

A NARROWING OF SECTION 1983 CLAIMS: HOW *GONZAGA* HAS LIMITED RECOVERY FOR VICTIMS OF LEAD POISONING IN FEDERAL COURT

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Abstract: Dellita Johnson brought a claim against the City of Detroit on behalf of her minor son, asserting that her son sustained lead poisoning from the public housing unit in which they lived. She brought claims under 42 U.S.C. § 1983 for the deprivation of federal rights created under provisions of the United States Housing Act, the Lead-Based Paint Poisoning Prevention Act, and administrative regulations created under those statutes. The United States Court of Appeals for the Sixth Circuit affirmed the District Court's dismissal of Ms. Johnson's claims, holding that the applicable provisions of the United States Housing and the Lead-Based Paint Poisoning Prevention Act do not contain rights-creating language sufficient to bring a § 1983 claim. The court also held that regulations promulgated pursuant to the statutes could not create enforceable rights on their own for purposes of § 1983. This comment argues that based on the *Gonzaga v. Doe* precedent, the Sixth Circuit reached the correct legal conclusion; however, *Gonzaga* has far-reaching negative implications on the individuals for whom these statutes were designed to protect.

INTRODUCTION

Lead poisoning can cause serious health problems when lead builds up in the body over a period of time.¹ Often, symptoms are not detected until dangerous amounts of lead accumulate in the body.² Lead-based paint is one of the most common and hazardous sources of lead poisoning for children, and for young children it can severely affect mental and physical development, IQ, ability to pay attention, and academic performance.³ At high levels, lead poisoning can even be fatal.⁴ Young children are more likely to be exposed to lead because they often put their hands, which may be contami-

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¹ *Lead Poisoning Definition*, MAYO CLINIC (Dec. 6, 2016), <http://www.mayoclinic.org/diseases-conditions/lead-poisoning/basics/definition/con-20035487> [<https://perma.cc/8U9E-CRZV>].

² *Lead Poisoning Symptoms*, MAYO CLINIC (Dec. 6, 2016), <http://www.mayoclinic.org/diseases-conditions/lead-poisoning/basics/symptoms/con-20035487> [<https://perma.cc/RNF5-RS6U>].

³ See *Lead Poisoning Definition*, *supra* note 1; *Lead Prevention Tips*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 19, 2014), <http://www.cdc.gov/nceh/lead/tips.htm> [<https://perma.cc/V96U-BSBP>].

⁴ *Lead Poisoning Definition*, *supra* note 1.

nated with lead dust from the breakdown of lead paint, in their mouths and they may even chew paint chips.⁵ In addition to increased exposure, the bodies of young children absorb lead more easily and sustain more harm from it than the bodies of older children and adults.⁶

According to advertising campaigns for lead paint, lead was added to paint to make it more durable.⁷ Congress banned the use of lead in residential paint in 1978, but about two-thirds of existing American housing units were built before the ban.⁸ Notably, about one-third of American housing units were built prior to 1960, when lead concentrations in paint were the highest.⁹ Of those homes built before 1960, the U.S. Department of Housing and Urban Development (“HUD”) estimates that seventy-eight percent contain lead-based paint and fifty-eight percent have significant lead-based paint hazards.¹⁰ Today, approximately four million households expose the families and children living in them to high levels of lead.¹¹

In *Johnson v. City of Detroit*, Dellita Johnson brought claims against the City of Detroit and the Detroit Housing Commission on behalf of her minor son alleging that the City violated the Lead Based Paint Poisoning Prevention Act (“LBPPA”), the United States Housing Act (“USHA”), and their implementing regulations.¹² In particular, she claimed that her son sustained lead-poisoning from the paint in their living unit, a public housing project.¹³ Ms. Johnson argued that, among other injuries, her son sustained severely painful and disabling injuries that necessitated medical care, men-

⁵ *Impacts of Lead Poisoning on Low-Income and Minority Communities: Hearing Before the Subcomm. on Health & the Env't of the Comm. on Energy & Commerce*, 102d Cong. 40 (1992) [hereinafter *Lead Poisoning Hearing*] (statement of Fred Krupp, Executive Director, Environmental Defense Fund); *Lead Poisoning Risk Factors*, MAYO CLINIC (Dec. 6, 2016), <http://www.mayoclinic.org/diseases-conditions/lead-poisoning/basics/risk-factors/con-20035487> [<https://perma.cc/YY94-3BEW>].

