 I mean, that's why I had the argument and the briefs.  
11:17AM 3 Continue. I'm not trying to cut anyone off. Good Lord,  
11:17AM 4 they hadn't even gotten to the podium yet. But we've  
11:17AM 5 been talking. We've been talking.

11:17AM 6 MS. PHILO: Yeah. I don't need the podium.

11:17AM 7 THE COURT: The podium's overrated.

11:17AM 8 MR. ST. JOHN: I regret coming up here now, Judge.  
11:17AM 9 Might have been easier to sit at the table.

11:17AM 10 THE COURT: Taxpayers paid good money for that  
11:17AM 11 podium. I'm glad somebody's using it.

11:17AM 12 MR. ST. JOHN: Taxpayers paying good money for  
11:18AM 13 everybody's time in here, Judge. So the standing  
11:18AM 14 investigations were pending when the complaint --

11:18AM 15 THE COURT: I understand they are pending.

11:18AM 16 MR. ST. JOHN: So we really are in the mootness --  
11:18AM 17 the question of mootness. There's a strong inference  
11:18AM 18 that the investigations were dropped as a result of  
11:18AM 19 litigation, and that does not moot. You had a bird in  
11:18AM 20 the hand, EPA or --

11:18AM 21 THE COURT: I'm sure the EPA's position, and they  
11:18AM 22 can comment on it, is -- your position is they had the  
11:18AM 23 investigations, they were dropped once y'all filed this  
11:18AM 24 suit. They're going to tell me what they say in the  
11:18AM 25 brief, well, we just didn't find any disparate impact so

11:18AM 1 we didn't need to go forward with them any further.

11:18AM 2 That's fair enough?

11:18AM 3 MR. RESAR: That's fair, Your Honor. I would add  
11:18AM 4 two things to that.

11:18AM 5 THE COURT: Please do.

11:18AM 6 MR. RESAR: First, the EPA determined, and this is  
11:18AM 7 in the closure letters, ECF 18, 1 and 2, believed that  
11:18AM 8 it could accomplish the goal's pursuit through the  
11:18AM 9 investigation through other means. For example, EPA  
11:18AM 10 opened a Clean Air Act. I believe plaintiff has  
11:18AM 11 suggested throughout this action that some of the aims  
11:19AM 12 of the disparate impact investigation could be best  
11:19AM 13 accomplished through the environmental statutes. EPA  
11:19AM 14 took that onboard and said yes, we will open a Clean Air  
11:19AM 15 Act complaint, and that's pending. They believe they  
11:19AM 16 can resolve some of the pollutions through that  
11:19AM 17 mechanism.

11:19AM 18 The second thing is that there was an impending  
11:19AM 19 deadline of July 11th to resolve the complaints and EPA  
11:19AM 20 determined in part that it couldn't make the findings  
11:19AM 21 within that timeline as required. Plaintiffs seem to be  
11:19AM 22 challenging the existence of that deadline. But given  
11:19AM 23 how it worked out for them, I'm slightly confused by  
11:19AM 24 that because it meant a closure of the investigations  
11:19AM 25 without any adverse findings for plaintiffs.

11:19AM 1 MR. ST. JOHN: The litigation was referenced in the  
11:19AM 2 negotiating documents. The final redlines that were  
11:19AM 3 exchanged are in the record, makes express reference to  
11:19AM 4 the litigation that my colleague is talking about. So  
11:19AM 5 this was not some sudden thing that nobody had  
11:19AM 6 considered. It was in the discussion. EPA could have  
11:19AM 7 taken the bird in the hand, had had counteroffers that  
11:20AM 8 the activist community thought would have been  
11:20AM 9 transformational. Our briefing goes through the  
11:20AM 10 language that was used by the complainants. Huge bird  
11:20AM 11 in the hand, huge win was the perception of the  
11:20AM 12 community of what EPA would have had just by saying yes,  
11:20AM 13 just by saying yes. Offers were on the table. EPA  
11:20AM 14 could have said yes. Instead, they dropped it and ran  
11:20AM 15 like a hot potato or dropped it like a hot potato and  
11:20AM 16 ran.

11:20AM 17 There is no grappling. The defendants don't  
11:20AM 18 grapple with the *Fenves* factors. That's kind of the  
11:20AM 19 controlling thing here. And Judge Oldham has said when  
11:20AM 20 the *Fenves* factors are satisfied the case is not moot,  
11:20AM 21 full stop. That's the controlling authority. *Fenves*  
11:20AM 22 was relegated to a footnote in defendants' reply saying,  
11:20AM 23 well, the case is moot so the *Fenves* factors don't  
11:21AM 24 apply. No, the *Fenves* factors are whether the case is  
11:21AM 25 moot or not and the *Fenves* factors all point to

11:21AM 1 mootness.

11:21AM 2 We haven't talked about the Department of Justice  
11:21AM 3 regulation which is a facial challenge. USD0J applying  
11:21AM 4 *Sandoval* in late 2020, going to a direct final rule  
11:21AM 5 repealing its disparate impact regulations and the  
11:21AM 6 standard for reopening is a serious substantive  
11:21AM 7 reconsideration. That's Page 15 of the defendants'  
11:21AM 8 reply. There's no dispute that the regulation and the  
11:21AM 9 proposed repeal was finalized by the U.S. Department of  
11:21AM 10 Justice, sent to OMB for review, and then pulled. It is  
11:21AM 11 incredible, I'd go so far as to say farcical, to say  
11:22AM 12 that a regulation signed off on and sent to OMB is not  
11:22AM 13 at the stage of a serious substantive reconsideration.

