

108TH CONGRESS
2D SESSION

H. R. 3809

To restore, reaffirm, and reconcile legal rights and remedies under civil rights statutes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 11, 2004

Mr. LEWIS of Georgia (for himself, Mr. GEORGE MILLER of California, Mr. CONYERS, Ms. DELAURO, Ms. PELOSI, Ms. SLAUGHTER, Mr. MEEKS of New York, Ms. WOOLSEY, Mrs. CHRISTENSEN, Ms. NORTON, Ms. LEE, Ms. SOLIS, Mr. FRANK of Massachusetts, Mr. FROST, Mr. KUCINICH, Mr. RODRIGUEZ, Mr. GREEN of Texas, Mr. BERMAN, Ms. MILLENDER-MCDONALD, Mr. GRIJALVA, Mrs. MCCARTHY of New York, Mr. DAVIS of Illinois, Mr. NADLER, Mrs. MALONEY, Ms. WATSON, Mr. TIERNEY, Mr. BROWN of Ohio, Mr. RANGEL, Mr. OWENS, Mr. KILDEE, Mr. FARR, Mr. MATSUI, Mr. MCGOVERN, Mr. HONDA, Mr. THOMPSON of Mississippi, Mrs. JONES of Ohio, Mr. SERRANO, Mr. BALLANCE, Mr. WATT, Mr. RYAN of Ohio, Mr. BLUMENAUER, Mr. BACA, Ms. KAPTUR, Ms. WATERS, Mr. PAYNE, Ms. JACKSON-LEE of Texas, Ms. MCCOLLUM, Mr. FATTAH, Mr. ANDREWS, Mr. TOWNS, Ms. EDDIE BERNICE JOHNSON of Texas, Ms. CORRINE BROWN of Florida, Mr. DELAHUNT, Mr. LANGEVIN, Mr. BISHOP of New York, Mr. ALLEN, Mr. FILNER, Ms. KILPATRICK, Ms. BALDWIN, Mr. RUSH, Mr. CUMMINGS, Ms. LINDA T. SÁNCHEZ of California, Mrs. DAVIS of California, Mr. GEPHARDT, Mr. UDALL of New Mexico, Mr. WEINER, Mr. GUTIERREZ, Ms. LOFGREN, Mr. STARK, Mr. STRICKLAND, Ms. MCCARTHY of Missouri, Mr. HASTINGS of Florida, Mr. SCOTT of Virginia, Mr. OLVER, Mr. HOLT, Mr. CLAY, Ms. SCHAKOWSKY, Ms. ROYBAL-ALLARD, Mr. MEEK of Florida, Mr. HOEFFEL, Mr. EMANUEL, Mr. HINOJOSA, Mr. MCNULTY, Mr. PASTOR, Ms. CARSON of Indiana, Mr. WYNN, Mr. BISHOP of Georgia, Ms. MAJETTE, and Mr. SCOTT of Georgia) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committees on Education and the Workforce, and Transportation and Infrastructure, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To restore, reaffirm, and reconcile legal rights and remedies
under civil rights statutes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fairness and Indi-
5 vidual Rights Necessary to Ensure a Stronger Society:
6 Civil Rights Act of 2004”.

7 **SEC. 2. TABLE OF CONTENTS.**

8 The table of contents for this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.

TITLE I—NONDISCRIMINATION IN FEDERALLY FUNDED
PROGRAMS AND ACTIVITIES

Subtitle A—Private Rights of Action and the Disparate Impact Standard of
Proof

Sec. 101. Findings.
Sec. 102. Prohibited discrimination.
Sec. 103. Rights of action.
Sec. 104. Right of recovery.
Sec. 105. Construction.
Sec. 106. Effective date.

Subtitle B—Harassment

Sec. 111. Findings.
Sec. 112. Right of recovery.
Sec. 113. Construction.
Sec. 114. Effective date.

TITLE II—UNIFORMED SERVICES EMPLOYMENT AND
REEMPLOYMENT RIGHTS ACT OF 1994 AMENDMENT

Sec. 201. Amendment to the Uniformed Services Employment and Reemploy-
ment Rights Act of 1994.

TITLE III—AIR CARRIER ACCESS ACT OF 1986 AMENDMENT

Sec. 301. Findings.
Sec. 302. Civil action.

TITLE IV—AGE DISCRIMINATION IN EMPLOYMENT ACT
AMENDMENTS

- Sec. 401. Short title.
- Sec. 402. Findings.
- Sec. 403. Purposes.
- Sec. 404. Remedies for State employees.
- Sec. 405. Disparate impact claims.
- Sec. 406. Effective date.

TITLE V—CIVIL RIGHTS REMEDIES AND RELIEF

Subtitle A—Prevailing Party

- Sec. 501. Short title.
- Sec. 502. Definition of prevailing party.

