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UNFUNDED FEDERAL MANDATES AND STATE JUDICIARIES: A QUESTION OF SOVEREIGNTY

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I. INTRODUCTION

In our constitutional republic, sovereignty is divided between the centralized national government and the state governments. As the scope of the federal government's authority expands, however, there is constant tension arising from federal encroachment into areas traditionally regulated by the states. When this encroachment occurs, it sometimes threatens to disrupt the deliberate balance of power created to ensure that local concerns are addressed by local government authorities. One area of historically local concern that has been subject to recent federal scrutiny is state judiciaries' obligations and efforts to provide individuals with limited English proficiency ("LEP individuals") meaningful access to state courts through the provision of court interpreters.[1]

Although this is largely a matter of local state judicial administration, it may in some cases implicate federal statutory protections against national origin discrimination under Title VI of the Civil Rights Act of 1964. The Civil Rights Division of the U.S. Department of Justice (DOJ) has interpreted the federal regulations under Title VI to authorize the imposition of detailed and comprehensive federal LEP mandates on state judiciaries. As detailed below, these federal mandates require state judiciaries to provide free court interpreters in an extremely broad range of state court services, regardless of the LEP individual's ability to pay. Moreover, DOJ has made clear that if state courts fail to voluntarily

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[1] LEP individuals are those who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English. *See* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 66 Fed. Reg. 3,834, 3,834 (Jan. 16, 2001).

comply with these federal standards, they may face withdrawal of potentially all of their federal funding and expose themselves to civil litigation.

But the question arises whether the federal government, consistent with the principles of federalism, has the legal authority under Title VI to coerce states to adopt specific court rules regarding court interpreters, and to require states to provide these interpreters entirely at the states' expense. As discussed below, the legal footing upon which the federal government justifies this sweeping authority is not firmly established. This Essay will outline the federalism concerns surrounding the LEP mandate and will examine how particular state judiciaries are responding to what is arguably federal encroachment on state sovereignty. This Essay examines the idea that the best way to avoid ceding sovereignty to the federal government on this issue is for state judiciaries to undertake a collaborative defense against unfunded federal mandates to the extent they threaten to upset the proper balance of power inherent in American federalism.

II. BACKGROUND

In August 2000, President Clinton signed Executive Order 13166, which required federal agencies to create and implement plans to ensure that LEP individuals would have meaningful access to federally funded services.[2] These plans were to cover not only the provision of services by the agencies themselves, but also services provided by those agencies' federal-fund recipients, including state agencies. To assist federal agencies in developing LEP guidance, the Executive Order incorporated by reference the contemporaneously issued DOJ General Policy Guidance,[3] and instructed each federal agency, including DOJ, to issue specific LEP guidance consistent with the General Policy Guidance provisions.[4] In 2002, DOJ issued its own agency-specific guidance to DOJ grant recipients, including state courts.[5] In essence, this guidance required state courts to take reasonable steps "to ensure meaningful access to their programs and activities by" LEP persons.[6]

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[2] Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

[3] *Id.*; *see also* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 66 Fed. Reg. 3,834.

[4] Exec. Order No. 13,166, 65 Fed. Reg. 50,121, 50,121.

[5] *See* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,459 (June 18, 2002).

[6] *Id.* at 41,455. The "meaningful access" analysis was designed to be a flexible, fact-dependent standard which balances the following four factors:

> (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of

The underlying basis for the Executive Order is the prohibition of national origin discrimination set forth in Title VI of the Civil Rights Act of 1964.[7] The Executive Order and DOJ guidance documents clarify the federal government's longstanding view that, in certain circumstances, regulations implementing Title VI require recipients of federal financial assistance to provide language assistance to LEP persons in order to avoid potential discrimination on the basis of national origin.[8]