11:22AM 14 So defendants fall back and say, well, it was never  
11:22AM 15 published and cite to a DC Circuit case. Thankfully  
11:22AM 16 we're in the Fifth Circuit and in the Fifth Circuit  
11:22AM 17 publication's not required. That very argument was  
11:22AM 18 rejected in a case called *Arlington Oil Mills v. Knebel*,  
11:22AM 19 K-N-E-B-E-L, 543 F.2d 1092 at 1099 to 1100. "The  
11:22AM 20 failure of APA required Federal Register publication is  
11:22AM 21 without consequence to a person having actual knowledge  
11:22AM 22 of the agency's actions" and "accordingly, neither the  
11:22AM 23 department's failure to publish its March 19th  
11:22AM 24 announcement in the Federal Register nor its failure to  
11:22AM 25 publish a basis and purpose statement render the

11:22AM 1 announcement ineffective as to the parties in this  
11:22AM 2 litigation." Here the State had knowledge. The  
11:23AM 3 regulation sent to OMB was published in the Washington  
11:23AM 4 Post. So the fact it didn't make the Federal Register  
11:23AM 5 doesn't mean we didn't have notice. USD0J reopened.  
11:23AM 6 They did serious reconsideration. This is timely.  
11:23AM 7 That's just a plain, easy APA facial challenge.

11:23AM 8 MR. RESAR: Want to step back, Your Honor, and make  
11:23AM 9 it sort of clear what we're talking about here. DOJ  
11:23AM 10 issued its disparate impact regulation in 1966.  
11:23AM 11 Plaintiffs just characterized the claim they're bringing  
11:23AM 12 as a facial challenge to that regulation. There's no  
11:23AM 13 dispute here that there is a six year statute of  
11:23AM 14 limitations for a facial challenge to a regulation. So  
11:23AM 15 the question that plaintiffs pose is whether or not DOJ  
11:23AM 16 sending to the office of management for -- the office  
11:23AM 17 for budgetary management a potential new regulation to  
11:23AM 18 replace the disparate impact regulation at some point in  
11:23AM 19 2021 and then two weeks later withdrawing that e-mail  
11:24AM 20 without ever alerting the public that they were  
11:24AM 21 considering retracting the disparate impact regulation  
11:24AM 22 amounts to a reopening. And if you look at the caselaw  
11:24AM 23 that governs the reopening doctrine, the answer is clear  
11:24AM 24 no and that's because the reopening doctrine, to the  
11:24AM 25 extent it even exists -- and I would direct Your Honor,

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

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

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

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

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

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

11:25AM 1 regulations you'd have a proposed regulation that would  
11:25AM 2 then be published for comment and then a final  
11:25AM 3 regulation that may make some tweaks around the edges.  
11:25AM 4 Once it's published -- as my colleagues have  
11:25AM 5 reticulated, once it's published as proposed regulation  
11:25AM 6 following the reopening caselaw, that would be enough.  
11:25AM 7 Okay. Here, because USDOJ said *Sandoval* effectively  
11:26AM 8 undermines this regulation, they weren't opening up for  
11:26AM 9 comment, they were going for a direct final rule where  
11:26AM 10 you say the law has changed, we don't need comment on  
11:26AM 11 this thing, direct the publication. The  
11:26AM 12 decision-maker -- and that's the way the Fifth Circuit  
11:26AM 13 looks at it. The decision-maker has made up his mind.  
11:26AM 14 They sent the final rule to OMB. That's just the  
11:26AM 15 process. And then I believe OMB review is completed and  
11:26AM 16 they just never publish it. Well, the Fifth Circuit  
11:26AM 17 does not require publication. The decision-maker, here  
11:26AM 18 the U.S. Department of Justice, the Attorney General,  
11:26AM 19 decided. That's reopening. That has to be in the case  
11:26AM 20 of a direct final rule or --

11:26AM 21 THE COURT: Even if they withdrew it.

11:26AM 22 MR. ST. JOHN: Even if they withdrew it because the  
11:26AM 23 decision was made and the regulated party, here  
11:26AM 24 Louisiana, was aware of that. It was in the Washington  
11:26AM 25 Post. They withdrew it, but it was in the Washington



11:27AM 1 Post.

11:27AM 2 MR. RESAR: Respectfully, Your Honor, the decision  
11:27AM 3 was not made because the rule had never been published.  
11:27AM 4 It had never been formally announced that there was a  
11:27AM 5 new rule coming into effect. It was an internal --  
11:27AM 6 entirely internal to the DOJ process that somehow it got  
11:27AM 7 leaked. And I acknowledge that there weren't  
11:27AM 8 publications, but DOJ did not publically announce to the  
11:27AM 9 world that it was considering withdrawing this rule or  
11:27AM 10 that it had reached a decision as to whether or not to  
11:27AM 11 withdraw this rule. Instead, within a two-week spell  
11:27AM 12 DOJ sent a proposed new rule to OMB for review and then  
11:27AM 13 two weeks later said we've changed our mind, we're  
11:27AM 14 withdrawing it, the old regulation will remain in  
11:27AM 15 effect. And that is simply not enough to satisfy the  
11:27AM 16 reopening doctrine because DOJ never held out to the  
11:27AM 17 public that it was reconsidering the existing rule.

11:27AM 18 MR. ST. JOHN: I think we've now fully teed up the  
11:27AM 19 issue on that. You've got to decide is the reopening  
11:27AM 20 rule viable and, two, was this a reopening. I think  
11:28AM 21 those are the issues.

11:28AM 22 MR. RESAR: Yes. I just want to add one thing that  
11:28AM 23 I neglected which is that OMB never actually completed  
11:28AM 24 its review of the rule. So that characterization is not  
11:28AM 25 correct.

11:28AM 1 THE COURT: I gotcha. I understand.

11:28AM 2 MR. ST. JOHN: Judge, I've been up here for a  
11:28AM 3 while.

11:28AM 4 THE COURT: No, that's fine.

11:28AM 5 MR. ST. JOHN: And we've covered, not in the order  
11:28AM 6 I'd planned to cover it, but we've covered --

11:28AM 7 THE COURT: Never goes that way.

11:28AM 8 MR. ST. JOHN: Never goes that way.

11:28AM 9 THE COURT: If you've argued to the Fifth Circuit,  
11:28AM 10 you know it never goes that way.

11:28AM 11 MR. ST. JOHN: I have, Judge, and I have been  
11:28AM 12 surprised.