Subtitle B—Arbitration

- Sec. 511. Short title.
- Sec. 512. Amendment to Federal Arbitration Act.
- Sec. 513. Unenforceability of arbitration clauses in employment contracts.
- Sec. 514. Application of amendments.

Subtitle C—Expert Witness Fees

- Sec. 521. Purpose.
- Sec. 522. Findings.
- Sec. 523. Effective provisions.

Subtitle D—Equal Remedies Act of 2004

- Sec. 531. Short title.
- Sec. 532. Equalization of remedies.

TITLE VI—PROHIBITIONS AGAINST SEX DISCRIMINATION

- Sec. 601. Short title.
- Sec. 602. Findings.
- Sec. 603. Enhanced enforcement of equal pay requirements.
- Sec. 604. Training.
- Sec. 605. Research, education, and outreach.
- Sec. 606. Technical assistance and employer recognition program.
- Sec. 607. Establishment of the National Award for Pay Equity in the Workplace.
- Sec. 608. Collection of pay information by the Equal Employment Opportunity Commission.
- Sec. 609. Authorization of appropriations.

TITLE VII—PROTECTIONS FOR WORKERS

Subtitle A—Protection for Undocumented Workers

- Sec. 701. Findings.
- Sec. 702. Continued application of backpay remedies.

Subtitle B—Fair Labor Standards Act Amendments

- Sec. 711. Short title.

Sec. 712. Findings.

Sec. 713. Purposes.

Sec. 714. Remedies for State employees.

1 **TITLE I—NONDISCRIMINATION**
2 **IN FEDERALLY FUNDED PRO-**
3 **GRAMS AND ACTIVITIES**

4 **Subtitle A—Private Rights of Ac-**
5 **tion and the Disparate Impact**
6 **Standard of Proof**

7 **SEC. 101. FINDINGS.**

8 Congress finds the following:

9 (1) This subtitle is made necessary by a deci-
10 sion of the Supreme Court in *Alexander v. Sandoval*,
11 532 U.S. 275 (2001) that significantly impairs stat-
12 utory protections against discrimination that Con-
13 gress has erected over a period of almost 4 decades.
14 The *Sandoval* decision undermines these statutory
15 protections by stripping victims of discrimination
16 (defined under regulations that Congress required
17 Federal departments and agencies to promulgate to
18 implement title VI of the Civil Rights Act of 1964
19 (42 U.S.C. 2000d et seq.)) of the right to bring ac-
20 tion in Federal court to redress the discrimination
21 and by casting doubt on the validity of the regula-
22 tions themselves.

23 (2) The *Sandoval* decision attacks settled expecta-
24 tions created by title VI of the Civil Rights Act of

1 1964, title IX of the Education Amendments of
2 1972 (also known as the “Patsy Takemoto Mink
3 Equal Opportunity in Education Act”) (20 U.S.C.
4 1681 et seq.), the Age Discrimination Act of 1975
5 (42 U.S.C. 6101 et seq.), and section 504 of the
6 Rehabilitation Act of 1973 (29 U.S.C. 794) (collec-
7 tively referred to in this Act as the “covered civil
8 rights provisions”). The covered civil rights provi-
9 sions were designed to establish and make effective
10 the rights of persons to be free from discrimination
11 on the part of entities that are subject to 1 or more
12 of the covered civil rights provisions, as appropriate
13 (referred to in this Act as “covered entities”). In
14 1964 Congress adopted title VI of the Civil Rights
15 Act of 1964 to ensure that Federal dollars would
16 not be used to subsidize or support programs or ac-
17 tivities that discriminated on racial, color, or na-
18 tional origin grounds. In the years that followed,
19 Congress extended these protections by enacting
20 laws barring discrimination in federally funded ac-
21 tivities on the basis of sex in title IX of the Edu-
22 cation Amendments of 1972, age in the Age Dis-
23 crimination Act of 1975, and disability in section
24 504 of the Rehabilitation Act of 1973.

1 (3) From the outset, Congress and the execu-
2 tive branch made clear that the regulatory process
3 would be used to ensure broad protections for bene-
4 ficiaries of the law. The first regulations promul-
5 gated by the Department of Justice under title VI
6 of the Civil Rights Act of 1964 (42 U.S.C. 2000d
7 et seq.) forbade the use of “criteria or methods of
8 administration which have the effect of subjecting
9 individuals to discrimination . . .” (section 80.3 of
10 title 45, Code of Federal Regulations) and prohib-
11 ited retaliation against persons participating in liti-
12 gation or administrative resolution of charges of dis-
13 crimination brought under the Act. These regula-
14 tions were drafted by the same executive branch offi-
15 cials who played a central role in drafting title VI
16 of the Civil Rights Act of 1964. The language used
17 is, in relevant respects, virtually indistinguishable
18 from regulations under the several Acts in effect
19 today. For example, section 304 of the Age Dis-
20 crimination Act of 1975 (42 U.S.C. 6103) required
21 the Secretary of the Department of Health, Edu-
22 cation, and Welfare (HEW) (now Health and
23 Human Services (HHS)) to promulgate “general
24 regulations” to effectuate the purposes of the Act.
25 These “government-wide regulations,” governing age

1 discrimination in programs and activities receiving
2 Federal financial assistance condemn “any actions
3 which have [a discriminatory] effect, on the basis of
4 age . . .” (section 90.12 of title 45, Code of Federal
5 Regulations).