In the decade following the Executive Order, state court systems sought to improve their capacity to handle cases and other matters involving LEP parties or witnesses. Yet, in spite of those efforts, in 2010 DOJ sent a letter to chief justices and state court administrators in which it renewed its commitment to enforce the Executive Order against state judiciaries due to perceived systemic noncompliance with the federal government's interpretation of Title VI.[9] In that letter, Assistant Attorney General Thomas Perez acknowledged state courts' progress with respect to the provision of court interpreters, but noted that DOJ continually "encounter[ed] state court language access policies or practices that are inconsistent with federal civil rights requirements."[10] Mr. Perez noted areas of particular concern and provided as "clarification" new mandatory requirements to which courts would be required to adhere in order to comply with the previously issued "meaningful access" requirement under federal law.[11]

The scope of these new obligations is staggering. According to DOJ, "meaningful access" now required that state courts provide *free* interpreters to *all* LEP persons, regardless of the individual's ability to pay, "including non-party LEP individuals whose presence or participation in a court matter is necessary or appropriate" in "*all* court and court-annexed proceedings, whether civil, criminal, or administrative including those presided over by non-judges," and "court-managed offices, operations, and programs," including "information counters[,] intake or filing offices[,] cashiers[,] records rooms[,] sheriff's offices[,] probation and parole offices[,] alternative dispute resolution programs[,] *pro se* clinics[,]

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the program, activity, or service provided by the program to people's lives; and
(4) the resources available to the grantee/recipient and costs.

Id. at 41,459. In doing so, DOJ ostensibly sought a balance that ensured meaningful access for LEP individuals while not imposing undue financial hardships on state courts. *See id.* Indeed, DOJ recognized that "[s]maller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets" and that "'reasonable steps' may cease to be reasonable where the costs imposed substantially exceed the benefits." *Id.* at 41,460.

[7] *See* 42 U.S.C. § 2000d (2006).

[8] Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Chief Justices and State Court Adm'rs (Aug. 16, 2010), *available at* http://www.lep.gov/final_courts_ltr_081610.pdf.

[9] *See id.*

[10] *Id.* at 1.

[11] *Id.*

criminal diversion programs[,] anger management classes[, and] detention facilities," as well as during meetings with any "individuals who are employed, paid, or supervised by the courts," including "[c]riminal defense counsel, child advocates or guardians *ad litem*, court psychologists, probation officers, doctors, [and] trustees."[12]

In response to DOJ's new "meaningful access" interpretation, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) (jointly referred to as "the Conferences") began an effort on two fronts to contest what they perceived to be unattainable and unreasonable standards. The Conferences first met with Attorney General Eric Holder in July 2011 to address their concerns.[13] In that meeting, the Conferences explained the federalism implications stemming from this new federal mandate and asked the Attorney General to encourage his staff to work with the Conferences to explore strategies for implementation of Title VI to achieve the shared goal of access to justice.

The Conferences next turned their attention to developments initiated within the American Bar Association (ABA) shortly after DOJ issued its "meaningful access" interpretation in 2010. In response to DOJ's correspondence to state supreme courts, the ABA began the process of developing and promulgating Standards for Language Access in State Courts, which standards initially tracked DOJ's most recent interpretation of the "meaningful access" requirement. Fearing the wholesale incorporation of the federal interpretation into ABA standards, the Conferences quickly drafted a letter to Stephen Zack, then-president of the ABA, which focused on two major concerns with the proposed standards.[14] First was the inability of state courts to meet these new federal demands absent additional funding. The Conferences explained that the standards as written "promot[ed] an access mandate that no state court in the nation [would] be able to meet," noting that at the same time the federal government was demanding absolute access to state court interpreters—both in and out of courtroom—"state courts are furloughing staff, shuttering courthouses, and sometimes requiring litigants to bring their own paper for copies."[15] Thus, absent significant additional funding, the Conferences lamented that compliance with the new mandate would require "cannibalizing other critical programs in such areas as domestic violence, juvenile justice, information technology, and problem-solving courts."[16] The Conferences proposed that in light of limited state resources, the standards should focus on

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[12] *Id.* at 2–3.

