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Testimony of Kathleen B. Boundy, Co-Director, Center for Law and Education in Support of H. 3533 and S. 1688: An Act To Restore Enforcement of Civil Rights

This bill is needed to ensure that persons who are statutorily protected against discrimination by governmental entities on the basis of race, color, national origin or gender as a result of neutral policies or practices engendered through methods or criteria of administration that have an unjustified disparate effect, are not without a remedy. This legislation will enable individuals within these protected classes to bring claims based on state statute that they used to be able to bring in federal court based on the “disparate effect” regulations promulgated under Title VI of the Civil Rights Act of 1964 (and under Title IX as applied to gender). After nearly 40 years, the United State Supreme Court in *Alexander v. Sandoval* (2001) took away this avenue – the right of impacted individuals who are subject to unintentional yet unjustified discrimination to bring their claims for relief into court.

Since the Court’s ruling, persons with such claims challenging policies and practices that are neutral on their face but which have a disparate effect based on race, color, national origin or gender are denied access to the courts and have no recourse but to wait for administrative agencies with enforcement responsibilities (e.g., within the fields of education, the environment, health, mental health, transportation, government benefits) to determine whether their claims of discrimination rise to an agency priority among other pending claims, warrant use of limited government resources, and regardless of the merits, whether they are deemed politically expedient. For example, in the area of education, the Center for Law and Education is concerned about certain public schools criminalizing school behavior by abusively filing delinquency charges to exclude students from school – a practice that has a disparate impact on racial and ethnic minority students; CLE is also concerned by school policies/practices that deny access to instructional classes designed to prepare students for higher order thinking and access to higher education that have a disparate effect on students based on race and ethnicity.

The proposed state legislation represents a modest first step in restoring the rights of affected individuals to bring claims under state law to challenge criteria and methods of administration used by governmental entities that have a disparate impact based on race, color, and national origin. This right is vital because policies and practices that have the effect of discriminating against people may operate under the guise of compliance, without an affirmative intent to injure, but rather by indifference or unexamined assumptions. This legislation is limited, covering only governmental entities, and it allows the courts to reach a state claim based on discriminatory effect and to act accordingly to eradicate unjustifiable discrimination against those individuals falling within the limited, protected classes of race, color, national origin, and gender. The proposed legislation seeks to restore lost civil rights. Although the *Sandoval* ruling was in response to a challenge based only on Title VI, the Court’s ruling that bars access to the court for individuals not alleging intentional discrimination but discrimination based on the disparate effect regulations has been subsequently applied in challenges based on Title IX sex discrimination as well. Unlike Title VI and Title IX, the Court has long interpreted Section 504 of the Rehabilitation Act, the civil rights statute prohibiting discrimination on the basis of disability, to prohibit actions that have a disparate effect on otherwise qualified individuals with a disability. In enacting Section 504, Congress

took note that policies or practices that discriminate against persons with disabilities are often based on benign motives and stereotypes and intentionally treat persons with disabilities different explicitly because of their disability.

It is important to recognize that courts will not find unjustified discrimination in every instance in which a governmental entity uses a criterion or method of administration or a policy or practice that has a disparate effect on a class of individuals based on race, color, national origin or sex. The courts will not operate in a vacuum but can be expected to look at judicial precedent and to federal administrative agencies overseeing Title VI and Title IX for guidance. Therefore, an analysis of disparate effect regulations for determining discrimination under the proposed statute can be expected to entail burden shifting – first with the aggrieved person having to demonstrate, in general through statistical analysis, that the covered entity’s policy or practice has a disparate impact on one or more of the protected based groups. Then based also on the language of this proposed state statute, the governmental entity must be prepared to demonstrate, from the totality of the circumstances, sufficient justification or necessity for the challenged policy or practice so as to justify the disparity imposed on the basis of race, color, national origin or sex. Furthermore, guided by Title VI analysis, if the burden is met by the governmental entity, the plaintiff or enforcing agency should have an opportunity to show that a less discriminatory viable alternative exists.

Finally, I would suggest that an important public policy argument supports this remedial legislation. Even in the best of times, administrative enforcement agencies lack the capacity to fully address all cases of significant, unjustified discriminatory impact, and presumably this will only get worse during this period when administrative enforcement agencies are operating under tight federal and state budgets. This legislation, if enacted, will enable individuals and their advocates to serve much as private attorney generals to help ensure that their governmental programs and activities are not engaged in unjustified discrimination based on race, color, national origin or gender, and to the extent they are, to vindicate the rights of those disparately impacted.

Thank you for your consideration. On behalf of the Center for Law and Education, I ask your support for H. 3533 and S. 1688.