⁶ *Lead Poisoning Risk Factors*, *supra* note 5.

⁷ *Lead Poisoning Hearing*, *supra* note 5, at 41. The most common source of lead poisoning for children was in the home or “residential environment,” particularly in older housing. PRESIDENT’S TASK FORCE ON EVTL. HEALTH RISKS & SAFETY RISKS TO CHILDREN, ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PAINT HAZARDS 2, 12–13 (2000), <https://www.cdc.gov/nceh/lead/about/fedstrategy2000.pdf> [<https://perma.cc/96LJ-B8ML>].

⁸ Greg Spiegel, *Childhood Lead Poisoning Prevention*, 37 CLEARINGHOUSE REV. 483, 484 (2004). The housing data provided is from the 2000 census. OFFICE OF MGMT. & BUDGET, DEFINITIONS AND EXPLANATIONS 3 (2016), <https://www.census.gov/housing/hvs/definitions.pdf> [<https://perma.cc/GKK5-UTSN>]. The U.S. Census Bureau defines a “housing unit” as a “house, apartment, group of rooms, or a single room occupied or intended for occupancy as separate living quarters.” *Id.*

⁹ Spiegel, *supra* note 8.

¹⁰ *Id.*

¹¹ *Lead*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 9, 2017), <http://www.cdc.gov/nceh/lead/default.htm> [<https://perma.cc/GT8J-WAA6>].

¹² *Johnson v. City of Detroit (Johnson II)*, 446 F.3d 614, 616–17 (6th Cir. 2006).

¹³ *Id.* at 617.

tal and psychological distress, behavioral difficulties, and permanent and irreversible brain damage.¹⁴ The United States District Court for the Eastern District of Michigan dismissed Johnson's claims, and the United States Court of Appeals for the Sixth Circuit affirmed with no further appeal by Ms. Johnson.¹⁵ This Comment argues that although the Sixth Circuit made the correct legal decision based on the Supreme Court's decision in *Gonzaga University v. Doe*, *Johnson* demonstrates the far-reaching negative implications of *Gonzaga* and the effect its precedent has on plaintiffs seeking environmental justice in the federal courts.¹⁶

I. FACTS AND PROCEDURAL HISTORY

From 1988 until 1992, Dellita Johnson ("Plaintiff") and her son, Jerome Johnson, lived at Jeffries Homes, a public housing project in Detroit, Michigan.¹⁷ During that time, the public housing project was owned and managed by the City of Detroit Housing Commission and the City of Detroit (together, "the defendants").¹⁸ The Detroit Housing Commission ("DHC") is a department of the City of Detroit ("the City"), and the City and the DHC receive federal funding from the Secretary of Housing and Urban Development for the operation and management of the Jeffries Homes facility pursuant to Section 8 of the USHA.¹⁹

Dellita Johnson filed this case against the City and the DHC on behalf of her seventeen-year-old minor son, Jerome Johnson, for injuries she alleged were caused by lead-based paint poisoning that he suffered while living at Jeffries Homes.²⁰ Jerome was diagnosed with lead poisoning when he was two years old.²¹ Ms. Johnson asserted that her living unit at the Jeffries Homes contained peeling, chipping, and flaking paint, and she complained

¹⁴ Complaint at 13–14, *Johnson v. City of Detroit*, 319 F. Supp. 2d 756 (E.D. Mich. 2004) (No. 03-74440).

¹⁵ *Johnson II*, 446 F.3d at 616–17.

¹⁶ *See id.* at 619, 623, 627; *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002); *see also* MARY FRANCES BERRY ET AL., U.S. COMM'N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 85, 94 (2003), <http://www.usccr.gov/pubs/envjust/ej0104.pdf> [<https://perma.cc/E73W-H55R>] (discussing the effect that *Gonzaga* has on 42 U.S.C. § 1983 claims).

¹⁷ *Johnson v. City of Detroit (Johnson I)*, 319 F. Supp. 2d 756, 758 (E.D. Mich. 2004), *aff'd*, 446 F.3d 614 (6th Cir. 2006).