[13] *See Limited English Proficiency*, NAT'L CTR. FOR STATE COURTS, https://www.ncsc.org/Services-and-Experts/Government-Relations/Access-to-Justice/Limited-English-Proficiency.aspx (last visited Mar. 14, 2014).

[14] Letter from Conference of Chief Justices and Conference of State Court Adm'rs to Stephen N. Zack, President, Am. Bar Ass'n (July 8, 2011), *available at* http://www.ncsc.org/services-and-experts/government-relations/access-to-justice/~/media/Files/PDF/Services%20and%20Experts/Government%20Relations/ABA%20Response%20Ltr-Jul8-11.ashx.

[15] *Id.*

[16] *Id.*

applying those resources to "improv[e] access to justice for those least able to afford it," by "focusing on the immediate concerns of citizens who are indigent."[17]

The second major concern addressed by the Conferences was that the standards promoted a level of access on the part of state courts that "appear[ed] inapplicable to either the federal courts or the many administrative agencies throughout government that have adjudicatory authority."[18] In other words, while compliance with the standards was mandatory for state courts, they appeared to be merely suggested "best practices" for their federal counterparts. As it concerns federalism principles, this double standard was perhaps the most troubling aspect of ABA's proposed access standards.

The Conferences closed by reaffirming their shared commitment of equal access to the courts, but pointed out that the ABA's standards failed to account for the practical realities courts encounter. Without properly addressing these realities, the Conferences feared that the proposed standards would fail to garner "the broad-based legitimacy necessary to effectuate their goals," and the Conferences therefore refused to support them.[19]

The Conferences' firm stance on the proposed ABA standards continued through the end of 2010. Conference leaders made an appearance at the 2010 ABA annual meeting and again expressed their concerns with the proposed ABA Language Access Standards. As a result of these efforts, the standards were pulled from the ABA House of Delegates' agenda.[20] In lieu of voting on the proposed standards, the ABA appointed a working group consisting of the Conferences, the ABA, and the National Center for State Courts (NCSC) to negotiate revised standards that adequately addressed the Conferences' budgetary and federalism concerns. Those negotiations proved successful, and on February 6, 2012, the working group's revised standards were adopted by the ABA in its 2012 Midyear Meeting.[21] The Conferences' success with the ABA provides an excellent example of how state court leadership can collaborate to ensure that states' interests are protected against federal efforts to dictate matters of local concern. Notwithstanding this outcome in the ABA, however, federal enforcement of the LEP mandate continues against state courts in accordance with federal interpretation of Title VI.

III. DOJ ENFORCEMENT OF LEP MANDATE AGAINST STATE JUDICIARIES

Title VI's implementing regulations authorize DOJ to engage in various procedures to monitor and secure state judiciaries' compliance with Title VI. As a

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] NAT'L CTR. FOR STATE COURTS, *supra* note 13.

[21] *See* AM. BAR ASS'N, *Foreword* to STANDARDS FOR LANGUAGE ACCESS IN COURTS (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf.

threshold matter, federal regulations now require every state judiciary's application for federal financial assistance to include an assurance that the state judiciary will comply with DOJ's directives regarding LEP access to the courts.[22] After federal assistance is granted, DOJ is further authorized to monitor state judiciaries by investigating any complaints alleging that a state judiciary is not complying with Title VI and its implementing regulations.[23] In that event, DOJ is authorized to issue findings regarding the results of that investigation.[24] If it discovers that the state judiciary is not in compliance with federal mandates, DOJ may then negotiate and secure the state's voluntary compliance if possible.[25] However, if DOJ is unable to obtain voluntary compliance, it is then authorized to pursue one or both of two options: (1) suspend or terminate financial assistance to the state judicial branch, or (2) bring a civil suit to enforce the federal mandate.[26]

Since the Executive Order's issuance in 2000, DOJ has utilized its investigatory authority to conduct at least four investigations of state judiciaries (Colorado, Maine, North Carolina, and Michigan) for alleged failure to provide LEP individuals with "meaningful access" to state court services. This Essay will focus on the investigations of North Carolina and Michigan, as they are particularly relevant in demonstrating the types of federal demands being made of state courts, and how DOJ interprets its authority under federal law.[27]

