charge to preclude consideration of mitigating circumstances that were not agreed to by all twelve jurors, and because that creates a risk that the death penalty was imposed in spite of "factors which may call for a less severe penalty," we must direct vacatur of Frey's sentence. *See id.* at 376, 108 S.Ct. at 1866. We do so, however, without prejudice to Pennsylvania's right to sentence Frey to life imprisonment or to conduct a new sentencing hearing in a manner not inconsistent with this opinion.[7]

The order of the district court will be reversed with instructions to grant the writ of habeas corpus conditionally, with the proviso that Pennsylvania shall, within 120 days, conduct a new sentencing hearing in a manner not inconsistent with this opinion, or sentence Frey to life imprisonment.

7. As noted *supra*, Frey also contends that habeas corpus relief is appropriate on the grounds that the Pennsylvania Supreme Court's proportionality review was procedurally and substantively inadequate, and therefore in violation of Frey's due process rights. The Commonwealth rejoins that the proportionality review statute, 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii), does not create any cognizable liberty interest, and therefore cannot ground a due process claim. On this point it relies on *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), and its progeny. In general, the *Greenholtz* line of decisions stands for the proposition that state-created liberty interests will be found when the state (1) establishes substantive predicates to guide official decisionmaking, and (2) uses explicit mandatory language in its regulations directing the decisionmaker to reach a particular outcome if the substantive predicates are present. *See Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 461–63, 109 S.Ct. 1904, 1908–10, 104 L.Ed.2d 506 (1989). The Commonwealth maintains that the proportionality review mandated by the Pennsylvania Supreme Court does not meet this standard.

We note, however, that it is uncertain whether the United States Supreme Court would follow this approach, or indeed, how it would rule on this issue. *Accord Ellis v. District of Columbia*, 84 F.3d 1413, 1417 (D.C.Cir.1996) (noting uncertainty regarding Supreme Court doctrine on state-created liberty interests). This is because the recent decision in *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), while not overruling any prior cases, *see id.* at 483 n. 5, 115 S.Ct. at 2300 n. 5, sharply criticizes and effectively abandons the Court's prior methodology (as articulated in cases such as *Greenholtz*) for determining the existence of a statutory liberty interest in the prisoner's rights context. *See Ellis*, 84 F.3d at 1417–18. *Sandin* holds that state-created liberty interests will be limited to "freedom from restraint which ... nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin* at 484, 115 S.Ct. at 2300. While this is undoubtedly a departure from *Greenholtz, Thompson*, et al., it is unclear exactly how radical a shift the Court intended to spur. *See Sandin* at 495–97, 115 S.Ct. at 2305–07 (Breyer, J., dissenting). And it is still uncertain how broadly this circuit and others will construe *Sandin*'s reasoning.

It seems apparent that *Sandin* was concerned quite specifically with the problem of prison administration and the interest of the states in the effective control of inmates. Those interests are not at issue here, and so it may be that *Sandin*'s new approach will not apply. *See Ellis*, 84 F.3d at 1418. Indeed, even the *Greenholtz–Thompson* line of cases did not directly deal with the type of liberty interest alleged here, and it may be that both *Sandin* and *Greenholtz* will prove to be imperfect analogies. At all events, this close and difficult legal problem was not adequately briefed before us, and, since we will vacate Frey's sentence and permit Pennsylvania to conduct a new hearing, and potentially a new proportionality review, we need not reach this issue at this time.

CHESTER RESIDENTS CONCERNED FOR QUALITY LIVING; Zulene Mayfield; Cathy Morse; Ossie Morse; King McDonald; Angela McDonald; Carlene P. Stevenson; Louis S. Morse; Rick Otten; Linda Morse Rothwell; Arthur H. Rothwell, III; Margarita Santiago; Ricardo Santiago*; Daniel Murphy; Janet Weiss; Reagan Otten; Renee D. Dale; Frances Rothwell; Lisa Gilliam,

v.

James M. SEIF, in his capacity as Secretary of the Pennsylvania Department of Environmental Protection; Pennsylvania Department of Environmental Protection; Carol R. Collier, in her capacity as Director of the Southeastern Region of Department of Environmental Protection; Pennsylvania Department of Environmental Protection—Southeast

* (Caption amended per Clerk's 3/10/97 order)

Region Chester Residents Concerned for Quality, Zulene Mayfield, Cathy Morse, King McDonald, Angela McDonald, Carlene P. Stevenson*, Louis S. Morse, Rick Otten, Lisa Morse Rothwell, Arthur H. Rothwell, III, Margarita Santiago, Ricardo Santiago, Daniel Murphy, Janet Weiss, Renee D. Dale, Frances Rothwell, and Lisa Gilliam, Appellants.

No. 97-1125.

United States Court of Appeals, Third Circuit.

Argued Sept. 25, 1997.

Decided Dec. 30, 1997.