¹⁸ *Id.*

¹⁹ *Id.* Section 8 of the United States Housing Act ("USHA") allows for assistance payments to be made to owners of existing dwelling units "for the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing . . ." 42 U.S.C. § 1437f(a) (2012).

²⁰ *Johnson I*, 319 F. Supp. 2d at 758.

²¹ *Id.*

to Defendants' agents and employees about these issues.²² Despite her complaints, she alleged that the Defendants failed to remedy the problem by repainting or repairing the living unit, or performing any lead inspections or risk assessments in the unit.²³

The August 27, 2003 complaint alleged seven claims: (1) a cause of action for damages under 42 U.S.C. § 1983 for the deprivation of federal rights created under provisions of the USHA, the LBPPPA, and administrative regulations created pursuant to these statutes; (2) "other violations of federal law" based on the same statutory and regulatory framework; (3) violation of an implied private right of action under the LBPPPA; (4) breach of the annual contributions contract ("ACC") executed between HUD and the DHC, as a third-party beneficiary; (5) violation of breach of the warranty of habitability; (6) common law negligence claim; and (7) nuisance per se.²⁴

Defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted.²⁵ On May 24, 2004, the United States District Court for the Eastern District of Michigan issued granted defendants' motion to dismiss with regard to the first three claims, and dismissed outright the remaining supplemental state law claims for lack of jurisdiction.²⁶ On June 8, 2004, Ms. Johnson filed a motion to alter or amend the judgment, but the district court submitted an order on June 21, 2004 denying these motions.²⁷ Plaintiff filed a timely notice of appeal on June 24, 2004, to appeal both the judgment granting in part the motion to dismiss and the order denying plaintiff's motion to alter or amend.²⁸ The Sixth Circuit Court of Appeals then reviewed the District Court's decision *de novo* and affirmed the decision of the District Court.²⁹

²² *Id.* at 759.

²³ *Id.*

²⁴ *Id.*

²⁵ *Johnson II*, 446 F.3d at 617.

²⁶ *Id.* The United States District Court for the Eastern District of Michigan dismissed issues one and two because the relevant USHA and Lead-Based Paint Poisoning Prevention Act ("LBPPPA") provisions, as well as the cited regulations, did not create rights enforceable under § 1983. *Johnson I*, 319 F. Supp. 2d at 781. The court dismissed the third claim because the LBPPPA did not create an implied private right of action. *Id.* Finally, the court dismissed the supplemental state law claims because after the federal claims were dismissed, the only remaining claims were state law claims, which the court did not have independent original jurisdiction over. *Id.* The court could exercise supplemental jurisdiction over the state law claims, but the court has discretion whether to do so. *Id.* The court decided not to exercise supplemental jurisdiction over the state law claims because the state law claims would require analysis under Michigan law, a task best handled by Michigan state courts. *Id.*

²⁷ *Johnson II*, 446 F.3d at 617.

²⁸ *Id.* at 618.

²⁹ *Id.* at 617–18, 629.

II. LEGAL BACKGROUND

The Lead-Based Paint Poisoning Prevention Act (“LBPPPA”) was enacted in 1971, and it required the Secretary of Health, Education, and Welfare to prohibit lead-based paint in residential structures constructed or rehabilitated by the federal government, or that receive federal assistance.³⁰ In 1973, an amendment to the LBPPPA was amended so that the Department of Housing and Urban Development (“HUD”) was required to eradicate lead based paint in certain housing that was federally owned, funded by federal subsidies, or covered by federal mortgage insurance.³¹

Specifically, 42 U.S.C. § 4821 requires the Secretary of HUD, along with the Secretary of Health and Urban Development, to implement a demonstration and research program in urban areas in order to determine the scope of the lead-based paint poisoning problem.³² This statutory requirement specifically seeks ways that lead-based paint hazards can be removed from interior surfaces, porches, and exterior surfaces of residential housing to which children may be exposed.³³ Section 4821 further requires the Chairman of the Consumer Product Safety Commission to determine the safe level of lead in residential paint products by conducting research on dried paint film containing different lead compounds that are commonly used.³⁴

Additionally, § 4822 sets out the requirements for housing that receives federal assistance, and requires the Secretary of HUD to establish procedures to eradicate the hazards of lead based paint poisoning in any housing that is either covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary, or receives over five thousand dollars in project-based assistance under a federal housing program.³⁵ It further requires distribution of lead hazard information pamphlets to purchasers and tenants; periodic risk assessments; and inspections, reductions, and abatement of lead-based paint hazards.³⁶