A. DOJ Investigation of North Carolina

In 2006, North Carolina's legislature authorized the judiciary's Administrative Office of the Courts (AOC) to prescribe mandatory policies for appointing and paying for foreign-language interpreters.[28] To comply with this legislative authorization, the AOC published a guidance document regarding the same.[29] Shortly thereafter, however, DOJ's Civil Rights Division received a complaint that the document failed to provide meaningful access to LEP individuals.[30] DOJ swiftly initiated an investigation into this complaint and issued

[22] *See* 28 C.F.R. § 42.105 (2012).

[23] *Id.* § 42.107.

[24] *See id.*

[25] *See id.*

[26] *Id.* § 42.108(a).

[27] The other two investigations (of Colorado and Maine) resulted in Memoranda of Understanding (MOAs) between DOJ and the respective states. The MOAs are essentially a product of each state's voluntary acquiescence to DOJ's interpretation of Title VI and appurtenant demands.

[28] *See* Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to John W. Smith, Dir. of N.C. Admin. Office of the Courts (Mar. 8, 2012), *available at* http://www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf.

[29] *Id.* at 5.

[30] *Id.* In addition to interpreter-specific complaints regarding the professionalism of the services provided, the complaint specifically alleged that the AOC does not provide interpreters for LEP Spanish speakers facing eviction. Another complaint was also filed in 2011, alleging that the North Carolina Judicial Branch was in violation of Title VI by

findings that North Carolina's policies and practices discriminated on the basis of national origin, in violation of federal law, by failing to provide LEP individuals with meaningful access to state court proceedings and operations.[31]

First, DOJ strenuously encouraged voluntary compliance and attempted to preempt North Carolina's concerns about fiscal pressures by declaring that strict adherence to federal guidelines was required despite financial constraints because such constraints "are not a blanket exemption from civil rights requirements."[32] Second, DOJ asserted that "federal law preempts the state law provisions . . . as a barrier to compliance."[33] Citing Supreme Court precedent, DOJ asserted that implementing regulations under federal laws such as Title VI preempt any inconsistent state-law obligations.[34] Third, DOJ threatened that if North Carolina did not voluntarily comply, "the United States [would] take appropriate enforcement action" including civil litigation, administrative procedures for injunctive relief, and "recovery, suspension, or termination of federal funding."[35] Finally, as an additional compliance incentive, DOJ noted that North Carolina's court system received federal assistance from other federal agencies (e.g., the Department of Health and Human Services) and because those agencies also had power to revoke their respective funding under Title VI, DOJ would be forwarding its report of findings to those agencies as well.[36]

A reading of DOJ's report makes clear that the dispute between the AOC's policy guidance and DOJ's interpretation of the federal "meaningful access" standard was simply one of degree. The AOC's policy guidance reflected the state judiciary's judgment about how best to provide for LEP access to the courts in light of budgetary constraints. DOJ's standard, by contrast, was much more expansive. DOJ described it as the controlling interpretation to be applied across the board without due regard to competing obligations or budgetary constraints.

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intentionally refusing to provide free interpreters to LEP individuals litigating or attempting to litigate civil claims. The scope of the investigation was later revised to include these claims.

[31] *Id.* at 1.

[32] *Id.* at 2. While it is true that state budgetary constraints do not provide a "blanket exemption" from civil rights requirements, they are clearly a valid and appropriate consideration when determining the reasonableness of a state's steps toward meaningful access. *See supra* note 6 and accompanying text. However, the tone of this letter suggests that a state's incorporation of fiscal pressures into the calculus of "meaningful access" will be frowned upon and cannot serve as a basis for failing to meet whatever federal standard DOJ decides to impose.

[33] Letter from Thomas E. Perez, Assistant U.S. Attorney Gen., to John Smith, Dir. of N.C. Admin. Office of the Courts, at 3 (Mar. 8, 2012), *available at* http://www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf.