Nonprofit residents organization brought action against Pennsylvania Department of Environmental Protection and related defendants, alleging that Department's issuance of permit authorizing operation of waste processing facility in predominantly black community violated civil rights of organization's members. Defendants moved to dismiss. The United States District Court for the Eastern District of Pennsylvania, Stuart Dalzell, J., 944 F.Supp. 413, granted motion. Defendants appealed. The Court of Appeals, Cowen, Circuit Judge, as a matter of apparent first impression, held that private plaintiffs may maintain action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to Title VI of the Civil Rights Act of 1964.

Reversed and remanded.

1. Federal Courts ⇐755

Court of Appeals exercises plenary review over district court's construction of Title VI and its conclusions of law. Civil Rights Act of 1964, § 601 et seq., as amended, 42 U.S.C.A. § 2000d et seq.

2. Civil Rights ⇐126, 200

Private right of action exists under statute barring discrimination under programs or activities receiving federal financial assistance, but this right only reaches instances of intentional discrimination, as opposed to instances of discriminatory effect or disparate impact. Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d.

3. Action ⇐3

Three-prong test for determining when it is appropriate to imply private rights of action to enforce agency regulations requires court to inquire (1) whether agency rule is properly within scope of enabling statute, (2) whether statute under which rule was promulgated properly permits implication of private right of action, and (3) whether implying private right of action will further purpose of enabling statute.

4. Action ⇐3

Factors relevant to determination of whether statute under which agency rule was promulgated properly permits implication of private right of action, as part of three-pronged analysis for determining whether it is appropriate to imply private right of action to enforce agency regulation, include (1) whether there is any indication of legislative intent, explicit or implicit, either to create such remedy or to deny one, and (2) whether it is consistent with underlying purposes of legislative scheme to imply such remedy for plaintiff.

5. Civil Rights ⇐200

Private plaintiffs may maintain action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to Title VI of the Civil Rights Act of 1964; actions having unjustifiable disparate impact could properly be redressed through such regulations, both legislative history and statute's structure supported implication of such remedy, and private right of action would increase enforcement, furthering purposes of Title VI. Civil Rights Act of 1964, § 602, as amended, 42 U.S.C.A. § 2000d-1.

Jerome Balter, Public Interest Law Center of Philadelphia, Philadelphia, PA, Gilbert Paul Carrasco, (Argued), Villanova University, Villanova Law School, Villanova, PA, for Appellants Chester Residents Concerned for Quality Living, Zulene Mayfield; Cathy Morse; Ossie Morse; King McDonald; Angela McDonald; Carlene P. Stevenson; Louis S. Morse; Rick Otten; Linda Morse

Rothwell; Arthur H. Rothwell, III; Margarita Santiago; Daniel Murphy; Janet Weiss; Reagan Otten; Renee D. Dale; Frances Rothwell; Lisa Gilliam; Ricardo Santiago.

Mark L. Freed, (Argued), Commonwealth of Pennsylvania, Department of Environmental Resources, Conshohocken, PA, for Appellees James M. Seif, in his capacity as Secretary of the Pennsylvania Department of Environmental Protection, Pennsylvania Department of Environmental Protection, Carol R. Collier, in her capacity as Director of the Southeastern Region of Department of Environmental Protection, Pennsylvania Department of Environmental Protection, Southeast Region.

Seth M. Galanter, United States Department of Justice, Civil Rights Division, Washington, DC, for Amicus–Appellant, United States of America.

Arthur H. Bryant, Trial Lawyers for Public Justice, Washington, DC, for Amicus–Appellant, Trial Lawyers for Public Justice Southern Poverty Law Center.

Before: COWEN, ROTH and LEWIS, Circuit Judges.

OPINION OF THE COURT

COWEN, Circuit Judge.

This appeal presents the purely legal question of whether a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* The district court determined that plaintiffs-appellants Chester Residents Concerned for Quality Living ("CRCQL") could not maintain an action under a discriminatory effect regulation promulgated by the United States Environmental Protection Agency ("EPA") pursuant to section 602 of Title VI. *See* 944 F.Supp. 413 (E.D.Pa.1996). In so doing, it relied largely on our decision in *Chowdhury v. Reading Hosp. & Med. Ctr.*, 677 F.2d 317 (3d Cir.1982).

We find that *Chowdhury* is not dispositive on this issue. Subsequent jurisprudence, namely *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), and its progeny, provides support for the existence of a private right of action. Moreover, *Chowdhury* did not apply this court's test for determining when it is appropriate to imply a private right of action to enforce regulations. We agree with the overwhelming number of courts of appeals that have indicated, with varying degrees of analysis, that a private right of action exists under section 602 of Title VI and its implementing regulations. We will reverse.

I.