The original United States Housing Act (“USHA”) was enacted in 1937 and was later amended by the Quality Housing and Work Responsibil-

³⁰ U.S. DEP’T OF HOUS. & URBAN DEV., LEGISLATIVE HISTORY OF LEAD-BASED PAINT 2, http://portal.hud.gov/hudportal/documents/huddoc?id=20258_legislativehistory.pdf [<https://perma.cc/5UYN-H8XG>]. The Secretary of Health, Education, and Welfare is now known as the Secretary of Health and Human Services. *Id.*

³¹ *Id.*

³² 42 U.S.C. § 4821(a) (2012).

³³ *Id.*

³⁴ *Id.* § 4821(b). The Consumer Product Safety Commission is tasked with protecting the public from injury or death associated with the use of consumer products. *About CPSC*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/en/About-CPSC/> [<https://perma.cc/424C-Q2VD>].

³⁵ 42 U.S.C. § 4822(a)(1).

³⁶ *Id.* § 4822(a)(1)(A)–(E).

ity Act of 1998 (“QHWRA”).³⁷ The policy declaration of the USHA states that it exists to aid states in solving both the shortage of safe and suitable housing for low-income families as well as the unsafe housing conditions that are present.³⁸ The QHWRA also goes on to state that our nation should promote and aim to provide “decent and affordable housing for all citizens.”³⁹

Furthermore, the USHA, as amended by the QHWRA, also addresses low-income housing assistance, which aids low-income families in procuring decent places to live and also promotes “economically mixed housing.”⁴⁰ Specifically, the statute authorizes the Secretary to enter into annual contribution contracts with public housing agencies that can make assistance payments to owners of existing dwelling units.⁴¹ If a particular area does not have a public housing agency, the Secretary may enter into contracts to make assistance payments and otherwise perform the functions of a public housing agency.⁴²

The remainder of § 1437f provisions outline the required contents and purposes of the contribution contracts as well as the restrictions, required provisions and duration of the contracts.⁴³ Additionally, § 1437d(f)(2) requires that the Secretary establish housing quality standards and requirements to make sure that public housing units are safe.⁴⁴

Title 42 § 1983 of the United States Code provides legal redress for those who have had their constitutional or other legal rights violated.⁴⁵ It purports to hold liable those persons who deprive United States citizens, or people within the jurisdiction of the United States, of their constitutional or

³⁷ United States Housing Act of 1937, Pub. L. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. §§ 1437–1437bbb-9 (2012)); Quality Housing and Work Responsibility Act of 1998, Pub. L. 105-276, 112 Stat. 2518 (codified as amended at 25 U.S.C. § 4168 (2012) and scattered sections of 42 U.S.C.).

³⁸ 42 U.S.C. § 1437(a)(1)(A).

³⁹ *Id.* § 1437(a)(4).

⁴⁰ *See id.* § 1437f(a). Although § 1437f does not specifically define “economically mixed housing” the purpose of the USHA, as amended by the Quality Housing and Work Responsibility Act, is to integrate lower income individuals into the private rental market and prevent the isolation of lower income individuals and families in large housing complexes. *See* Armen H. Merjian, *Attempted Nullification: The Administrative Burden Defense in Source of Income Discrimination Cases*, 22 GEO. J. POVERTY L. & POL’Y 211, 214 (2015); Jenna Bernstein, Note, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407, 1407 (2010).

⁴¹ 42 U.S.C. § 1437f(b)(1).

⁴² *Id.* § 1437f(b)(1).

⁴³ *See id.* § 1437f.

⁴⁴ *Id.* § 1437d(f)(2).