[34] *Id.* at 9. Conspicuously absent, however, were any citations to precedent holding that an agency's *interpretation* of such regulations, like DOJ's LEP mandate here, is entitled to the same preemptive power.

[35] *Id.* at 3–4.

[36] *Id.* at 4.

While DOJ's interpretation certainly incorporates laudable goals, its goals are unattainable for many court systems in light of current limited state resources. DOJ's insistence on a standard that many court systems cannot meet, along with its threats of defunding and civil litigation, create serious questions regarding the legality of its approach in light of well-established principles of federalism. Specifically, it is debatable whether Title VI and its regulations actually authorize DOJ to force state judiciaries to allocate their resources in a particular way in order to satisfy its expansive interpretation of Title VI and its regulations. Equally debatable is whether the federal government can enforce these standards through civil litigation if state judiciaries disagree. The following section discusses DOJ's investigation of Michigan's courts and Michigan's response. It focuses particularly on Michigan Supreme Court Justice Stephen Markman's dissent to Michigan's new LEP rules, and discusses how state-court resistance through defensive litigation could prove to be an effective way to delineate the contours of federalism in this arena.

B. Michigan's Response to DOJ Investigation

As in North Carolina, Michigan's court system was the subject of a DOJ investigation after the Civil Rights Division of DOJ received a complaint. Before the investigation, Michigan provided interpreters for all criminal defendants who needed them, and the courts retained discretion to appoint interpreters in civil cases.[37] These policies had been in place long before Assistant Attorney General Thomas Perez issued his August 2010 letter clarifying the "meaningful access" standard for state courts, and by all measures Michigan's interpreter program had provided well for Michigan's LEP population.[38]

However, after receiving DOJ's August 2010 letter, the Michigan Supreme Court "convened a steering committee of judges and court administrators to develop proposals addressing access to court services for LEP individuals."[39] To aid in developing new court rules, the Michigan Supreme Court sought input from DOJ, "sharing [with it] numerous versions of the proposed court rules, exchanging ideas for the hiring and training of interpreters, and devising new and innovative ways to provide interpreter services at low or reduced costs."[40] In the end, Michigan promulgated new state court rules that significantly expanded the Court's LEP program, but did not adopt DOJ guidelines wholesale.[41] The new rules focus on providing free interpreter services to the "truly needy" while giving

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[37] Michigan Supreme Court Order, ADM File No. 2012-03, at 17 (Sept. 11, 2013), *available at* http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2012-03_2013-09-11_formatted.pdf.

[38] *Id.* Indeed, Michigan Supreme Court Justice Stephen Markman noted that in his experience on the court over the preceding fourteen years, he could not "recall a single case in which an LEP person alleged that he or she had been denied an interpreter." *Id.*

[39] *Id.* at 1.

[40] *Id.*

[41] *See generally id.*

trial judges the discretion to require reimbursement for such services from nonindigent LEP individuals.[42] The new rules were adopted to "strike the balance between ensuring meaningful access while not imposing undue burdens on Michigan's local courts."[43] In doing so, these narrower rules were fashioned in "frank acknowledgment that [Michigan's] trial courts—and indeed, [Michigan's] economy—are under severe financial stress and cannot, without explicit legal authority, be required to provide, at taxpayer expense, interpreter services for all LEP persons regardless of their means."[44]

While all of the other Michigan Supreme Court Justices concurred in these new rules, Justice Stephen Markman wrote a strong dissent, taking issue with the staggering scope of DOJ's demands,[45] the coercive nature of its threat to eliminate federal funding if the state refused to voluntarily comply, and the "flimsiness of the legal support" justifying DOJ's assertion that states would be in violation of U.S. law by failing to adopt *in toto* its LEP rules.[46] Part II addressed the expansive scope of DOJ's demands, but the issues of federal coercion and the legal basis underlying DOJ's demands are worth exploring in greater depth below.