The non-profit corporation CRCQL brought suit against the Pennsylvania Department of Environmental Protection ("PADEP") and James M. Seif, in his capacity as Secretary of PADEP, and other related defendants. CRCQL alleges that PADEP's issuance of a permit to Soil Remediation Services, Inc., to operate a facility in the City of Chester, a predominantly black community, violated the civil rights of CRCQL's members.[1] Specifically, the complaint asserts that PADEP's grant of the permit violated: (1) section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*;[2] (2) the EPA's civil rights regulations, 40 C.F.R. § 7.10 *et seq.*, promulgated pursuant to section 602 of Title VI;[3] and (3) PADEP's assur-

1. The City of Chester is located in Delaware County, Pennsylvania, and has a population of approximately 42,000, of which 65% is black and 32% is white. Delaware County, excluding Chester, has a population of approximately 502,000, of which 6.2% is black and 91% is white. CRCQL alleges that PADEP granted five waste facility permits for sites in the City of Chester since 1987, while only granting two permits for sites in the rest of Delaware County. It further alleges that the Chester facilities have a total permit capacity of 2.1 million tons of waste per year, while the non-Chester facilities have a total permit capacity of only 1,400 tons of waste per year.

2. Section 601 of Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

3. Section 602 of Title VI provides, in part, that:

ance pursuant to the regulations that it would not violate the regulations. This appeal concerns only Count Two.

PADEP has authority to issue or deny applications for permits to operate waste processing facilities. *See* 35 Pa. Stat. Ann. § 6018.101 *et seq.* (West 1993). PADEP receives federal funding from the EPA to operate Pennsylvania's waste programs pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, and other federal sources.

Title VI and the EPA's civil rights regulations implementing Title VI condition PADEP's receipt of federal funding on its assurance that it will comply with Title VI and the regulations. *See* 40 C.F.R. § 7.80(a) (1997).[4] In part, these regulations prohibit recipients of federal funding from using "criteria or methods ... which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex...." 40 C.F.R. § 7.35(b).

The district court dismissed Count One of CRCQL's complaint without prejudice. It found that CRCQL failed to allege intentional discrimination on the part of PADEP, which is a required element for an action brought under section 601 of Title VI.[5] The court, however, granted leave to amend Count One, affording CRCQL the opportunity to allege intentional discrimination. CRCQL subsequently informed the district court that it would not amend the complaint, and the district court entered a final judgment on that count.

The district court dismissed Counts Two and Three with prejudice, finding that no private right of action exists under which CRCQL could enforce the EPA's civil rights regulations.[6] In reaching this determination, it relied on our statements in *Chowdhury,* which concerned whether a private plaintiff must first exhaust administrative remedies under section 602 of Title VI and its implementing regulations before bringing suit directly under section 601. In holding that a plaintiff need not do so, we reasoned in *Chowdhury:*

> Congress explicitly provided for an administrative enforcement mechanism, contained in section 602, by which the funding agency attempts to secure voluntary compliance and, failing that, is empowered to terminate the violator's federal funding. Under the regulations promulgated pursuant to this section, an aggrieved individual may file a complaint with the funding agency but has no role in the investigation or adjudication, if any, of the complaint. The only remedies contemplated by the language of the Act and the Regulations are voluntary compliance and funding termination. There is no provision for a remedy for the victim of the discrimination, such as injunctive relief or damages.

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.
>
> 42 U.S.C. § 2000d–1.

4. This provision requires:

> Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this Part. Applicants must also submit any other information that the OCR determines is necessary for pre-award review. The applicant's acceptance of EPA assistance is an acceptance of the obligation of this assurance and this Part.
>
> 40 C.F.R. § 7.80(a)(1).

5. *See Alexander v. Choate,* 469 U.S. 287, 293, 105 S.Ct. 712, 716, 83 L.Ed.2d 661 (1985) (clarifying that the Court's decision in *Guardians* established that "Title VI itself directly reache[s] only instances of intentional discrimination").

6. CRCQL only appeals the dismissal of Count Two. We have no occasion to consider the issue, raised by Count Three, of whether a private cause of action exists to enforce 40 C.F.R. § 7.80(a), which requires applicants for EPA assistance to "submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of [the regulations]."

677 F.2d at 319–20 (footnotes omitted). The district court took these statements to signify that no private right of action exists under the EPA's civil rights regulations. Although the district court noted that the Supreme Court's decision in *Guardians* and the decisions of other courts of appeals provide support for implying a private right of action, it determined that *Chowdhury* required the opposite conclusion. *See* 944 F.Supp. at 417 n. 5 ("We find that the Supreme Court has never decided the question of whether there is an implied right of action under the regulations and that our Court of Appeals's *Chowdhury* decision is authoritative on us.").

II.

[1] The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over the district court's construction of Title VI and its conclusions of law. *See In re Corestates Trust Fee Litig.*, 39 F.3d 61, 63 (3d Cir.1994); *Unger v. Nat'l Residents Matching Program*, 928 F.2d 1392, 1394 (3d Cir.1991).

III.

[2] It is important to distinguish at the outset between section 601 of Title VI, which was the basis of Count One of CRCQL's complaint, and section 602, which was the basis of Count Two. A private right of action exists under section 601, but this right only reaches instances of intentional discrimination as opposed to instances of discriminatory effect or disparate impact. *See Alexander*, 469 U.S. at 293, 105 S.Ct. at 716 ("Title VI itself directly reache[s] only instances of intentional discrimination.").