6 (4) None of the regulations under the laws ad-
7 dressed in this subtitle have ever been invalidated.
8 In 1966, Congress considered and rejected a pro-
9 posal to invalidate the disparate impact regulations
10 promulgated pursuant to title VI of the Civil Rights
11 Act of 1964 (42 U.S.C. 2000d et seq.). In 1975,
12 Congress reviewed and maintained the implementing
13 regulations promulgated pursuant to title IX of the
14 Education Amendments of 1972 (20 U.S.C. 1681 et
15 seq.), pursuant to a statutory procedure designed to
16 afford Congress the opportunity to invalidate provi-
17 sions deemed to be inconsistent with congressional
18 intent. The Supreme Court has recognized that
19 Congress’s failure to disapprove regulations implies
20 that the regulations accurately reflect congressional
21 intent. *North Haven Bd. of Educ. v. Bell*, 456 U.S.
22 512, 533–34 (1982). Moreover, the Supreme Court
23 explicitly recognized congressional approval of the
24 regulations promulgated to implement section 504 of
25 the Rehabilitation Act of 1973 (29 U.S.C. 794) in

1 Consolidated Rail Corp. v. Darrone, 465 U.S. 624,
2 634 (1984), stating that “[t]he regulations particu-
3 larly merit deference in the present case: the respon-
4 sible Congressional committees participated in their
5 formation and both these committees and Congress
6 itself endorsed the regulations in their final form.”.

7 (5) All of the civil rights provisions cited in this
8 section were designed to confer a benefit on persons
9 who were discriminated against. They relied heavily
10 on private attorneys general for effective enforce-
11 ment. Congress acknowledged that it could not se-
12 cure compliance solely through enforcement actions
13 initiated by the Attorney General. *Newman v. Piggie*
14 *Park Enterprises*, 390 U.S. 400 (1968) (per cu-
15 riam).

16 (6) The Supreme Court has made it clear that
17 individuals suffering discrimination under these stat-
18 utes have a private right of action in the Federal
19 courts, and that this is necessary for effective pro-
20 tection of the law, although Congress did not make
21 such a right of action explicit in the statute. *Cannon*
22 *v. University of Chicago*, 441 U.S. 677 (1979).

23 (7)(A) Notwithstanding the decision of the Su-
24 preme Court in *Cort v. Ash*, 422 U.S. 66 (1975) to
25 abandon prior precedent and require explicit statu-

1 tory statements of a right of action, Congress and
2 the Courts both before and after Cort have recog-
3 nized an implied right of action under the above
4 statutes. For example, Congress has consistently
5 provided the means for enforcing the statutes. In
6 1972, Congress established a right to attorney's fees
7 in private actions brought under title VI of the Civil
8 Rights Act of 1964 (42 U.S.C. 2000d et seq.) and
9 title IX of the Education Amendments of 1972 (20
10 U.S.C. 1681 et seq.) that continued with enactment
11 of the Civil Rights Attorneys' Fees Awards Act of
12 1976 (Public Law 94-559; 90 Stat. 2641). In 1973,
13 Congress provided a right to attorney's fees for pre-
14 vailing parties under section 504 of the Rehabilita-
15 tion Act of 1973 (29 U.S.C. 794) without expressly
16 stating that there was a right of action. In 1978
17 Congress amended the Age Discrimination Act of
18 1975 (42 U.S.C. 6101 et seq.) to include a right
19 to attorney's fees. Because the Age Discrimination
20 Act of 1975 was enacted while the Cort decision was
21 pending, Congress also enacted in 1978 a limited
22 private right of action to enforce the Age Discrimi-
23 nation Act of 1975.

24 (B) The Senate Report that accompanied the
25 Civil Rights Attorneys' Fees Awards Act of 1976

1 (Public Law 94–559; 90 Stat. 2641) stated that
2 “All of these civil rights laws . . . depend heavily
3 upon private enforcement, and fee awards have
4 proved an essential remedy if private citizens are to
5 have a meaningful opportunity to vindicate the im-
6 portant congressional policies which these laws con-
7 tain.” S. Rep. No. 94–1011 (1976).