1. Legal Basis Underlying DOJ Mandates

DOJ traces its authority to impose federal LEP mandates to Title VI of the Civil Rights Act of 1964.[47] But the gap between this federal statute and DOJ's ultimate demands is quite large. Indeed, the actual language of the statute must first pass through several layers of interpretation before it reaches DOJ's detailed and comprehensive LEP mandates. As Justice Markman aptly points out, DOJ's demands

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[42] *Id.* at 1. The new rules require the appointment at public expense of interpreters in all court proceedings, including both criminal and civil cases, for all parties and witnesses who need one in order to meaningfully participate in court proceedings. MCR 1.111(B)(1). The rules then allow, but do not require, the court to order financially able parties to reimburse the court at the conclusion of trial. MCR 1.111(F)(5). Regarding the ability to reimburse the court, the Michigan Supreme Court stated,

> In determining whether a party has the ability to reimburse for interpreter services, the court will impose costs only if the party has income above 125% of the federal poverty level *and* the court finds assessment of the interpreter costs would not unreasonably impede the person's ability to pursue or defend a claim.

Michigan Supreme Court Order, *supra* note 37, at 2.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 12–20. As Justice Markman points out, the scope of DOJ's demands would extend LEP benefits to "almost any individual having virtually any interaction with any court-related proceeding or program, and they would require the courts to provide these individuals with free interpreters regardless of their ability to pay." *Id.* at 13.

[46] *Id.* at 14.

[47] Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug 11, 2000).

> rel[y] upon a *letter* from the Assistant Attorney General placing a new *gloss* upon a non-binding statement of "*policy guidance*" previously issued by the [DOJ]. That "policy guidance" in turn is ostensibly based upon the [DOJ's] own *regulations*, which are in turn based upon Title VI, the only authority in this listing that is an actual statute of the United States.[48]

In addition to the attenuated line of legal authority supporting DOJ's demands, the constitutionality of at least one federal regulation upon which DOJ relies has previously been called into question.[49] That regulation prohibits federal fund recipients from implementing programs that have a disparate impact on racial or ethnic minorities, apparently without regard to whether the disparate impact is a product of intentional discrimination.[50] Justice Markman describes how the Michigan investigation demonstrates that DOJ appears to be "ground[ing] its efforts to compel state supreme courts to adopt its preferred LEP court rules exclusively in 'disparate impact' analysis."[51] These efforts are misguided, however, given that U.S. Supreme Court precedent clearly dictates that Title VI, like the federal constitution, prohibits only *intentional* discrimination.[52] Because DOJ's findings in Michigan and in other states have not connected the alleged disparate impact of state LEP programs to intentional efforts on the part of states to discriminate, DOJ arguably lacks legal authority for compelling state courts to adopt its expansive rules. As a result, "[g]iven that Title VI nowhere requires or implies the free appointment of interpreters," Justice Markman argues DOJ's claim that "Title VI provides it with the legal authority to compel state adoption of its favored LEP policies deserves to be resisted and challenged in court if necessary."[53]

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[48] Michigan Supreme Court Order, *supra* note 37, at 15.

[49] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 278, 281–82 (2001) (calling into question the propriety of 28 C.F.R. 42.104(b)(2), which forbids recipients of federal funds from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ."). The *Alexander* case noted that regulations "proscrib[ing] activities that have a disparate impact on racial groups, even though such activities are permissible under [Title VI] . . . are in considerable tension with the rule of [*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)] and [*Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)] that [Title VI] forbids only intentional discrimination . . . ." *Id.* at 281–82.

[50] *See* 28 C.F.R. 42.104(b)(2) (2000).

[51] Michigan Supreme Court Order, *supra* note 37, at 16.

[52] *See Guardians*, 463 U.S. at 584; *Bakke*, 438 U.S. at 284–87; *see also Alexander*, 532 U.S. at 285 (2001) ("It is clear now that the disparate-impact regulations do not simply apply [Title VI]—since they indeed forbid conduct that [Title VI] permits.").

[53] Michigan Supreme Court Order, *supra* note 37, at 17.