⁴⁵ *See id.* § 1983.

other legal rights.⁴⁶ Section 1983 gives a legal remedy for a person to bring an action if his or her constitutional or legal rights have been violated.⁴⁷

Case law illustrates whether certain statutes create viable legal rights for purposes of § 1983 actions.⁴⁸ In *Blessing v. Freestone*, a group of five mothers whose children were eligible for state child support services under Title IV-D of the Social Security Act filed a § 1983 lawsuit against the Director of the Arizona Department of Economic Security, the agency charged with providing such services.⁴⁹ The mothers claimed that the agency did not take adequate steps to obtain child support payments from the fathers of their children.⁵⁰ The United States Supreme Court identified three factors pertinent to determining if a statute confers a viable § 1983 action: (1) Congress must have intended the provision to benefit the plaintiff; (2) the statute is not so “‘vague and amorphous’ that its enforcement would strain judicial competence”; and (3) the provision imposes a binding obligation on the state, i.e., it must be couched in mandatory, rather than precatory, terms.⁵¹ Based on these factors, the Court held that Title IV-D did not give the mothers individually enforceable federal rights, and vacated the judgment of the Ninth Circuit Court of Appeals, with instructions to remand to the U.S. District Court for the District of Arizona.⁵²

In *Gonzaga University v. Doe*, a former Gonzaga University (“Gonzaga” or “the university”) student sued the school under § 1983.⁵³ The student wanted to become an elementary school teacher, and he needed an affidavit from the university of good moral character.⁵⁴ The teacher certification specialist at Gonzaga overheard two students discussing allegations of sexual misconduct against the former student.⁵⁵ The teacher certification specialist launched an investigation and ultimately informed the state agency for teacher certification of the allegations against the student.⁵⁶ The teacher certification specialist also informed the student that he would not receive the affidavit of good moral character from the university.⁵⁷ The student alleged that the university violated the Family Educational Rights and

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.*; *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285–86 (2002); *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997).

⁴⁹ 520 U.S. at 329, 332–33.

⁵⁰ *Id.* at 337.

⁵¹ *Id.* at 340–41.

⁵² *Id.* at 349.

⁵³ 536 U.S. at 277.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

Privacy Act (“FERPA”), 20 U.S.C. § 1232g, by releasing personal information to an unauthorized person.⁵⁸

The Court held that FERPA’s nondisclosure provisions created no personal rights under § 1983, reasoning that when Congress intends to create an enforceable right, the statute phrases the right in terms of the persons benefited.⁵⁹ The Court determined that FERPA gives instructions about funding educational institutions, but does not have the language necessary to create an otherwise enforceable right.⁶⁰

Likewise, in *Caswell v. City of Detroit Housing Commission*, a recipient of housing subsidies from the City of Detroit Housing Commission (“the Housing Commission” or “the Commission”), brought a claim under § 1983, arguing that the Housing Commission infringed upon his federal rights when the Commission terminated his housing subsidies before his eviction proceedings were final.⁶¹ The regulation at issue mandates that the housing authority continue making housing assistance payments to the owner until the owner is able to get a court judgment evicting the tenant.⁶² The issue before the court examined whether regulations promulgated under a federal statute can create private rights for purposes of § 1983.⁶³

The Sixth Circuit Court of Appeals in *Caswell* was bound by prior precedent from the United States Supreme Court, *Gonzaga* and *Alexander v. Sandoval*.⁶⁴ Specifically, in *Sandoval* the Supreme Court found that regulations themselves can invoke private rights of action created in statutes, but regulations on their own cannot create private rights of action.⁶⁵ In particular, the court relied heavily on *Sandoval* quoting the Court’s precedent: “[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not”⁶⁶ The plaintiff in *Caswell* could not point to a specific

⁵⁸ *Gonzaga*, 536 U.S. at 277; see 20 U.S.C. § 1232g (2012). The Family Educational Rights Privacy Act prohibits the federal funding of schools that have a policy or practice of permitting the release of students’ education records without authorization. See 20 U.S.C. § 1232g; *Gonzaga*, 536 U.S. at 276.

⁵⁹ *Gonzaga*, 536 U.S. at 283–84, 287 (“rights, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced”).

⁶⁰ See *id.* at 287.

⁶¹ 418 F.3d 615, 616, 618 (6th Cir. 2005).

⁶² *Id.* at 618. Owner is defined as any person who has the legal right to lease or sublease a unit to a participant. 24 C.F.R. § 982.4 (2016).

⁶³ 418 F.3d at 618.

⁶⁴ See *Caswell*, 418 F.3d at 619–20.