11:28AM 13 I keep coming back to this, that -- the fact that  
11:28AM 14 we're having this discussion this way. Justice Scalia I  
11:28AM 15 think was pretty accurate when he said our opinions have  
11:28AM 16 not eliminated the uncertainty or resolved the  
11:28AM 17 uncertainty in what Section 601 says or what Title VI  
11:29AM 18 says. That was in *Sandoval*. And the fact that we just  
11:29AM 19 had this back and forth, the State wins on spending  
11:29AM 20 clause and major questions because it's just not clear.  
11:29AM 21 That's the easy out for you, Judge. You don't -- we  
11:29AM 22 think that 602 clearly does not authorize disparate  
11:29AM 23 impact, but what is abundantly clear is that it does not  
11:29AM 24 clearly authorize it. And so the State then wins under  
11:29AM 25 spending clause and major questions.

11:29AM 1 If the Court has no other questions, I'll hand the  
11:29AM 2 podium to my colleague and she can be the target for a  
11:29AM 3 few minutes.

11:29AM 4 MS. PHILO: I've gotten quite comfortable here.

11:29AM 5 THE COURT: You can stay there if you prefer.

11:29AM 6 MS. PHILO: So I wanted to -- I rose to address the  
11:29AM 7 major questions doctrine and the spending clause. I  
11:30AM 8 don't want to glide over their other jurisdictional  
11:30AM 9 issues that my colleague is well prepared to address but  
11:30AM 10 just to touch on these for right now. I'll start with  
11:30AM 11 the major questions doctrine because I think that's  
11:30AM 12 particularly easy. I think the major questions doctrine  
11:30AM 13 doesn't apply here. The major questions doctrine is  
11:30AM 14 concerned with new assertions of agency power that are  
11:30AM 15 of great political or economic significance. This is  
11:30AM 16 not a new assertion of power. As we talked about when I  
11:30AM 17 first rose, this has been on the books since  
11:30AM 18 basically -- the model regulation was promulgated almost  
11:30AM 19 contemporaneously with the statute. EPA promulgated its  
11:30AM 20 regulation almost at its inception in 1973. So this is  
11:30AM 21 simply not a case where you're concerned like in --

11:30AM 22 THE COURT: *West Virginia*.

11:30AM 23 MS. PHILO: -- *West Virginia* or *Alabama Association*  
11:30AM 24 *of Realtors* or *OSHA v. NFIB*. Those are all new  
11:30AM 25 assertions looking to these ancillary provisions of the

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

9 MR. ST. JOHN: Judge, we would disagree. This is  
10 not a -- the fact that EPA may have tiptoed around this  
11 over four decades and then suddenly finds in the word  
12 effectuate the power for EPA to regulate the State's  
13 Medicaid program, talk about a fundamental  
14 transformation of society. That is exactly the kind of  
15 newfound power or new analysis of a provision that the  
16 major questions doctrine targets. Doesn't have to be,  
17 oh, we've never done this before, we're going to do it  
18 now. It's, okay, they tiptoed around but this is a  
19 radical, radical new writing and understanding of both  
20 602 and EPA's own disparate impact regulations.

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

11:32AM 1 *West Virginia v. EPA*, and that's just a fundamental  
11:32AM 2 disagreement.

11:32AM 3 Turning to the spending clause, unless my  
11:32AM 4 colleague -- turning to the spending clause, Congress  
11:32AM 5 can put conditions on the receipt of federal funds  
11:32AM 6 subject to certain limitations. *Dole* sets out five of  
11:32AM 7 those limitations. The one at issue here is that the  
11:32AM 8 conditions attached to federal funds must be  
11:32AM 9 unambiguous. And what that's really concerned with in  
11:32AM 10 this quasi-contract analysis when you're talking about  
11:32AM 11 did the recipient accept this contract knowingly and  
11:32AM 12 voluntarily, it's concerned about knowing aspect. So  
11:33AM 13 the issue is notice, and the Supreme Court has made  
11:33AM 14 clear when you do this analysis you put yourself in the  
11:33AM 15 shoes of the state official deciding whether or not to  
11:33AM 16 accept funds and would he or she know that there were  
11:33AM 17 strings attached to those funds.

11:33AM 18 You don't need to do that analysis here because the  
11:33AM 19 Supreme Court has already suggested approval of  
11:33AM 20 substantively identical disparate impact regulations.  
11:33AM 21 In *Lau* the Supreme Court said whatever the limits of the  
11:33AM 22 spending clause are, they have not been reached here.  
11:33AM 23 That was cited approvingly in *Dole*, that fundamental  
11:33AM 24 spending clause case for the proposition that Congress  
11:33AM 25 can require funding recipients to comply with statutory

11:33AM 1 or administrative directives.

11:33AM 2 But if you do do the analysis, then I would say  
11:33AM 3 there are three critical ways that plaintiff had notice  
11:33AM 4 here. First, Section 601 is unambiguous in that it  
11:33AM 5 prohibits discrimination. Second, Section 602 is  
11:33AM 6 unambiguous it directly authorizes the agencies to  
11:33AM 7 promulgate regulations with which the recipients must  
11:34AM 8 comply. And those regulations which are themselves  
11:34AM 9 unambiguous preexisted the receipt of federal funds.  
11:34AM 10 And we know that the plaintiff had notice because they  
11:34AM 11 signed assurances about complying with the statute and  
11:34AM 12 regulations for decades. And if you look at *Gruver*,  
11:34AM 13 although that's a coercion case, the plaintiff's kind of  
11:34AM 14 continual acceptance of funds has to come in somewhere  
11:34AM 15 in the contract life analysis and we would argue that it  
11:34AM 16 shows they indeed had notice.

11:34AM 17 Now, my colleague is about to stand up and say that  
11:34AM 18 the disparate impact regulations are contained in the  
11:34AM 19 regulations and that that doesn't satisfy the spending  
11:34AM 20 clause. I would respectfully point Your Honor to  
11:34AM 21 *Bennett*, the Supreme Court case which makes clear that  
11:34AM 22 recipients must comply with the legal requirements in  
11:34AM 23 place when the grants were made. It doesn't decide  
11:34AM 24 about regulations that might come later, but  
11:34AM 25 regulations -- pre-existing regulations are part of that

11:34AM 1 notice analysis.