8 (8) The Supreme Court had no basis in law or
9 in legislative history in *Sandoval* for denying a right
10 of action under regulations promulgated pursuant to
11 title VI of the Civil Rights Act of 1964 (42 U.S.C.
12 2000d et seq.) while permitting it under the statute.
13 The regulations were congressionally mandated and
14 their promulgation was specifically directed by Con-
15 gress under section 602 of that Act (42 U.S.C.
16 2000d–1) “to effectuate” the antidiscrimination pro-
17 visions of the statute. Title VI of the Civil Rights
18 Act of 1964 stressed the importance of the regula-
19 tions by requiring them to be “approved by the
20 President”. Similarly, the regulations promulgated
21 pursuant to title IX of the Education Amendments
22 of 1972 (20 U.S.C. 1681 et seq.) were also congres-
23 sionally authorized and specifically directed by Con-
24 gress to effectuate the provisions of the statute.
25 Title IX of the Education Amendments of 1972

1 stressed the importance of the regulations by requir-
2 ing them to be “approved by the President”.

3 (9) Regulations that prohibit practices that
4 have the effect of discrimination are consistent with
5 prohibitions of disparate treatment that require a
6 showing of intent, as the Supreme Court has ac-
7 knowledged in the following decisions:

8 (A) A disparate impact standard allows a
9 court to reach discrimination that could actu-
10 ally exist under the guise of compliance with
11 the law. *Griggs v. Duke Power Co.*, 401 U.S.
12 424 (1971).

13 (B) Evidence of a disproportionate burden
14 will often be the starting point in any analysis
15 of unlawful discrimination. *Village of Arlington*
16 *Heights v. Metropolitan Hous. Dev. Corp.*, 429
17 U.S. 252 (1977).

18 (C) An invidious purpose may often be in-
19 ferred from the totality of the relevant facts, in-
20 cluding, where true, that the practice bears
21 more heavily on one race than another. *Wash-*
22 *ington v. Davis*, 426 U.S. 229 (1976).

23 (D) The disparate impact method of proof
24 is critical to ferreting out stereotypes under-

1 lying intentional discrimination. *Watson v. Fort*
2 *Worth Bank & Trust*, 487 U.S. 977 (1988).

3 (10) The interpretation of title VI of the Civil
4 Rights Act of 1964 (42 U.S.C. 2000d et seq.), title
5 IX of the Education Amendments of 1972 (20
6 U.S.C. 1681 et seq.), and other statutes barring dis-
7 crimination by covered entities as prohibiting prac-
8 tices that have disparate impact and that are not
9 justified as necessary to achieve the goals of the pro-
10 grams or activities supported by the Federal finan-
11 cial assistance is powerfully reinforced by the use of
12 such a standard in enforcing title VII of the Civil
13 Rights Act of 1964 (42 U.S.C. 2000e et seq.). When
14 the Supreme Court wavered on the application of a
15 disparate impact standard under title VII, Congress
16 specifically reinstated it as law in the Civil Rights
17 Act of 1991 (Public Law 102–166; 105 Stat. 1071).

18 (11) By reinstating a private right of action
19 under title VI of the Civil Rights Act of 1964 (42
20 U.S.C. 2000d et seq.) and confirming that right for
21 other civil rights statutes, Congress is not acting in
22 a manner that would expose covered entities to un-
23 fair findings of discrimination. The legal standard
24 for a disparate impact claim has never been struc-

1 tured so that a finding of discrimination could be
2 based on numerical imbalance alone.

3 (12) In contrast, a failure to reinstate or con-
4 firm a private right of action would leave vindication
5 of the rights to equality of opportunity solely to Fed-
6 eral agencies, which may fail to take necessary and
7 appropriate action because of administrative over-
8 burden or other reasons. Action by Congress to
9 specify a private right of action is necessary to en-
10 sure that persons will have a remedy if they are de-
11 nied equal access to education, housing, health, envi-
12 ronmental protection, transportation, and many
13 other programs and services by practices of covered
14 entities that result in discrimination.

15 (13) As a result of the Supreme Court's deci-
16 sion in *Sandoval*, courts have dismissed numerous
17 claims brought under the regulations promulgated
18 pursuant to title VI of the Civil Rights Act of 1964
19 (42 U.S.C. 2000d et seq.) that challenged actions
20 with an unjustified discriminatory effect. Although
21 the *Sandoval* Court did not address title IX of the
22 Education Amendments of 1972 (20 U.S.C. 1681 et
23 seq.), lower courts have similarly dismissed claims
24 under such Act. Courts relying on the *Sandoval* deci-
25 sion have also dismissed claims seeking redress for

1 unlawful retaliation against persons who opposed
2 prohibited acts, brought actions, or participated in
3 actions, under title VI of the Civil Rights Act of
4 1964 and title IX of the Education Amendments of
5 1972. Because judicial interpretation of the Age
6 Discrimination Act of 1975 (42 U.S.C. 6101 et seq.)
7 has tracked that of title VI of the Civil Rights Act
8 of 1964 and title IX of the Education Amendments
9 of 1972, without clarification of Sandoval, plaintiffs
10 run the risk that courts may dismiss claims brought
11 under regulations promulgated pursuant to the Age
12 Discrimination Act of 1975 challenging actions with
13 an unjustified discriminatory effect and claims seek-
14 ing redress for unlawful retaliation against persons
15 who have brought or participated in actions under
16 the Age Discrimination Act of 1975.