⁶⁵ *Id.*

⁶⁶ *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001); *Caswell*, 418 F.3d at 619–20. In *Alexander v. Sandoval*, an individual applying for a driver’s license brought a class action suit against the Alabama Department of Public Safety, alleging discrimination arising out of the policy of giving driver’s license examinations only in English. 532 U.S. at 279. *Sandoval* brought the claim under a regulation promulgated through Title VI of the Civil Rights Act of 1964, which forbids federal

statute that conferred the right he claimed and therefore his § 1983 claim failed.⁶⁷

III. ANALYSIS

In *Johnson v. City of Detroit*, the Sixth Circuit held: (1) the Lead-Based Paint Poisoning Prevention Act (“LBPPPA”) does not confer individual rights enforceable in an action under 42 U.S.C. § 1983; (2) United States Housing Act (“USHA”) provisions did not create enforceable rights for purposes of a § 1983 action; and (3) regulations promulgated pursuant to the USHA could not create enforceable rights to sustain a claim under § 1983.⁶⁸ Focusing on the Supreme Court’s decision in *Gonzaga University v. Doe*, the Sixth Circuit Court of Appeals agreed with the lower court that the LBPPPA does not confer individual rights enforceable in a § 1983 action because the statutory provisions of the LBPPPA do not contain “the sort of rights-creating language which reveals Congressional intent to create a federal right”⁶⁹ Rather than focusing on giving tenants individual rights, the statute creates duties for the Department of Housing and Urban Development (“HUD”).⁷⁰ Additionally, although the LBPPPA was enacted to benefit public housing tenants, the statutory language does not expressly create any individual rights.⁷¹

In the same way that the Court found no rights-creating language in Family Educational Rights and Privacy Act (“FERPA”), the court in *Johnson* held that the USHA contains congressional policy declarations and requirements of annual contribution contracts, rather than rights-creating language.⁷² The court found that although the tenants benefit from the USHA, the statute focuses on the regulated entity, and does not create enforceable rights for the tenants.⁷³ Based on *Gonzaga*, the tenants in *Johnson* could not bring the § 1983 action because the statute does not contain the rights-creating language that is sufficient to bring a § 1983 claim.⁷⁴

Finally, the court held that the regulations promulgated pursuant to the LBPPPA and USHA could not create enforceable rights of their own accord

funding recipients from utilizing criteria or administrative methods having the effect of subjecting individuals to discrimination. *Id.* at 278–79. The United States Supreme Court held that Title VI does not contain a private right of action to enforce regulations based on a theory of disparate impact. *Id.* at 293.

⁶⁷ *Id.* at 620.

⁶⁸ *Johnson v. City of Detroit (Johnson II)*, 446 F.3d 614, 617 (6th Cir. 2006).

⁶⁹ *Id.* at 623.

⁷⁰ *See id.* at 624.

⁷¹ *Id.* at 624–25.

⁷² *See Gonzaga v. Doe*, 536 U.S. 273, 287 (2002); *Johnson II*, 446 F.3d at 626.

⁷³ *Johnson II*, 446 F.3d at 627.

⁷⁴ *See id.*

under § 1983.⁷⁵ The court cited the Sixth Circuit decision in *Caswell v. City of Detroit Housing Commission*, which concluded that because there was no specific statutory provision in the USHA that conferred a right relevant to the regulation regarding housing assistance payments, Caswell could not pursue his claim under § 1983.⁷⁶ Even if a regulation contains rights-creating language, a regulation alone cannot create a private right of action that was not first created through statutory text.⁷⁷

The United States Court of Appeals for the Sixth Circuit reached the correct decision based on the *Gonzaga* and *Alexander v. Sandoval* precedents; however, *Johnson* demonstrates the negative impact that these decisions can have on plaintiffs attempting to bring § 1983 claims in federal court.⁷⁸ The court found that even though the USHA and LBPPA benefit tenants of public housing, the “benefit” is not enough to create individual rights for the tenants to bring a claim under § 1983.⁷⁹ The *Gonzaga* and *Sandoval* decisions drew a hard line between individuals who merely “benefitted” from the statutes, and those who could actually bring a cause of action.⁸⁰ The decision to only allow § 1983 claims by individuals explicitly given an enforceable right under statute unnecessarily limits legal remedies, and excludes a power tool against government overreach, § 1983.⁸¹ Without

⁷⁵ *Id.* at 629.

⁷⁶ *Id.* at 628–29.