In contrast, section 602 merely authorizes agencies that distribute federal funds to promulgate regulations implementing section 601. The EPA promulgated such implementing regulations, which provide in relevant part:

> A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

40 C.F.R. § 7.35(b). This regulation clearly incorporates a discriminatory effect standard. The Supreme Court subsequently held that the promulgation of regulations incorporating this standard is a valid exercise of agency authority. *See Alexander*, 469 U.S. at 292–94, 105 S.Ct. at 716. CRCQL seeks the right to proceed against PADEP under this standard, rather than the more stringent standard required under section 601.

A.

We look first to the applicable Supreme Court jurisprudence. CRCQL contends that the Court's decisions in *Guardians* and *Alexander* establish a private right of action. *Guardians* is a fragmented decision consisting of five separate opinions. It concerned a suit by black and hispanic police officers alleging that certain lay-offs by their department violated Title VI and Title VII of the Civil Rights Act of 1964, as well as the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, and other state and federal laws. The Supreme Court has now made it undeniably clear that *Guardians* stands for at least two propositions: (1) a private right of action exists under section 601 of Title VI that requires plaintiffs to show intentional discrimination; and (2) discriminatory effect regulations promulgated by agencies pursuant to section 602 are valid exercises of their authority under that section. *See Alexander*, 469 U.S. at 292–94, 105 S.Ct. at 716.

i.

Guardians did not explicitly address whether a private right of action exists under discriminatory effect regulations promulgated under section 602. CRCQL contends that *Guardians* nevertheless implicitly validated the existence of a private right of action. CRCQL makes two principal arguments in support of its position: (1) a majority of the Court in *Guardians* determined that private plaintiffs in disparate impact cases can recov-

er injunctive or declarative relief; and (2) if a private right of action did not exist, the Court would have dismissed the plaintiffs' claims under the regulations *sua sponte* for failure to state a claim.

A close reading of the opinions in *Guardians* reveals that five Justices agreed that injunctive and declarative relief are available in discriminatory effect cases. For instance, Justice White stated in his opinion that he would allow private plaintiffs to proceed under section 601 with a discriminatory effect claim and to recover injunctive or declaratory relief. *See* 463 U.S. at 584, 589–93, 103 S.Ct. at 3223, 3226–28 (opinion of White, J.). Justice White did not comment on section 602 and its implementing regulations. We can infer, however, from his willingness to allow a private plaintiff to proceed under section 601 in cases of discriminatory effect that he would have allowed private actions to proceed under section 602 and its implementing regulations, where a discriminatory effect standard applies.[7]

Justice Marshall stated in his dissent that he would allow private plaintiffs in discriminatory effect cases to proceed under section 601 but, unlike Justice White, would allow them to recover injunctive, declaratory, or compensatory relief. *See* 463 U.S. at 615, 103 S.Ct. at 3239–40 (Marshall, J., dissenting). As with Justice White, we can infer that Justice Marshall would have allowed similar actions under section 602 and its implementing regulations.

Justice Stevens, joined by Justices Brennan and Blackmun, determined: (1) private plaintiffs may seek injunctive, declaratory, or compensatory relief under Title VI; (2) intentional discrimination is a necessary element under section 601 of Title VI; and (3) regulations that incorporate a disparate impact standard are valid. *See* 463 U.S. at 641–45, 103 S.Ct. at 3253–55 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). Although Justice Stevens did not distinguish between a private right of action and an administrative remedy, he concluded by saying, "[A]lthough petitioners had to prove that the respondents' actions were motivated by an invidious intent in order to prove a violation of[Title VI], they only had to show that the respondents' actions were producing discriminatory effects in order to prove a violation of [the regulations]." *Id.* at 645, 103 S.Ct. at 3255.

Based on the foregoing, we can find an implicit approval by five Justices of the existence of a private right of action under discriminatory effect regulations implementing section 602 of Title VI. We hesitate, however, to hold that *Guardians* is dispositive of this appeal because the Court did not directly address the issue now before us.

CRCQL's second argument based on *Guardians* also has some merit. CRCQL argues that a private right of action exists because the *Guardians* Court did not dismiss the plaintiffs' action *sua sponte* for failure to state a claim. It is important to remember, however, that no party in *Guardians* raised, by Rule 12(b)(6) of the Federal Rules of Civil Procedure or otherwise, the issue of whether a private right of action exists under section 602 and its implementing regulations. The Court did not have reason to speak directly to the issue, and based on the foregoing discussion, it is clear that it did not. Consequently, we find that CRCQL's second argument also lacks sufficient force to dispose of this appeal.

ii.

The Court offered some clarification of *Guardians* in its unanimous decision in *Alexander*, which involved section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulations. With respect to *Guardians*, the *Alexander* Court stated:

> In *Guardians*, we confronted the question whether Title VI of the Civil Rights Act of 1964, which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged hold-

7. We recognize that this inference requires a supposition, because sections 601 and 602 differ in substantial respects, as the discussion in section III.C.ii., *infra*, indicates.

ing on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

469 U.S. at 292–94, 105 S.Ct. at 716 (citation and footnotes omitted). The most plausible reading of this language is that it confirms that a private right of action exists under section 601 of Title VI and that the promulgation of discriminatory effect regulations is a valid exercise of agency authority under section 602.