17 (14) Section 504 of the Rehabilitation Act of
18 1973 (29 U.S.C. 794) has received different treat-
19 ment by the Supreme Court. In *Alexander v. Choate*,
20 469 U.S. 287 (1985), the Court proceeded on the
21 assumption that the statute itself prohibited some
22 actions that had a disparate impact on handicapped
23 individuals—an assumption borne out by congress-
24 sional statements made during passage of the Act.
25 In *Sandoval*, the Court appeared to accept this prin-

1 ciple of Alexander. Moreover, the Supreme Court ex-
2 plicitly recognized congressional approval of the reg-
3 ulations promulgated to implement section 504 of
4 the Rehabilitation Act of 1973 in *Consolidated Rail*
5 *Corp. v. Darrone*, 465 U.S. 624, 634 (1984). Rely-
6 ing on the validity of the regulations, Congress in-
7 corporated the regulations into the statutory require-
8 ments of section 204 of the Americans with Disabil-
9 ities Act of 1990 (42 U.S.C. 12134). Thus it does
10 not appear at this time that there is a risk that the
11 private right of action to challenge disparate impact
12 discrimination under section 504 of the Rehabilita-
13 tion Act of 1973 will become unavailable.

14 (15) Since the enactment of title VI of the Civil
15 Rights Act of 1964, title IX of the Education
16 Amendments of 1972, the Age Discrimination Act of
17 1975, and section 504 of the Rehabilitation Act of
18 1973, Congress has intended that the prohibitions
19 on discrimination in those provisions include a prohi-
20 bition on retaliation. The ability to prevent retalia-
21 tion against persons who oppose any policy or prac-
22 tice prohibited by those provisions, or make a
23 charge, testify, assist, or participate in any manner
24 in an investigation, proceeding, or hearing under

1 those provisions, is essential to realizing the prohibi-
2 tions on discrimination in those provisions.

3 (16) The right to maintain a private right of
4 action under a provision added to a statute under
5 this subtitle will be effectuated by a waiver of sov-
6 ereign immunity in the same manner as sovereign
7 immunity is waived under the remaining provisions
8 of that statute.

9 **SEC. 102. PROHIBITED DISCRIMINATION.**

10 (a) CIVIL RIGHTS ACT OF 1964.—Section 601 of the
11 Civil Rights Act of 1964 (42 U.S.C. 2000d) is amended—

12 (1) by striking “No” and inserting “(a) No”;
13 and

14 (2) by adding at the end the following:

15 “(b)(1)(A) Discrimination (including exclusion from
16 participation and denial of benefits) based on disparate
17 impact is established under this title only if—

18 “(i) a person aggrieved by discrimination on the
19 basis of race, color, or national origin (referred to in
20 this title as an ‘aggrieved person’) demonstrates that
21 an entity subject to this title (referred to in this title
22 as a ‘covered entity’) has a policy or practice that
23 causes a disparate impact on the basis of race, color,
24 or national origin and the covered entity fails to
25 demonstrate that the challenged policy or practice

1 is related to and necessary to achieve the non-
2 discriminatory goals of the program or activity al-
3 leged to have been operated in a discriminatory
4 manner; or

5 “(ii) the aggrieved person demonstrates (con-
6 sistent with the demonstration required under title
7 VII with respect to an ‘alternative employment prac-
8 tice’) that a less discriminatory alternative policy or
9 practice exists, and the covered entity refuses to
10 adopt such alternative policy or practice.

11 “(B)(i) With respect to demonstrating that a par-
12 ticular policy or practice causes a disparate impact as de-
13 scribed in subparagraph (A)(i), the aggrieved person shall
14 demonstrate that each particular challenged policy or
15 practice causes a disparate impact, except that if the ag-
16 grieved person demonstrates to the court that the elements
17 of a covered entity’s decisionmaking process are not capa-
18 ble of separation for analysis, the decisionmaking process
19 may be analyzed as one policy or practice.

20 “(ii) If the covered entity demonstrates that a specific
21 policy or practice does not cause the disparate impact, the
22 covered entity shall not be required to demonstrate that
23 such policy or practice is necessary to achieve the goals
24 of its program or activity.

1 “(2) A demonstration that a policy or practice is nec-
2 essary to achieve the goals of a program or activity may
3 not be used as a defense against a claim of intentional
4 discrimination under this title.