⁷⁷ See *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

⁷⁸ *Johnson II*, 446 F.3d at 621; BERRY ET AL., *supra* note 16, at 85. The *Alexander v. Sandoval* decision limits a plaintiff’s ability to bring discrimination claims based on disparate impact. See *Sandoval*, 532 U.S. at 293; BERRY ET AL., *supra* note 16 at 85; see also BRADFORD C. MANK, *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 38 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008) (“In light of both the *Sandoval* and [*Gonzaga University v. Doe*] decisions, most federal courts have held that [§ 1983] suits cannot be used to enforce . . . disparate impact regulations.”).

⁷⁹ *Johnson II*, 446 F.3d at 624–25, 27; see Anne E. Melley, Annotation, *Construction and Application of Federal Lead Paint Poisoning Prevention and Hazard Reduction Statutes (42 U.S.C.A. §§ 4801 to 4856)*, 47 A.L.R. Fed. 2d 95, 150 (2010).

⁸⁰ See *Gonzaga*, 536 U.S. at 283; *Sandoval*, 532 U.S. at 289; *Johnson II*, 446 F.3d at 619, 21. When viewed in the light of the *Sandoval* decision, civil rights advocates believe *Gonzaga* indicates “the Court’s intention to ‘substantially curb private lawsuits.’” BERRY ET AL., *supra* note 16, at 90; see *Gonzaga*, 536 U.S. at 283; *Sandoval*, 532 U.S. at 289. Additionally, Justice Stevens, in the *Gonzaga* dissent, argued that the majority improperly inserted the test that is used in implied-right-of-action cases into the § 1983 analysis. *Gonzaga*, 536 U.S. at 299–302 (Stevens, J. dissenting). The implied-right-of-action test that Justice Stevens refers to in his dissenting opinion looks to congressional intent to determine whether Congress sought to establish a private remedy. *Gonzaga*, 536 U.S. at 299–302 (Stevens, J. dissenting); see Bradford C. Mank, *The Long-Term Implications of Gonzaga v. Doe*, AM. BAR ASS’N HUMAN RIGHTS MAG., July 2014, at 2, 3, http://www.americanbar.org/publications/human_rights_magazine_home/2015-vol-41-vol-41-no-1-lurking-in-the-shadows-the-supreme-court-s-qui/the-long-term-implications-of-gonzaga-v-doe.html [<https://perma.cc/TJU3-JUDY>] (discussing Justice Steven’s dissent in *Gonzaga*).

⁸¹ See BERRY ET AL., *supra* note 16, at 94. The reaction is similar to the reaction that arose out of the court’s narrow reading of the Title VI in *Sandoval*, which some found goes against the

the ability to bring a claim under § 1983, Dellita Johnson, and other tenants like her, are limited in their means to achieve justice: she was unable to hold the City and the Housing Commission accountable in federal court for their asserted role in her son's illness.⁸²

Although public housing tenants cannot bring § 1983 claims alleging violations of LBPPPA and USHA, plaintiffs who have suffered from lead-based paint poisoning can bring state common law and statutory claims.⁸³ Plaintiffs should consider causes of action such as environmental toxic tort, common law negligence, negligence per se, strict liability, breach of covenant to repair, and/or breach of implied warranty of habitability.⁸⁴ Although state claims are an option for plaintiffs, courts' interpretation of these claims vary from state to state and do not provide a uniform level of protection for

inclusive spirit of the civil rights legislation. *Sandoval*, 532 U.S. at 293; BERRY ET AL., *supra* note 16, at 85. "The Court's prohibition of this implied private right of action to enforce regulations promulgated under § 602 bars civil rights and environmental justice plaintiffs from enforcing their disparate impact discrimination claims." BERRY ET AL., *supra* note 16, at 85. Such a narrow reading of the statutes, limiting the claims that can be brought under both § 1983 and agency regulations causes plaintiffs to increasingly rely on administrative remedies, instead of bringing claims in court to obtain relief from violations of the statute. *See id.* at 76.