2. Federal Coercion by Threat of Defunding and Civil Litigation

In its collaboration with Michigan's steering committee, DOJ informed the Michigan Supreme Court that compliance with its demands was a condition of the court system receiving "federal financial assistance."[54] But because Michigan's court system, like many state judiciaries, receives federal funds from multiple federal agencies, both directly and indirectly (as subrecipients of federal grants), DOJ's threat did not make clear whether failure to comply *in toto* with DOJ's LEP demands would cut off only DOJ's funding or *all* federal assistance, whatever the source.[55] In Justice Markman's view, this vague reference to federal financial assistance was likely used intentionally as a "more effective 'negotiating' strategy to allow a state to stew in uncertainty concerning the financial stakes involved should it fail" to acquiesce entirely to DOJ's demands.[56]

It seems unlikely that DOJ would have the legal authority to deprive a state judiciary of all federal funding merely for a state's *partial* noncompliance with DOJ's extraordinarily far-reaching LEP demands.[57] Of course, while the federal government may permissibly condition financial assistance on state compliance with federal guidelines, there comes a point "in some circumstances [when] financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[58] "When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."[59]As a result, Justice Markman notes,

> It is hardly self-evident that the [U.S. Supreme] Court would look . . . favorably upon a threat directed toward the Michigan court system focused upon the loss of 100% of its federal financial assistance, almost all of which has little or nothing to do with the matter in dispute.[60]

3. Justice Markman's Proposed Solution

Given the potential legal infirmities of DOJ's demands, coupled with the lack of evidence that Michigan's existing programs were failing to provide meaningful access to LEP individuals, Justice Markman dissented to the new rules, primarily

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[54] *Id*. at 12.

[55] Federal financial assistance to Michigan's court system is $108.6 million, not including grants paid directly to local courts. *Id.* at 13. In another letter to the Michigan Supreme Court, however, DOJ referenced only a $1.5 million program as triggering LEP requirements. *Id.*

[56] *Id.*

[57] *See id.*

[58] South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

[59] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012).

[60] Michigan Supreme Court Order, *supra* note 37, at 14.

on the basis that they were the product of federal coercion rather than "of any exercise of independent judgment by the courts themselves that such rules are warranted."[61] Justice Markman viewed the LEP issue as just one instance in an "increasingly familiar pattern by which . . . state supreme courts have routinely been 'commandeered' or 'dragooned' by federal agencies to enact new court rules . . . as the product of financial threats."[62] And especially troubling is the fact that "[t]hese demands typically occur in areas of policy that lie within the core constitutional responsibility of the states . . . and where there is little or no federal authority that can be discerned from the Constitution."[63] Thus, while sensitive to the need to provide all individuals with meaningful access to the courts, Justice Markman dissented on federalism grounds, out of concern for the way in which the Michigan judges, as "elected representatives of the people[,] become little more than mechanical instrumentalities for obediently carrying out the demands of federal officials."[64]

Instead of adopting new court rules under pressure from DOJ, Justice Markman argued that Michigan should stand its ground and inform the Assistant Attorney General that, in the judgment of the court, the existing rules have operated fairly and effectively to provide LEP individuals with meaningful access to the state court system.[65] If DOJ then decided to carry out its implicit threats to sue the state, it would be a welcome opportunity for Michigan to assert its constitutional prerogatives in federal court.[66] Justice Markman posited that defending against such suits would give states the opportunity to ensure that the burden of proof rests squarely on DOJ to demonstrate the soundness of the legal position underlying its LEP mandates.[67] He also noted that the state supreme courts are in the best position to assert the constitutional prerogatives of their individual states, "both in asserting the rule of law and in delineating the contours of American federalism."[68] As a result, Justice Markman opposed the adoption of the new rules, not because he disagreed with their substance, but because they represented the product of federal coercion rather than the state's own deliberation and judgment.[69] He feared that by accepting some, but not all, of DOJ's demands, the potential ensuing lawsuit by DOJ would focus more on the details that divide DOJ and the Michigan Supreme Court, rather than on the larger and more important federalism concerns.[70]