11:34AM 2 And *Texas Education Agency* does not hold  
11:35AM 3 differently. I would make two points to distinguish  
11:35AM 4 *TEA, Texas Education Agency*. One is that it's a  
11:35AM 5 sovereign immunity case. Although the analysis for the  
11:35AM 6 waiver of sovereign immunity and the unambiguous  
11:35AM 7 requirements for spending clause conditions overlap,  
11:35AM 8 they're not identical. There's a particular specificity  
11:35AM 9 required for the waiver of sovereign immunity. But  
11:35AM 10 regardless, the Fifth Circuit makes clear that  
11:35AM 11 regulations can be one of two flavors. One is pursuant  
11:35AM 12 to a direct statutory command and the other is  
11:35AM 13 clarifying an ambiguous statute, and *Texas Education*  
11:35AM 14 *Agency* dealt with a regulation in that second bucket  
11:35AM 15 clarifying an ambiguous statute. We're dealing with  
11:35AM 16 something in the first bucket pursuant to Congress's  
11:35AM 17 command because these regulations were promulgated  
11:35AM 18 pursuant to that direct command to effectuate the  
11:35AM 19 antidiscrimination mandate in Section 602. So just with  
11:35AM 20 all of that, with those three provisions in the  
11:35AM 21 pre-existing regulations, plaintiff had notice and that  
11:36AM 22 state official when deciding whether to accept funds had  
11:36AM 23 notice of those disparate impact obligations.

11:36AM 24 MR. ST. JOHN: Turning to my colleague's reliance  
11:36AM 25 on *Lau*. I saw this in a brief. I'm a little bit

11:36AM 1 shocked by it. The abrogation of *Lau* was recognized by  
11:36AM 2 the Fifth Circuit, *Castaneda v. Pickard*, 648 F.2d 989,  
11:36AM 3 1007, in 1981, recognized -- the abrogation was further  
11:36AM 4 recognized by *Sandoval* by the Supreme Court, 532 U.S.  
11:36AM 5 275, and *Rollerson*, again the Fifth Circuit in 2021,  
11:36AM 6 6 F.4th 633. *Lau* was a 601 case where 6 -- before 601  
11:36AM 7 was limited to intentional discrimination, *Lau* was fully  
11:36AM 8 abrogated. And this has been a continuous concern.  
11:36AM 9 When we look through EPA's guidance there's *Lau, Lau,*  
11:37AM 10 *Lau, Lau, Lau*. We've got four decades of cases,  
11:37AM 11 subsequent Supreme Court and Fifth Circuit caselaw,  
11:37AM 12 including that *Lau* was abrogated five years after it was  
11:37AM 13 entered.

11:37AM 14 Two, my colleague is correct. *Texas Education*  
11:37AM 15 *Agency*. The statute cannot narrowly specify a  
11:37AM 16 condition. It must specify the condition, the  
11:37AM 17 condition. That is Fifth Circuit law that's simply  
11:37AM 18 controlling, and the Fifth Circuit -- my colleague tries  
11:37AM 19 to spin *Texas Education* -- tries to spin *Texas Education*  
11:37AM 20 *Agency* a little bit, but part of its holding was  
11:37AM 21 constitutional. The spending power belongs to Congress.  
11:37AM 22 Congress cannot delegate that power to the Executive.  
11:37AM 23 Executive power cannot extend to adding conditions on  
11:38AM 24 spending. That would make the delegation itself  
11:38AM 25 unconstitutional. There's a plain separation of powers



11:38AM 1 problem there, and *TEA* relied on that. You see the  
11:38AM 2 Supreme Court in *Cummings* and *Arlington Central*, they  
11:38AM 3 too focussed on the delegation has to be -- or the  
11:38AM 4 condition has to be in the statute itself. It can't  
11:38AM 5 merely be a condition.

11:38AM 6 My colleague is essentially arguing, well, you, the  
11:38AM 7 State, Louisiana, had notice there was a condition. No,  
11:38AM 8 that's not correct. The condition. And I see nothing  
11:38AM 9 in 602 about cumulative impact. I see nothing about  
11:38AM 10 disparate impact. I see effectuate 601. And to the  
11:38AM 11 degree my colleague is reading 602 to authorize spending  
11:39AM 12 clause restrictions beyond the scope of 601, that calls  
11:39AM 13 the statute itself into question, the constitutionality  
11:39AM 14 of the statute under *Texas Education Agency*. That's  
11:39AM 15 pretty plain. So how do you avoid that doctrine of  
11:39AM 16 constitutional avoidance? 602 is limited to regulations  
11:39AM 17 effectuating 601 which means intentional discrimination.

11:39AM 18 MS. PHILO: So I have a couple comments, as you  
11:39AM 19 might expect. So the first is that my colleague  
11:39AM 20 characterized *Lau* as fully abrogated. I want to  
11:39AM 21 respectfully push back on that idea. I agree that  
11:39AM 22 you'll see a red flag when you look up that case. It  
11:39AM 23 has been abrogated to the extent that it relied on  
11:39AM 24 Section 601 for disparate impact and two later cases  
11:39AM 25 overruled that part of the holding because Section 601

11:39AM 1 was later interpreted to only directly reach intentional  
11:39AM 2 discrimination. But the discussion of the spending  
11:40AM 3 clause has been subsequently cited by *Dole*, that pivotal  
11:40AM 4 case which made clear that you can put conditions on  
11:40AM 5 federal statutes on the receipt of federal funds to  
11:40AM 6 comply with statutory or administrative directives  
11:40AM 7 citing *Lau* in a string cite. And that also comports  
11:40AM 8 with *Bennett* which my colleague fails to address, the  
11:40AM 9 Supreme Court case that made clear that recipients of  
11:40AM 10 federal funds have to comply with the legal requirements  
11:40AM 11 in place when the grants were made and that includes,  
11:40AM 12 according to the Supreme Court, pre-existing  
11:40AM 13 regulations.

11:40AM 14 Just checking my notes to make sure I don't miss  
11:40AM 15 anything. And I would just -- on the *Cummings* point,  
11:40AM 16 both *Arlington Central* and *Cummings* again stress this  
11:40AM 17 idea of notice which has been kind of the core of did  
11:40AM 18 they have notice, and I explained how they did. And  
11:40AM 19 *Cummings* looks beyond the statute itself to basic  
11:40AM 20 background principles of contract law to ask whether or  
11:41AM 21 not the recipients would have had notice.