CRCQL argues that the Court recognized the existence of a private right of action in the following language from *Alexander*:

> *Guardians*, therefore, does not support petitioners' blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in *Guardians* is relevant to the interpretation of § 504, *Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case.

469 U.S. at 294, 105 S.Ct. at 716.[8] Stitching together CRCQL's arguments and those made by the Trial Lawyers for Public Justice ("TLPJ") and the Southern Poverty Law Center ("SPLC") as amici, the argument in favor of inferring the existence of a private right of action from *Alexander* proceeds as follows. The *Alexander* Court noted in the above-quoted language that, to the extent that Title VI jurisprudence is relevant to the Rehabilitation Act, *Guardians* "suggests" that a party can proceed with a disparate impact claim under section 504's implementing regulations. This suggestion obtains, the argument must go, because *Guardians* itself stands for the proposition that a party can proceed with a disparate impact claim under the regulations implementing section 602. *Alexander*, therefore, implicitly confirms that *Guardians* recognized the existence of a private right of action.

While CRCQL's argument has some merit, we are not persuaded. The Court in *Alexander* spoke in the passive voice—"could make actionable"—and did not indicate whether *Guardians* stood for the proposition that a private plaintiff, or the relevant agency, could proceed under a disparate impact standard. CRCQL's argument requires the inference that because *Alexander* was a suit brought by private plaintiffs, and because *Guardians* was also brought by private plaintiffs, the *Alexander* Court must have been speaking of private plaintiffs when it used the passive voice. This inference from *Guardians* may be justified, but we find no direct authority in *Alexander* that either confirms or denies the existence of a private right of action. Consequently, we decline to hold that a private right of action exists based on *Guardians* and *Alexander* alone.[9]

8. The issue that the *Alexander* Court was addressing when it made these statements was whether discriminatory intent is required to establish a violation of section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and its implementing regulations. The Court ultimately determined that some, but not all, disparate impact showings constitute a prima facie case under the Rehabilitation Act. 469 U.S. at 292–99, 105 S.Ct. at 715–19.

9. PADEP argues that the Court's opinion in *United States v. Fordice*, 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992), indicates that no private right of action to enforce Title VI regulations exists. PADEP misconstrues *Fordice*. *Fordice* addressed Title VI in a single footnote, which stated in relevant part:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. We thus treat the issues

B.

Having determined that the applicable Supreme Court precedent is not dispositive, we look to our own precedent. The district court relied on our statements in *Chowdhury* for the conclusion that no private right of action exists. *See* 944 F.Supp. at 417. CRCQL, and TLPJ and SPLC as amici, argue that reliance on *Chowdhury* is questionable because: (1) *Chowdhury* did not apply this Circuit's three-prong test for determining when it is appropriate to infer a private right of action to enforce regulations; and (2) *Chowdhury* was decided before *Guardians*.

The sole question in *Chowdhury* was whether a private plaintiff must first exhaust administrative remedies under section 602 and its implementing regulations before bringing suit directly under section 601. In holding that a plaintiff need not do so, we reasoned that "an aggrieved individual may file a complaint with the funding agency but has no role in the investigation or adjudication, if any, of the complaint." 677 F.2d at 319 (footnotes omitted). Moreover, we stated that "[t]here is no provision for a remedy for the victim of the discrimination, such as injunctive relief or damages." *Id.* at 320 (footnote omitted).

Chowdhury appears to decide that no private right of action exists under the regulations, and we readily understand why the district court reached this conclusion. We nevertheless disagree with that conclusion. *Chowdhury* does not hold that no private right of action exists under section 602 and its implementing regulations. It merely indicates that the regulations themselves do not expressly provide for a significant role for private parties, which is apparent on the face of the regulations. *Chowdhury* says nothing about the appropriateness of implying a private right of action. Section 602 and its implementing regulations were only relevant in *Chowdhury* to the extent that they, on their face, afforded private plaintiffs a peripheral role in administrative proceedings. The *Chowdhury* court took this peripheral role as an indication that private plaintiffs should not have to pursue their claims under the regulations before initiating a direct action pursuant to their rights under section 601. The district court misapplied our statements in *Chowdhury*.

Looking to our other precedent, CRCQL and amici cite our decision in *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir.1990), a post-*Guardians* opinion, in support of the existence of a private right of action. *Pfeiffer* involved a suit by a high school student alleging gender discrimination in her dismissal from the local chapter of the National Honor Society. The plaintiff asserted claims under Title IX of the Education Amendments of 1972 and its implementing regulations, as well as other federal and state statutes. *Pfeiffer* is only significant to this appeal because we made therein the following statements concerning *Guardians*:

> In *Guardians*, the "threshold issue before the Court [was] whether ... private plaintiffs ... need to prove discriminatory intent to establish a violation of Title VI ... and administrative implementing regulations promulgated thereunder." A majority of the Court agreed that a violation of the statute itself requires proof of discriminatory intent. A different majority seemed to suggest that proof of discriminatory effect suffices to establish liability when suit is brought to enforce the regulations rather than the statute itself.