5 “(3) In this subsection, the term ‘demonstrates’
6 means meets the burdens of production and persuasion.

7 “(c) No person in the United States shall be sub-
8 jected to discrimination, including retaliation, because
9 such person opposed any policy or practice prohibited by
10 this title, or because such person made a charge, testified,
11 assisted, or participated in any manner in an investiga-
12 tion, proceeding, or hearing under this title.”.

13 (b) EDUCATION AMENDMENTS OF 1972.—Section
14 901 of the Education Amendments of 1972 (20 U.S.C.
15 1681) is amended—

16 (1) by redesignating subsection (c) as sub-
17 section (e); and

18 (2) by inserting after subsection (b) the fol-
19 lowing:

20 “(c)(1)(A) Subject to the conditions described in
21 paragraphs (1) through (9) of subsection (a), discrimina-
22 tion (including exclusion from participation and denial of
23 benefits) based on disparate impact is established under
24 this title only if—

1 “(i) a person aggrieved by discrimination on the
2 basis of sex (referred to in this title as an ‘aggrieved
3 person’) demonstrates that an entity subject to this
4 title (referred to in this title as a ‘covered entity’)
5 has a policy or practice that causes a disparate im-
6 pact on the basis of sex and the covered entity fails
7 to demonstrate that the challenged policy or practice
8 is related to and necessary to achieve the non-
9 discriminatory goals of the program or activity al-
10 leged to have been operated in a discriminatory
11 manner; or

12 “(ii) the aggrieved person demonstrates (con-
13 sistent with the demonstration required under title
14 VII of the Civil Rights Act of 1964 (42 U.S.C.
15 2000e et seq.) with respect to an ‘alternative em-
16 ployment practice’) that a less discriminatory alter-
17 native policy or practice exists, and the covered enti-
18 ty refuses to adopt such alternative policy or prac-
19 tice.

20 “(B)(i) With respect to demonstrating that a par-
21 ticular policy or practice causes a disparate impact as de-
22 scribed in subparagraph (A)(i), the aggrieved person shall
23 demonstrate that each particular challenged policy or
24 practice causes a disparate impact, except that if the ag-
25 grieved person demonstrates to the court that the elements

1 of a covered entity’s decisionmaking process are not capa-
2 ble of separation for analysis, the decisionmaking process
3 may be analyzed as one policy or practice.

4 “(ii) If the covered entity demonstrates that a specific
5 policy or practice does not cause the disparate impact, the
6 covered entity shall not be required to demonstrate that
7 such policy or practice is necessary to achieve the goals
8 of its program or activity.

9 “(2) A demonstration that a policy or practice is nec-
10 essary to achieve the goals of a program or activity may
11 not be used as a defense against a claim of intentional
12 discrimination under this title.

13 “(3) In this subsection, the term ‘demonstrates’
14 means meets the burdens of production and persuasion.

15 “(d) No person in the United States shall be sub-
16 jected to discrimination, including retaliation, because
17 such person opposed any policy or practice prohibited by
18 this title, or because such person made a charge, testified,
19 assisted, or participated in any manner in an investiga-
20 tion, proceeding, or hearing under this title.”.

21 (c) AGE DISCRIMINATION ACT OF 1975.—Section
22 303 of the Age Discrimination Act of 1975 (42 U.S.C.
23 6102) is amended—

24 (1) by striking “Pursuant” and inserting “(a)
25 Pursuant”; and

1 (2) by adding at the end the following:

2 “(b)(1)(A) Subject to the conditions described in sub-
3 sections (b) and (c) of section 304, discrimination (includ-
4 ing exclusion from participation and denial of benefits)
5 based on disparate impact is established under this title
6 only if—

7 “(i) a person aggrieved by discrimination on the
8 basis of age (referred to in this title as an ‘aggrieved
9 person’) demonstrates that an entity subject to this
10 title (referred to in this title as a ‘covered entity’)
11 has a policy or practice that causes a disparate im-
12 pact on the basis of age and the covered entity fails
13 to demonstrate that the challenged policy or practice
14 is related to and necessary to achieve the non-
15 discriminatory goals of the program or activity al-
16 leged to have been operated in a discriminatory
17 manner; or

18 “(ii) the aggrieved person demonstrates (con-
19 sistent with the demonstration required under title
20 VII of the Civil Rights Act of 1964 (42 U.S.C.
21 2000e et seq.) with respect to an ‘alternative em-
22 ployment practice’) that a less discriminatory alter-
23 native policy or practice exists, and the covered enti-
24 ty refuses to adopt such alternative policy or prac-
25 tice.