11:41AM 22 MR. ST. JOHN: What I hear from my colleague is  
11:41AM 23 frankly shocking, that the Executive can issue a nakedly  
11:41AM 24 unlawful spending clause regulation. Oh, you had notice  
11:41AM 25 of it, you can't attack illegality. We're attacking the

11:41AM 1 illegality here, Judge. That's a flavor of *MedImmune*  
11:41AM 2 where we can say, look, we're not going to breach the  
11:41AM 3 contract just yet because the stakes are too high,  
11:41AM 4 although my colleague has conceded in their briefs that  
11:41AM 5 Louisiana is -- or they've argued that we are breaching  
11:41AM 6 the contract, but we don't have to breach the contract  
11:41AM 7 to have standing. We can attack the underlying  
11:41AM 8 illegality. The contract is a license for a patent. I  
11:41AM 9 can attack the validity of the patent. That's exactly  
11:42AM 10 what the State is doing here.

11:42AM 11 MS. PHILO: I'm not making a standing argument. My  
11:42AM 12 colleague was happy to rise, I'm sure, and make that.

11:42AM 13 MR. ST. JOHN: It's the condition point, though. I  
11:42AM 14 can still attack the underlying condition. It's a naked  
11:42AM 15 illegality. That's the State's position.

11:42AM 16 MS. PHILO: And the question is was the State on  
11:42AM 17 notice of that condition, was it unambiguous. And here  
11:42AM 18 again, I don't want to gloss over the fact that  
11:42AM 19 Section 602 unambiguously tells recipients that the  
11:42AM 20 agencies not only could promulgate regulations but that  
11:42AM 21 they would be promulgating regulations with which they  
11:42AM 22 must comply. And those regulations, which no one has  
11:42AM 23 contested that they are unambiguous, pre-existed the  
11:42AM 24 receipt of funds as the State signed assurances to for  
11:42AM 25 decades.

11:42AM 1 *Texas Education Agency* is not a spending clause  
11:42AM 2 case. It is about that waiver of sovereign immunity and  
11:42AM 3 again just distinguishable.

11:42AM 4 THE COURT: Well, what about the intentional part  
11:43AM 5 found in 601? I mean, you're not -- from earlier  
11:43AM 6 argument, you weren't -- it sounds to me like the EPA's  
11:43AM 7 not demanding investigations based on intentional  
11:43AM 8 discrimination, but that's what that statute says so  
11:43AM 9 that is a little ambiguous to me on what you're asking  
11:43AM 10 the State to do. Did they have notice. They had notice  
11:43AM 11 of maybe the intentional part but what about the  
11:43AM 12 non-intentional part.

11:43AM 13 MS. PHILO: So Section 601 doesn't explicitly use  
11:43AM 14 the words intentional discrimination. That's the gloss  
11:43AM 15 that the courts have put on it.

11:43AM 16 THE COURT: That's right.

11:43AM 17 MS. PHILO: And then --

11:43AM 18 THE COURT: So how did the State have notice of  
11:43AM 19 that, of the non-intentional disparate analysis they'd  
11:43AM 20 have to do? How would they have notice of that?

11:43AM 21 MS. PHILO: Based on the unambiguous delegation in  
11:43AM 22 Section 602 that made clear that the recipients would  
11:44AM 23 have to comply with those regulations, and those  
11:44AM 24 regulations were in place when they accepted the funds  
11:44AM 25 and signed assurances that they would comply with them.

11:44AM 1 Those regulations made clear that the disparate -- the  
11:44AM 2 prohibition on disparate impact would apply to the  
11:44AM 3 receipt of federal funds.

11:44AM 4 MR. ST. JOHN: Clarity cannot come from the  
11:44AM 5 regulations. The condition must be in the statute.  
11:44AM 6 That's *Texas Education Agency*. And my colleague is  
11:44AM 7 about to say we get that the agency is entitled to  
11:44AM 8 deference. *Texas Education Agency* also makes clear that  
11:44AM 9 by asserting deference, which they did in the brief,  
11:44AM 10 that's a concession that the statute is insufficiently  
11:44AM 11 clear because you only get deference if the statute is  
11:44AM 12 ambiguous. We're back in the State wins on spending  
11:44AM 13 clause.

11:44AM 14 THE COURT: It's an interesting issue.

11:44AM 15 MS. PHILO: I think we disagree on whether or not  
11:44AM 16 the regulation can provide that clarity and whether or  
11:44AM 17 not *TEA* is controlling. It's just distinguishable both  
11:45AM 18 on the sovereign immunity grounds and the fact that this  
11:45AM 19 is not clarifying an ambiguous statute. That delegation  
11:45AM 20 is clear in Section 602, and those regulations  
11:45AM 21 pre-existed the acceptance of federal funds.

11:45AM 22 THE COURT: Anything else on that? I think we've  
11:45AM 23 covered the spending clause.

11:45AM 24 MS. PHILO: Not on the spending clause. I believe  
11:45AM 25 my colleague has plenty to say on jurisdiction. And the

11:45AM 1 only other thing that I had planned to address was  
11:45AM 2 proposed relief, but I imagine that can wait for a  
11:45AM 3 minute.

11:45AM 4 THE COURT: Sure.

11:45AM 5 MR. RESAR: Thank you, Your Honor. I would just  
11:45AM 6 briefly like to address, I think, the main  
11:45AM 7 jurisdictional/threshold issues with each bucket of  
11:45AM 8 claim and hopefully this will -- what I endeavor to do  
11:45AM 9 at least is give you a way to resolve this action  
11:45AM 10 without having to get into these very interesting but  
11:45AM 11 thorny constitutional issues.

11:45AM 12 Now, there are three buckets of claims at issue in  
11:46AM 13 this action. First are the claims challenging EPA and  
11:46AM 14 DOJ's disparate impact regulations which we've been  
11:46AM 15 discussing today for most of the hearing. These can  
11:46AM 16 most simply be dismissed as untimely facial challenges  
11:46AM 17 to regulations which were promulgated over 50 years ago.  
11:46AM 18 We discussed earlier the reopening doctrine. I want to  
11:46AM 19 be crystal clear that plaintiffs have not claimed the  
11:46AM 20 reopening doctrine applies to the challenges to EPA's  
11:46AM 21 regulations so at most that could resuscitate the claim  
11:46AM 22 to DOJ's regulations, although I think I explained  
11:46AM 23 earlier why I don't believe the reopening doctrine  
11:46AM 24 actually applies. And to the extent there is some  
11:46AM 25 residual as-applied challenges, Louisiana has selected

11:46AM 1 the wrong forum at the wrong time to bring those  
11:46AM 2 challenges.