917 F.2d at 788 (quoting *Guardians*, 463 U.S. at 584, 103 S.Ct. at 3223) (citations omitted).

It is of course informative to read an interpretation of *Guardians* by a prior panel. The interpretation, however, is dicta and not

in these cases as they are implicated under the Constitution.

Id. at 732 n. 7, 112 S.Ct. at 2737–38 n. 7 (citations omitted). *Fordice* did not indicate that private plaintiffs were barred from asserting a claim under the regulation quoted. Rather, the Court merely noted that the affirmative relief called for under the statute could not reach beyond that afforded by the Constitution itself. Hidden within the Court's statement may be an indication that implementing regulations, such as the EPA's, that incorporate a discriminatory effect standard are invalid, because they extend further than the Fourteenth Amendment. *Guardians* and *Alexander*, however, state that such regulations are valid. Moreover, we do not believe that the Court would overturn *Guardians* and *Alexander* in such an oblique manner.

binding on this panel. *Pfeiffer* concerned a claim of intentional gender discrimination, not discriminatory effect. *See id.* ("This is, therefore, not a case of discriminatory effect, but one of discriminatory intention."). The issue before the court was whether the district court's finding that school authorities dismissed the plaintiff from the National Honor Society because of premarital sex and not gender discrimination was clearly erroneous. *See id.* at 780. The court had no reason to consider the status of a private right of action under section 602 and its implementing regulations. In addition, the above-quoted language from *Pfeiffer*, like the Supreme Court's opinion in *Alexander*, is in the passive voice—"when suit is brought"—and fails to specify who may bring suit to enforce the regulations. Although *Pfeiffer* is instructive, we find it insufficient to dispose of this appeal.

C.

[3] Since our own precedent does not resolve the matter, we must now determine whether to imply a private right of action. This court has established a three-prong test for determining when it is appropriate to imply private rights of action to enforce regulations. The test requires a court to inquire: "(1) 'whether the agency rule is properly within the scope of the enabling statute'; (2) 'whether the statute under which the rule was promulgated properly permits the implication of a private right of action'; and (3)'whether implying a private right of action will further the purpose of the enabling statute.' " *Polaroid Corp. v. Disney*, 862 F.2d 987, 994 (3d Cir.1988) (quoting *Angelastro v. Prudential–Bache Sec., Inc.*, 764 F.2d 939, 947 (3d Cir.1985)). We discuss each prong in turn.

i.

There is no question that the EPA's discriminatory effect regulation satisfies the first prong. The Supreme Court's unanimous opinion in *Alexander* makes clear that "actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI." 469 U.S. at 293, 105 S.Ct. at 716 (footnote omitted).

ii.

[4] The second and third prongs are the crux of this case. In addressing the second, a court will consider the factors set out by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), and its progeny. *See Angelastro*, 764 F.2d at 947. The factors relevant here are: (1) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; and (2) whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." *Cort*, 422 U.S. at 78, 95 S.Ct. at 2088 (citations omitted).[10]

The United States, as amicus, contends that the implication of a private right of action is consistent with legislative intent because Congress acknowledged the existence of the right when it amended Title VI. The purpose of the amendment was to broaden the scope of coverage of Title VI in response to the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), where the Court narrowly construed the terms "program or activity."[11] The United States cites various items of legislative history which it claims indicates an "understanding ... [of]

10. The other *Cort* factors are: (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted,—that is, does the statute create a federal right in favor of the plaintiff"; and (2) whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78, 95 S.Ct. at 2088 (citations and internal quotation marks omitted). Clearly, CRCQL satisfies the first. The second is irrelevant because Title VI is federal law.

11. Section 601 of Title VI prohibits any "program or activity" receiving Federal funds from discriminating on various grounds. *See* 42 U.S.C. § 2000d.

the existence of the discriminatory effects regulations and the fact that they could be enforced in federal court by private parties." Amicus Br. at 21.

First, the United States relies on a House Report on an early version of the relevant bill, which states that the "private right of action which allows a private individual or entity to sue to enforce Title IX would continue to provide the vehicle to test [certain] regulations in Title IX and their expanded meaning to their outermost limits." H.R. REP. No. 963, Pt. 1, 99th Cong., 2d Sess. 24 (1986).[12] Second, the United States relies on several legislators' comments in the *Congressional Record*, where the legislators appear to recognize the existence of a private right of action.[13] Third, the United States also relies on the following compilations of testimony at congressional hearings: *Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 23–24, 153–54, 200 (1984); *Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 Before the House Comm. on Educ. & Labor and the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 734, 1095, 1099 (1985). The first compilation contains, *inter alia*, a memorandum by the Office of Management and Budget ("OMB") which states OMB's opinion that "every licensed attorney would be empowered to file suit to enforce the 'effects test' regulations of agencies, challenging practices in *every* aspect of *every* institution that receives *any* Federal assistance." *Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 527 (1984).