1 “(B)(i) With respect to demonstrating that a par-
2 ticular policy or practice causes a disparate impact as de-
3 scribed in subparagraph (A)(i), the aggrieved person shall
4 demonstrate that each particular challenged policy or
5 practice causes a disparate impact, except that if the ag-
6 grieved person demonstrates to the court that the elements
7 of a covered entity’s decisionmaking process are not capa-
8 ble of separation for analysis, the decisionmaking process
9 may be analyzed as one policy or practice.

10 “(ii) If the covered entity demonstrates that a specific
11 policy or practice does not cause the disparate impact, the
12 covered entity shall not be required to demonstrate that
13 such policy or practice is necessary to achieve the goals
14 of its program or activity.

15 “(2) A demonstration that a policy or practice is nec-
16 essary to achieve the goals of a program or activity may
17 not be used as a defense against a claim of intentional
18 discrimination under this title.

19 “(3) In this subsection, the term ‘demonstrates’
20 means meets the burdens of production and persuasion.

21 “(c) No person in the United States shall be sub-
22 jected to discrimination, including retaliation, because
23 such person opposed any policy or practice prohibited by
24 this title, or because such person made a charge, testified,

1 assisted, or participated in any manner in an investiga-
2 tion, proceeding, or hearing under this title.”.

3 **SEC. 103. RIGHTS OF ACTION.**

4 (a) CIVIL RIGHTS ACT OF 1964.—Section 602 of the
5 Civil Rights Act of 1964 (42 U.S.C. 2000d–1) is amend-
6 ed—

7 (1) by inserting “(a)” before “Each Federal de-
8 partment and agency which is empowered”; and

9 (2) by adding at the end the following:

10 “(b) Any person aggrieved by the failure of a covered
11 entity to comply with this title, including any regulation
12 promulgated pursuant to this title, may bring a civil action
13 in any Federal or State court of competent jurisdiction
14 to enforce such person’s rights.”.

15 (b) EDUCATION AMENDMENTS OF 1972.—Section
16 902 of the Education Amendments of 1972 (20 U.S.C.
17 1682) is amended—

18 (1) by inserting “(a)” before “Each Federal de-
19 partment and agency which is empowered”; and

20 (2) by adding at the end the following:

21 “(b) Any person aggrieved by the failure of a covered
22 entity to comply with this title, including any regulation
23 promulgated pursuant to this title, may bring a civil action
24 in any Federal or State court of competent jurisdiction
25 to enforce such person’s rights.”.

1 (c) AGE DISCRIMINATION ACT OF 1975.—Section
2 305(e) of the Age Discrimination Act of 1975 (42 U.S.C.
3 6104(e)) is amended in the first sentence of paragraph
4 (1), by striking “this Act” and inserting “this title, includ-
5 ing a regulation promulgated to carry out this title,”.

6 **SEC. 104. RIGHT OF RECOVERY.**

7 (a) CIVIL RIGHTS ACT OF 1964.—Title VI of the
8 Civil Rights Act of 1964 (42 U.S.C. 2000–d et seq.) is
9 amended by inserting after section 602 the following:

10 **“SEC. 602A. ACTIONS BROUGHT BY AGGRIEVED PERSONS.**

11 “(a) CLAIMS BASED ON PROOF OF INTENTIONAL
12 DISCRIMINATION.—In an action brought by an aggrieved
13 person under this title against a covered entity who has
14 engaged in unlawful intentional discrimination (not a
15 practice that is unlawful because of its disparate impact)
16 prohibited under this title (including its implementing reg-
17 ulations), the aggrieved person may recover equitable and
18 legal relief (including compensatory and punitive dam-
19 ages), attorney’s fees (including expert fees), and costs,
20 except that punitive damages are not available against a
21 government, government agency, or political subdivision.

22 “(b) CLAIMS BASED ON THE DISPARATE IMPACT
23 STANDARD OF PROOF.—In an action brought by an ag-
24 grieved person under this title against a covered entity
25 who has engaged in unlawful discrimination based on dis-

1 parate impact prohibited under this title (including its im-
2 plementing regulations), the aggrieved person may recover
3 equitable relief, attorney’s fees (including expert fees), and
4 costs.”.

5 (b) EDUCATION AMENDMENTS OF 1972.—Title IX of
6 the Education Amendments of 1972 (20 U.S.C. 1681 et
7 seq.) is amended by inserting after section 902 the fol-
8 lowing:

9 **“SEC. 902A. ACTIONS BROUGHT BY AGGRIEVED PERSONS.**

10 “(a) CLAIMS BASED ON PROOF OF INTENTIONAL
11 DISCRIMINATION.—In an action brought by an aggrieved
12 person under this title against a covered entity who has
13 engaged in unlawful intentional discrimination (not a
14 practice that is unlawful because of its disparate impact)
15 prohibited under this title (including its implementing reg-
16 ulations), the aggrieved person may recover equitable and
17 legal relief (including compensatory and punitive dam-
18 ages), attorney’s fees (including expert fees), and costs,
19 except that punitive damages are not available against a
20 government, government agency, or political subdivision.