11:46AM 3 The second bucket of claims are the non-delegation  
11:46AM 4 claims which challenge what really amounts to an  
11:47AM 5 insignificant procedural mechanism by which EPA can  
11:47AM 6 extend the 180-day deadline it has to conduct a Title VI  
11:47AM 7 investigation. These claims can most simply be  
11:47AM 8 dismissed for lack of standing because Louisiana has not  
11:47AM 9 and will not incur any injury as a result of this  
11:47AM 10 180-day deadline. In fact, Louisiana has benefitted  
11:47AM 11 immensely from the existence of this 180-day deadline  
11:47AM 12 because it was one of the reasons why the complaints  
11:47AM 13 were closed when they were.

11:47AM 14 And then third bucket of claims is actually just  
11:47AM 15 one claim and it's the extra regulatory requirement  
11:47AM 16 claim which primarily challenges negotiating positions  
11:47AM 17 that EPA took during the informal resolution process.  
11:47AM 18 Again, this can most simply be dismissed for lack of  
11:47AM 19 standing. Merely hearing a negotiating position in an  
11:47AM 20 informal resolution process is not itself an injury, and  
11:47AM 21 that's clear from the fact that EPA never actually  
11:48AM 22 imposed any of its negotiating positions on the State of  
11:48AM 23 Louisiana. Louisiana walked away, said no, we're not  
11:48AM 24 going to accept that, and then no agreement was reached.  
11:48AM 25 So there's simply no injury to support this Court

11:48AM 1 reaching the question of whether the extra regulatory  
11:48AM 2 requirements which, in fact, are not requirements are  
11:48AM 3 legal.

11:48AM 4 I want to go a little bit into more detail on the  
11:48AM 5 timeliness challenge because, as I've tried to emphasize  
11:48AM 6 throughout, these are regulations that are over 50 years  
11:48AM 7 old. There is a six year statute of limitations under  
11:48AM 8 the EPA for challenges to -- for facial challenges to  
11:48AM 9 regulations. I don't think there's any dispute that  
11:48AM 10 what plaintiff is primarily bringing here is a facial  
11:48AM 11 challenge to the EPA and DOJ's regulations. They say as  
11:48AM 12 much at Footnote 7 on Page 16 of their opposition brief.  
11:48AM 13 They've said repeatedly today that it's a facial  
11:48AM 14 challenge. And the prayer for relief at Page 55 in  
11:48AM 15 their complaint makes clear that what they're asking for  
11:49AM 16 is the disparate impact regulations to be held unlawful  
11:49AM 17 as a whole, and under clear Fifth Circuit precedent in  
11:49AM 18 *Turtle Island Foods* that means this is a facial  
11:49AM 19 challenge. And the problem for Louisiana with bringing  
11:49AM 20 a facial challenge is that the statute of limitations  
11:49AM 21 ran in 1979 for -- or expired in 1979 for EPA's  
11:49AM 22 regulations because that's when the -- six years after  
11:49AM 23 the disparate impact regulations were promulgated by the  
11:49AM 24 EPA in 1973. And DOJ's were promulgated in 1966. Six  
11:49AM 25 years after that is still about half a century ago. So



11:49AM 1 they're simply too late.

11:49AM 2 Louisiana makes three arguments as to EPA's  
11:49AM 3 regulations for why they're not too late. None of those  
11:49AM 4 are supported by caselaw or should be availing here.  
11:49AM 5 First they say there's a credible threat of future  
11:49AM 6 enforcement which somehow makes their APA claims timely.  
11:49AM 7 There's no caselaw to support this proposition. If  
11:50AM 8 there was a future enforcement action, then Louisiana  
11:50AM 9 sure could bring an as-applied challenge; but they have  
11:50AM 10 to wait for that to actually happen. They don't get to  
11:50AM 11 reset the statute of limitations merely by claiming  
11:50AM 12 there's the possibility of a future enforcement action.

11:50AM 13 Second, Louisiana argues every time a new grant is  
11:50AM 14 issued the statute of limitations restarts. That's not  
11:50AM 15 correct if the grants do not change or extend the period  
11:50AM 16 of time in which those obligations are legally binding.  
11:50AM 17 And Louisiana, who bears the burden of establishing  
11:50AM 18 jurisdiction, does not identify a single existing grant  
11:50AM 19 in this case that extended the already existing Title VI  
11:50AM 20 obligations further into the future than already existed  
11:50AM 21 and nor could they.

11:50AM 22 We in our reply brief identify funding for real  
11:50AM 23 property construction grants. Those are detailed in  
11:51AM 24 Exhibits G and F of that. And funds accepted for real  
11:51AM 25 property construction grants require compliance with

1 Title VI for as long as the real property is used for  
2 the funded purpose. That's laid out in 40 CFR  
3 Section 70.80(a)(2). And Louisiana has not disputed  
4 that and, therefore, they are bound by Title VI  
5 obligations for accepting those real property grants  
6 indefinitely and, therefore, there's no new extension of  
7 the time period in which they're bound by Title VI  
8 obligations and they do not have a timely claim.

9 Lastly, they argue that the current presidential  
10 administration has somehow prioritized disparate impact  
11 regulations in a way that previous administrations did  
12 not. This in and of itself is insufficient to restart  
13 the statute of limitations. Effectively, the result of  
14 this argument would be every time a new political party  
15 comes into power you have a complete restart on all  
16 statute of limitations for all regulations in the Code  
17 of Federal Register. That's simply not how the law  
18 works. And the sole case they cite in support of that  
19 proposition is *Mendoza v. Perez*. In that case there was  
20 a guidance letter that changed substantive obligations,  
21 and here there has been no change in substantive  
22 obligations because the disparate impact regulations  
23 have existed for 50 years.