PADEP presents two responses. First, PADEP emphasizes that the purpose of the amendment of Title VI was to address the Supreme Court's decision in *Grove City*, not to confirm or announce the existence of a private right of action. Second, PADEP reminds the court that many of the above-cited comments may only reflect the views of individual members of Congress. PADEP does not, however, cite to any statements in the *Congressional Record* or elsewhere that would undermine those cited by the United States. We therefore find that there is some indication in the legislative history, here uncontroverted, of an intent to create a private right of action, in satisfaction of the *Cort* factors.

This finding, however, does not end our inquiry. The *Cort* factors also require a court to determine whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff[.]" 422 U.S. at 78, 95 S.Ct. at 2088. Relevant to this inquiry is PADEP's argument that section 602 and the regulations situate the EPA as, in essence, a gatekeeper to enforcement, and that the implication of a private right of action would be inconsistent with this legislative scheme. According to PADEP, section 602 imposes what PADEP terms as "strict preconditions" on the use of

12. Courts have regarded Title IX and Title VI jurisprudence as, more or less, interchangeable. *See Cannon v. University of Chicago*, 441 U.S. 677, 694–96, 99 S.Ct. 1946, 1956–57, 60 L.Ed.2d 560 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class.... The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." (footnotes omitted)).

13. The United States quotes the following observations of Senator Hatch:

> The failure to provide a particular share of contract opportunities to minority-owned businesses, for example, could lead Federal agencies to undertake enforcement action asserting that the failure to provide more contracts to minority-owned firms, standing alone, is discriminatory under agency disparate impact regulations implementing Title VI.... Of course, advocacy groups will be able to bring private lawsuits making the same allegations before federal judges.

134 CONG. REC. 4,257 (1988). The United States also quotes a portion of the following statement by Representative Fields: "If a greater percentage of minority than white students fail a bar exam or a medical exam ... will a State be subject to private lawsuits because the tests have

that section's enforcement apparatus.[14] Specifically, section 602 provides:

> [N]o such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d–1. EPA enforcement action can occur only after the agency has negotiated these procedural requirements. Should we find that it is appropriate to imply a private right of action, PADEP emphasizes that private plaintiffs would not have to negotiate these requirements.

In addition, PADEP emphasizes that the EPA's regulations expressly provide private parties with an administrative mechanism through which they can raise allegations of unintentional discrimination. *See* 40 C.F.R. §§ 7.120–7.130. These regulations provide, in relevant part:

> A person who believes that he or she or a specific class of persons has been discriminated against in violation of this Part may file a complaint. The complaint may be filed by an authorized representative. A complaint alleging employment discrimination must identify at least one individual aggrieved by such discrimination. Complaints solely alleging employment discrimination against an individual on the basis of race, color, national origin, sex or religion shall be processed under the procedures for complaints of employment discrimination filed against recipients of federal assistance. Complainants are encouraged but not required to make use of any grievance procedure established under § 7.90 before filing a complaint. Filing a complaint through a grievance procedure does not extend the 180 day calendar requirement of paragraph (b)(2) of this section.

40 C.F.R. § 7.120(a) (citation omitted). In PADEP's estimation, section 602 and the regulations situate the EPA as a gatekeeper to enforcement, with private parties submitting their allegations to the agency and its discretion. PADEP contends that a private right of action is inconsistent with this legislative scheme.

We recognize that PADEP's argument has some force. There is, however, a more convincing counter-argument. The procedural requirements in section 602 provide a fund recipient with a form of notice that the agency has begun an investigation which may culminate in the termination of its funding. We note that a private lawsuit also affords a fund recipient similar notice. If the purpose of the requirements is to provide bare notice, private lawsuits are consistent with the legislative scheme of Title VI. Furthermore, unlike the EPA, private plaintiffs do not have the authority to terminate funding.[15] As a

a disproportionate impact on minorities[.]" 130 CONG. REC. 18,880 (1984).

14. Section 602 provides for the following enforcement apparatus:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law....

42 U.S.C. § 2000d–1.

15. While it is well established that private plaintiffs do not have the authority to compel a termination of funding, we make no determination at this time as to what alternative remedies offer appropriate relief for plaintiffs who prevail in actions to enforce agency regulations brought pursuant to section 602. *See NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1254 n. 27 (3d Cir. 1979). *See also Cannon*, 441 U.S. at 711–17, 99 S.Ct. at 1965–68 (discussing the legislative histo-

result, the purpose that the requirements serve is not as significant in private lawsuits, where the potential remedy does not include the result (*i.e.*, termination of funding) at which Congress directed the requirements. Stated differently, the requirements were designed to cushion the blow of a result that private plaintiffs cannot effectuate. Based on the foregoing, we find that the implication of a private right of action would be consistent with the legislative scheme of Title VI.