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[61] *Id.* at 19.
[62] *Id.*
[63] *Id.* at 20.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 19–20.
[67] *Id.* at 19 n.11.
[68] *Id.*
[69] *Id.* at 19–20.
[70] *Id.*

DOJ responded six days after the Michigan Supreme Court issued its order regarding the new rules.[71] In a letter to the court, DOJ expressed "grave concerns" that the new rules would result in national-origin discrimination.[72] But this time, rather than threatening legal action, DOJ simply noted that its "investigation of the Michigan state courts continues."[73] It described its successes in working with other state court systems in implementing its guidelines and concluded by expressing confidence that "working together, the same results can be achieved in Michigan."[74] The tone of DOJ's letter suggests that Michigan's response—and particularly Justice Markman's dissent—may have encouraged DOJ to tread more lightly with respect to its demands. Though more confrontational, the stance proposed by Justice Markman may turn out to be a viable strategy for state courts across the country to adopt in order to assert the proper balance of power inherent in federalism.

IV. CONCLUSION

State courts have a well-recognized obligation to provide LEP individuals with meaningful access. In accordance with federal law, state courts have long been taking steps to increase that access, though perhaps not with time frames as swift as DOJ (or even the courts themselves) would prefer. But determining the manner in which state courts allocate their resources to provide interpreters should be within the discretion of the states to decide, provided, of course, that the courts provide meaningful access to LEP individuals. Additionally, state courts must make LEP funding decisions in a holistic context that requires courts to allocate scarce resources across multiple important considerations, only one of which is the provision of free court interpreters for LEP individuals. These realities were acknowledged in federal Title VI interpretive guidance that contemplates a balanced approach in focusing on whether a state's steps to increase LEP access are "reasonable." DOJ has taken this guidance a step further, construing Title VI's requirements to include free access to court interpreters across a breathtakingly expansive range of court services, and regardless of an LEP individual's ability to pay for an interpreter.

It is unlikely, however, that a federal agency acts pursuant to its authority within our constitutional architecture when it seeks to require the courts of every state to adopt court rules imposing considerable new financial costs upon their citizens, which rules are predicated on "letter interpretations" grounded in statements of "policy guidance" based on administrative regulations purporting to interpret congressional statutes.

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[71] Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Justice, et al., to Matthew Schneider, Chief Legal Counsel, Mich. Dep't of Att'y Gen. (Sept. 17, 2013), *available at* http://www.justice.gov/usao/mie/downloads/091713_AAG_Letter_to_MI_Re_Court_Rule%20(2).pdf.

[72] *Id.* at 1.

[73] *Id.* at 3.

[74] *Id.*

It seems equally unlikely that DOJ possesses the constitutional authority to deprive a state court system of the entirety of its federal financial assistance simply because the state does not fully assent to the conditions imposed by DOJ pertaining to LEP services. Indeed, the "financial inducement" DOJ has chosen in this circumstance is much less akin to "relatively mild encouragement" than it is to a "gun to the head."[75] While it is clear that the federal spending authority includes the authority to attach conditions to the receipt of funds, this authority is not without limit. DOJ's conditions in this instance may be a bridge too far.

Thus, DOJ's recent demands leave state court systems with a difficult choice. On one hand, they can simply assume the legal legitimacy of the new LEP mandates and try their best to implement the demands despite disagreements or budgetary constraints. On the other hand, state courts could place at risk at least a portion, and potentially all, of their federal funding and prepare to defend against DOJ in civil litigation by refusing to adopt the demands wholesale. The latter option would require courts to take a somewhat more confrontational stand, but as Justice Markman notes, forcing DOJ to carry the burden of proving the legal basis for its demands may provide a viable strategy to ensure that the proper contours of American federalism are preserved, and respect for state sovereignty is maintained.

[75] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012) ("When . . . such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes. . . . [T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head."); South Dakota v. Dole, 483 U.S. 203, 207, 211 (1987) ("[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion. . . . [Accordingly], conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." (citations and internal quotation marks omitted)).