24 Unless Your Honor has further questions on the  
25 threshold challenges to the disparate impact claims, I

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

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

11:54AM 1 regulations are causing the State of Louisiana any harm  
11:54AM 2 or that those regulations will cause the State of  
11:54AM 3 Louisiana any harm so there is simply no standing to  
11:54AM 4 assert those claims.

11:54AM 5 Turning to the non-delegation claims which I think  
11:54AM 6 can also be disposed of for lack of standing, most  
11:54AM 7 simply, plaintiffs haven't established any sort of  
11:54AM 8 injury. As I said earlier, they benefitted from the  
11:54AM 9 existence of the 180-day deadline. That deadline  
11:54AM 10 contributed to the closure of the complaints, and that  
11:54AM 11 was to Louisiana's benefit. There were no adverse  
11:54AM 12 findings. There were no obligations imposed through  
11:54AM 13 those investigation processes. So they basically  
11:54AM 14 haven't suffered the injury necessary to bring the  
11:54AM 15 non-delegation claims. Unless Your Honor has questions  
11:54AM 16 on that point, I think we can just rest on our briefs  
11:54AM 17 which have laid it out clearly.

11:55AM 18 THE COURT: I don't have any questions. Thank you.  
11:55AM 19 Quick response.

11:55AM 20 MR. ST. JOHN: Starting at the back and working up,  
11:55AM 21 *Axon Enterprises -- or Axon and Free Enterprise Board*  
11:55AM 22 make clear that being subject to an unlawful decision-  
11:55AM 23 maker is a here and now injury. There is no dispute  
11:55AM 24 that Louisiana's ability to continue its negotiations  
11:55AM 25 with EPA was subject to a veto by the private activists.

11:55AM 1 They were in an injunction to give the activists that  
11:55AM 2 veto. Louisiana was injured when, worse than a private  
11:55AM 3 individual like an *Axon* or *Free Enterprise*, a state, a  
11:55AM 4 sovereign state in its relations with the Federal  
11:55AM 5 Government was subject to a veto by private individuals.

11:55AM 6 Two, regarding Louisiana Department of Justice, we  
11:55AM 7 take money. I agree the State does not want to engage  
11:56AM 8 in a disparate impact analysis on law enforcement. It  
11:56AM 9 kind of highlights the practical import. I'm sure Your  
11:56AM 10 Honor's aware the new Governor and the new Attorney  
11:56AM 11 General -- the Governor is deploying the state police to  
11:56AM 12 New Orleans. The Attorney General will prosecute cases  
11:56AM 13 involving state police arrests. What's the disparate  
11:56AM 14 impact analysis? New Orleans is a disproportionately  
11:56AM 15 minority community. Is there an adverse disparate  
11:56AM 16 impact because we are deploying more law enforcement  
11:56AM 17 resources that are going to result in more arrests? Is  
11:56AM 18 that the adverse disparate impact? Are we damned if we  
11:56AM 19 don't deploy those law enforcement resources and leave  
11:56AM 20 higher crime rates in a more minority community? We're  
11:56AM 21 damned if we do, damned if we don't. And the State is  
11:56AM 22 entitled to clarity on that. Louisiana Department of  
11:56AM 23 Justice does not look at race. That is  
11:57AM 24 Mr. Sinuefield's declaration. We do not want to look  
11:57AM 25 at race. We do not make law enforcement decisions on

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11:57AM 1 the basis of race. We do not want to make law  
11:57AM 2 enforcement decisions on the basis of race. It should  
11:57AM 3 have no role whatsoever. But best practices, best  
11:57AM 4 practices, that gun to the head, is that the Louisiana  
11:57AM 5 Department of Justice and Louisiana State Police need to  
11:57AM 6 do a disparate impact analysis. I don't know even know  
11:57AM 7 which way it comes out because this disparate impact  
11:57AM 8 thing depends on what you consider adverse impact.

11:57AM 9 THE COURT: You rise to comment on that.

11:57AM 10 MR. RESAR: I did, Your Honor. I guess just  
11:57AM 11 responding briefly to the most recent point, the EPA's  
11:57AM 12 best practices for conducting disparate impact analysis  
11:57AM 13 are not binding on -- they're not the same as DOJ's best  
11:57AM 14 practices. Plaintiffs haven't identified anything in  
11:57AM 15 any document from DOJ sort of compelling this type of  
11:57AM 16 analysis.

11:57AM 17 MR. ST. JOHN: Not binding on Medicaid either,  
11:58AM 18 Judge, but it turns out somebody somewhere accepted some  
11:58AM 19 money from EPA so now EPA is claiming the right to  
11:58AM 20 regulate Medicaid. Now then, he may have a point that  
11:58AM 21 Louisiana DOJ hasn't accepted that money. I don't know.

11:58AM 22 MR. RESAR: My response to him not knowing, Your  
11:58AM 23 Honor, is that at the summary judgment stage it is  
11:58AM 24 plaintiffs' burden to adduce sufficient evidence of  
11:58AM 25 standing. It is not enough for him to stand up here and

11:58AM 1 say I don't know, we could be subject to DOJ's disparate  
11:58AM 2 impact regulations. They have to identify specific  
11:58AM 3 evidence. Pleadings are no longer enough with a summary  
11:58AM 4 judgment case to show --

11:58AM 5 MR. ST. JOHN: This is a game, Judge. This is a  
11:58AM 6 game. This is a game. I can't say I'm thrilled with  
11:58AM 7 it. We're playing musical agencies here. The  
11:58AM 8 Department of Justice identify -- Louisiana Department  
11:58AM 9 of Justice is taking money from the United States  
11:58AM 10 Department of Justice. Louisiana Department of Justice  
11:58AM 11 challenged that regulation. We have standing to do  
11:58AM 12 that. Then we have this problem of EPA's making where  
11:59AM 13 state agencies can't have a clear who is my regulator if  
11:59AM 14 I take this money. Because I can tell you the then  
11:59AM 15 Secretary of LDH, Mr. Russo, was shocked that his  
11:59AM 16 Medicaid program was being regulated by EPA. And if  
11:59AM 17 that's a negotiating position, I hear the Federal  
11:59AM 18 Government, oh, it was just a negotiating position.  
11:59AM 19 Well, this is an unusual --

11:59AM 20 THE COURT: I do have a concern with EPA meddling  
11:59AM 21 around with Louisiana Department of Health and  
11:59AM 22 Hospitals. What's your comment on that? I mean, that  
11:59AM 23 is some crossover strong-arm tactics.