⁸² *See Johnson*, 446 F.3d at 617; *see also* BERRY ET AL., *supra* note 16, at 94. A heightened § 1983 standard can have serious consequences for many civil rights and environmental justice groups that have turned to federal courts to enforce their rights. BERRY ET AL., *supra* note 16, at 94; *see* Mank, *supra* note 80, at 3. Scholars have argued that Chief Justice Rehnquist's majority opinion in *Gonzaga* diminished civil liberties because it hindered the right to enforce federal statutory rights under § 1983's explicit provision for enforcement of statutory rights. Mank, *supra* note 80, at 3. The decision lessened the distinction between rights and remedies, which essentially caused a shifting of the burden of proof from the defendant to the plaintiff when having to show that § 1983 can be used to impose a remedy for a deprivation of a federal statutory right. *Id.*

⁸³ *See, e.g.,* *Rochkind v. Finch*, 9 A.3d 88, 91 (Md. 2010) (bringing negligence claim against landlord, landlord's sole shareholder, and property manager); *Colon v. N.Y. City Hous. Auth.*, 630 N.Y.S. 2d 218, 220 (Sup. Ct. 1995) (bringing negligence claim against landlord); *Chase v. Pistolesse*, 739 N.Y.S. 2d 250, 253 (City Ct. 2002) (bringing breach of implied warranty of habitability claim against landlord); *see also* Kyle W. La Londe, *Who Wants to Be an Environmental Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENVTL. AFF. L. REV. 27, 34–35 (2004) (introducing alternative options for bringing environmental justice claims after *Sandoval*). Ms. Johnson did bring various state common law and statutory claims, but the District Court declined to extend their supplemental jurisdiction and dismissed the state claims without prejudice. *Johnson v. City of Detroit*, 319 F. Supp. 2d 756, 781 (E.D. Mich. 2004). Ms. Johnson then brought those same claims in Michigan state court. *Johnson v. City of Detroit*, No. 264125, 2006 WL 3019425, at *1 (Mich. Ct. App. Oct. 24, 2006). She was unable to recover in state court under the negligence and breach of contract claims because she failed to meet the statutory notice requirements. *Id.* at *4–5. She was also unable to recover for the negligence per se claim because the defendants had governmental immunity. *Id.* at *1.

⁸⁴ *See, e.g.,* *Rochkind*, 9 A.3d at 91 (bringing negligence claim against landlord, landlord's sole shareholder, and property manager); *Colon*, 630 N.Y.S.2d at 220 (bringing negligence claim against landlord); *Chase*, 739 N.Y.S.2d at 253 (bringing breach of implied warranty of habitability claim against landlord).

public housing tenants.⁸⁵ The court in *Johnson* had an opportunity to remedy this lack of uniformity and to protect future public housing tenants, but the court was bound by the harsh precedent of *Gonzaga* that left the court unable to remedy the injustice suffered by Johnson and similarly situated public housing tenants.⁸⁶

CONCLUSION

Johnson v. City of Detroit is a result of the precedent set in both *Gonzaga University v. Doe* and *Alexander v. Sandoval*, which has limited the ability of plaintiffs to bring claims under § 1983. As Ms. Johnson experienced, a plaintiff's ability to recover in federal court for lead poisoning caused by lead paint in his or her living unit is severely limited by these decisions. Plaintiffs like her will not be able to achieve justice through the federal court system that they would have otherwise been able to achieve. Jerome Johnson and his mother did not receive justice for the preventable damage, specifically Jerome's painful and disabling bodily injuries that have necessitated medical care, the behavioral difficulties, and the irreversible brain damage that he has suffered.

⁸⁵ Compare *Childs v. Purl*, 882 A.2d 227, 233–34 (D.C. 2005) (entering summary judgment for landlord, management company, and company's principals finding that they had no actual or constructive knowledge that the lead paint was painting, peeling or flaking even though there was evidence that the management company and its principals occasionally inspected apartment when paint may have been peeling and chipping), with *Bencosme v. Kokoras*, 507 N.E.2d 748, 750 (Mass. 1987) (holding the landlord strictly liable under state's lead paint poisoning prevention statute finding statute imposed liability on landlord for the children's injuries even without finding that the owner had knowledge or received notice of the lead paint). In addition, governmental immunity and notice provisions could also limit a plaintiff's recovery in state court as they did for Ms. Johnson. See *Johnson*, 2006 WL 3019425, at *1.

⁸⁶ See *Gonzaga*, 536 U.S. at 283; BERRY ET AL., *supra* note 16, at 93–94.