In sum, we find that there is some indication in the legislative history of an intent to create a private right of action and that the implication of a private right of action would be consistent with the legislative scheme of Title VI, in accordance with the relevant *Cort* factors. Accordingly, we find that " 'the statute under which the rule was promulgated properly permits the implication of a private right of action,' " *Polaroid Corp.*, 862 F.2d at 994 (quoting *Angelastro*, 764 F.2d at 947), and that the second prong of the test is satisfied.

iii.

The third prong of the test requires the court to inquire " 'whether implying a private right of action will further the purpose of the enabling statute.' " *Id.* (quoting *Angelastro*, 764 F.2d at 947). The United States contends that this prong is satisfied because the implication of a private right of action under section 602 and the regulations will further the dual purposes of Title VI, which are to: (1) combat discrimination by entities who receive federal funds; and (2) provide citizens with effective protection against discrimination. *See Cannon*, 441 U.S. at 704, 99 S.Ct. at 1961. A private right of action will further these purposes, the argument goes, because it will deputize private attorneys general who will enforce section 602 and its implementing regulations. The United States, moreover, points out that the EPA itself lacks sufficient resources to achieve adequate enforcement.

We agree with the United States that, to the extent that a private right of action will increase enforcement, the implication of that right will further the dual purposes of Title VI. Consequently, we find that the third prong of the test is also satisfied.

iv.

Lastly, although no other court of appeals has rendered a holding on the precise issue before this court, we note that the decisions of other courts of appeals indicate support for our reasoning. *See, e.g., Latinos Unidos De Chelsea v. Secretary of Hous. & Urban Dev.*, 799 F.2d 774, 785 n. 20 (1st Cir.1986) ("Under the statute itself, plaintiffs must make a showing of discriminatory intent; under the regulations, plaintiffs simply must show a discriminatory impact." (citation omitted)); *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir.1995) ("Courts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance. A plaintiff alleging a violation of the DOT regulations must make a *prima facie* showing that the alleged conduct has a disparate impact." (citations omitted)); *Castaneda by Castaneda v. Pickard*, 781 F.2d 456, 465 n.11 (5th Cir.1986) ("Thus a Title VI action can now be maintained in either the guise of a disparate treatment case, where proof of discriminatory motive is critical, or in the guise of a disparate impact case, involving employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another. In this latter type of case, proof of discriminatory intent is not necessary." (citation omitted)); *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1356 n. 5 (6th Cir.1996) ("A plaintiff may pursue a claim under a disparate impact theory as well. However, a disparate impact theory is not applicable in the case at hand." (citation omitted)); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir.1988) ("It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act. Moreover, plaintiffs need not show intentional discriminatory conduct to

ry of Title VI as it relates to the implication of a private remedy for victims of discrimination). Rather, should relief prove warranted in this case, we leave the determination of the appropriate remedy to the district court in the first instance.

prevail on a claim brought under these administrative regulations. Evidence of a discriminatory effect is sufficient." (citation omitted)); *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1044–45 (7th Cir.1987) ("Although the voting of the Justices may be difficult for the reader to discern at first, a majority of the Court in *Guardians Association* concluded that a discriminatory-impact claim could be maintained under those regulations, although not under the statute." (citations omitted)); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 981–82 (9th Cir.1984) ("[P]roof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute rather than the statute itself." (footnote omitted)); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir.1996) ("Although Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent." (citation omitted)); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir.1993) ("While Title VI itself, like the Fourteenth Amendment, bars only intentional discrimination, the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory." (citations omitted)); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir.1985) ("There is no doubt that the plaintiffs predicated this cause of action on the regulations. As a result, the district court correctly applied disparate impact analyses to their Title VI claims." (footnote omitted)).

v.

[5] In conclusion, the district court misapplied our decision in *Chowdhury v. Reading Hosp. & Med. Ctr.*, 677 F.2d 317 (3d Cir.1982). *Chowdhury* did not apply this court's three-prong test for determining when it is appropriate to imply a private right of action to enforce regulations and was decided before the Supreme Court's decision in *Guardians*. Applying that three-prong test, we hold that private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964. Accordingly, we will reverse and remand for further proceedings, including a consideration of the remaining grounds for dismissal contained in defendants' Motion to Dismiss.

Bert WILLIAMS, Petitioner,

v.

Cynthia METZLER, Acting Secretary, U.S. Department of Labor and Public Service Electric and Gas Company, Respondents.

No. 97–3127.

United States Court of Appeals, Third Circuit.

Argued Oct. 30, 1997.

Decided Dec. 30, 1997.

Former employee petitioned for review of decision by Secretary of Labor denying former employee's motion to enforce agreement settling his claim that former employer violated Energy Reorganization Act by retaliating against him for raising nuclear safety violation. The Court of Appeals, Weis, Circuit Judge, held that: (1) Secretary of Labor lacked authority, even with consent of parties, to enforce settlement agreement; (2) Court of Appeals had jurisdiction to review Secretary's decision; and (3) employer breached agreement by withholding taxes so as to reduce monthly payments below amount specified.

Petition granted; remanded.