11:59AM 24 MR. RESAR: The response, Your Honor, is that LDH  
11:59AM 25 accepted EPA funds and when they accept EPA funds they

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

14 MR. ST. JOHN: So we have a concession that EPA's  
15 saying, okay, you accepted a grant to perform a study to  
16 help LDEQ. That was what the trigger was here. It's an  
17 \$80,000 grant for LDH to perform a study to help LDEQ --

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

19 MR. ST. JOHN: We tried.

20 THE COURT: They wouldn't take it?

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

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

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



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

6 MR. ST. JOHN: Mr. Russo was, "Can I give my  
7 \$80,000 back and get out of this?" The answer was no.  
8 But that's the practical problem with this, Judge.  
9 That's the practical problem. Health and Human Services  
10 that actually knows something about Medicaid is  
11 perfectly content with what LDH is doing; but you get an  
12 activist at EPA, she thinks she knows better than Health  
13 and Human Services how Medicaid should operate. There's  
14 a very pragmatic problem with this general article.

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

25 The uncontroverted facts are that Louisiana, LDEQ

12:02PM 1 and LDH, had redline offers on the table that they  
12:02PM 2 responded to EPA with. I think it was LDEQ after EPA  
12:02PM 3 continued cancelling the calls said, hey, still wanting  
12:02PM 4 to negotiate, got an offer on the table, and this case  
12:02PM 5 was dropped like a hot potato.

12:02PM 6 THE COURT: His position is 180 days ran on it so  
12:02PM 7 they were done.

12:02PM 8 MR. ST. JOHN: A very convenient 180 days, but it  
12:03PM 9 doesn't halt or doesn't undermine the problem of  
12:03PM 10 Louisiana being subject to this 180 days. That's  
12:03PM 11 standing. That's Louisiana standing for the as-applied  
12:03PM 12 challenge. It's Louisiana standing for the  
12:03PM 13 nondelegation.

12:03PM 14 The final thing that I kind of want to hit on is  
12:03PM 15 this negotiating positions idea. Title VI and EPA's  
12:03PM 16 regulations are both somewhat unique here. The  
12:03PM 17 reticulated scheme that Title VI sets out talks about  
12:03PM 18 compliance, and there's a statutory obligation for the  
12:03PM 19 agency to seek voluntary compliance before enforcement.  
12:03PM 20 That's in 602. The EPA's regulations say that EPA will  
12:03PM 21 informally resolve complaints whenever possible. That's  
12:04PM 22 a mandatory obligation. The negotiations themselves  
12:04PM 23 were all about EPA's view of what it's regulations  
12:04PM 24 require, what disparate impact requires. But if my  
12:04PM 25 colleagues are coming here now with attorney argument

12:04PM 1 saying, hey, that was just negotiating positions, that's  
12:04PM 2 just another form of illegality by EPA. That's not  
12:04PM 3 seeking voluntary compliance. That's seeking something  
12:04PM 4 more than compliance. That's not resolving informally,  
12:04PM 5 quote, whenever possible when you're asking for the moon  
12:04PM 6 and somebody says not going to give you the moon. And  
12:04PM 7 that's not seeking that voluntary compliance. That's  
12:04PM 8 not resolving informally.

12:04PM 9 THE COURT: In other words, you take it they're  
12:04PM 10 strong-arming --

12:04PM 11 MR. ST. JOHN: They're strong-arming.

12:04PM 12 THE COURT: -- the State.

12:04PM 13 MR. ST. JOHN: They're strong-arming the State, and  
12:04PM 14 that's what the statute forbids and that's what the  
12:04PM 15 regulation forbids. So if that's what they're relying  
12:04PM 16 on, they're just confessing that EPA was operating  
12:04PM 17 illegally in yet another form.

12:05PM 18 MR. RESAR: Your Honor, I don't think that a  
12:05PM 19 negotiating position is strong-arm because Louisiana  
12:05PM 20 obviously doesn't have to accept the negotiation  
12:05PM 21 position. And in this case they, in fact, didn't accept  
12:05PM 22 many of these negotiation positions and they suffered no  
12:05PM 23 adverse consequences. So it's sort of confusing to me  
12:05PM 24 how that the State of Louisiana can claim a strong-arm  
12:05PM 25 on this factual record given the factual record shows

12:05PM 1 they refused to comply and didn't suffer adverse  
12:05PM 2 consequences.

12:05PM 3 MR. ST. JOHN: Mr. Seidemann's declaration  
12:05PM 4 includes, quote, Dorka, it's not just \$80,000, it's  
12:05PM 5 millions and millions and millions of dollars. I think  
12:05PM 6 she said \$200 million. That's a gun to the head, Judge.  
12:05PM 7 That is a gun to the head.

12:05PM 8 THE COURT: The declaration does say that.

12:05PM 9 MR. ST. JOHN: And for a state --

12:05PM 10 THE COURT: Do you disagree? I mean, that's what  
12:05PM 11 it says.

12:05PM 12 MR. RESAR: I understand the declaration says that.

12:05PM 13 THE COURT: That's what it says. That's  
12:05PM 14 strong-arming. You know, I didn't go -- I went to  
12:06PM 15 public school, but that's strong-arming.

12:06PM 16 MR. RESAR: Respectfully, Your Honor, the factual  
12:06PM 17 record just refutes this suggestion that it's  
12:06PM 18 strong-arming because the investigations were closed.  
12:06PM 19 Louisiana never was forced to --

12:06PM 20 THE COURT: So it's a bluff, is what you're telling  
12:06PM 21 me. You were bluffing them at the negotiating table by  
12:06PM 22 telling them that you were going to make them pay back  
12:06PM 23 hundreds of million dollars, which you probably know the  
12:06PM 24 State of Louisiana probably can't pay. So it was a  
12:06PM 25 bluff.

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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

Deidre D. Juranka, CRR  
United States Court Reporter  
Western District of Louisiana