21 “(b) CLAIMS BASED ON THE DISPARATE IMPACT
22 STANDARD OF PROOF.—In an action brought by an ag-
23 grieved person under this title against a covered entity
24 who has engaged in unlawful discrimination based on dis-
25 parate impact prohibited under this title (including its im-

1 plementing regulations), the aggrieved person may recover
2 equitable relief, attorney’s fees (including expert fees), and
3 costs.”.

4 (c) AGE DISCRIMINATION ACT OF 1975.—

5 (1) IN GENERAL.—Section 305 of the Age Dis-
6 crimination Act of 1975 (42 U.S.C. 6104) is amend-
7 ed by adding at the end the following:

8 “(g)(1) In an action brought by an aggrieved person
9 under this title against a covered entity who has engaged
10 in unlawful intentional discrimination (not a practice that
11 is unlawful because of its disparate impact) prohibited
12 under this title (including its implementing regulations),
13 the aggrieved person may recover equitable and legal relief
14 (including compensatory and punitive damages), attor-
15 ney’s fees (including expert fees), and costs, except that
16 punitive damages are not available against a government,
17 government agency, or political subdivision.

18 “(2) In an action brought by an aggrieved person
19 under this title against a covered entity who has engaged
20 in unlawful discrimination based on disparate impact pro-
21 hibited under this title (including its implementing regula-
22 tions), the aggrieved person may recover equitable relief,
23 attorney’s fees (including expert fees), and costs.”.

24 (2) CONFORMITY OF ADA WITH TITLE VI AND
25 TITLE IX.—

1 (A) ELIMINATING WAIVER OF RIGHT TO
2 FEES IF NOT REQUESTED IN COMPLAINT.—Sec-
3 tion 305(e)(1) of the Age Discrimination Act of
4 1975 (42 U.S.C. 6104(e)) is amended—

5 (i) by striking “to enjoin a violation”
6 and inserting “to redress a violation”; and

7 (ii) by striking the second sentence
8 and inserting the following: “The Court
9 shall award the costs of suit, including a
10 reasonable attorney’s fee (including expert
11 fees), to the prevailing plaintiff.”.

12 (B) ELIMINATING UNNECESSARY MAN-
13 DATES: TO EXHAUST ADMINISTRATIVE REM-
14 EDIES; AND TO DELAY SUIT LONGER THAN 180
15 DAYS TO OBTAIN AGENCY REVIEW.—Section
16 305(f) of the Age Discrimination Act of 1975
17 (42 U.S.C. 6104(f)) is amended by striking
18 “With respect to actions brought for relief
19 based on an alleged violation of the provisions
20 of this title,” and inserting “Actions brought
21 for relief based on an alleged violation of the
22 provisions of this title may be initiated in a
23 court of competent jurisdiction, pursuant to
24 section 305(e), or before the relevant Federal
25 department or agency. With respect to such ac-

1 tions brought initially before the relevant Fed-
2 eral department or agency,”.

3 (C) ELIMINATING DUPLICATIVE “REASON-
4 ABLENESS” REQUIREMENT; CLARIFYING THAT
5 “REASONABLE FACTORS OTHER THAN AGE” IS
6 DEFENSE TO A DISPARATE IMPACT CLAIM, NOT
7 AN EXCEPTION TO ADA COVERAGE.—Section
8 304(b)(1) of the Age Discrimination Act of
9 1975 (42 U.S.C. 6103(b)(1)) is amended by
10 striking “involved—” and all that follows
11 through the period and inserting “involved such
12 action reasonably takes into account age as a
13 factor necessary to the normal operation or the
14 achievement of any statutory objective of such
15 program or activity.”.

16 (d) REHABILITATION ACT OF 1973.—Section 504 of
17 the Rehabilitation Act of 1973 (29 U.S.C. 794) is amend-
18 ed by adding at the end the following:

19 “(e)(1) In an action brought by a person aggrieved
20 by discrimination on the basis of disability (referred to in
21 this section as an ‘aggrieved person’) under this section
22 against an entity subject to this section (referred to in
23 this section as a ‘covered entity’) who has engaged in un-
24 lawful intentional discrimination (not a practice that is
25 unlawful because of its disparate impact) prohibited under

1 this section (including its implementing regulations), the
2 aggrieved person may recover equitable and legal relief
3 (including compensatory and punitive damages), attor-
4 ney’s fees (including expert fees), and costs, except that
5 punitive damages are not available against a government,
6 government agency, or political subdivision.

7 “(2) In an action brought by an aggrieved person
8 under this section against a covered entity who has en-
9 gaged in unlawful discrimination based on disparate im-
10 pact prohibited under this section (including its imple-
11 menting regulations), the aggrieved person may recover
12 equitable relief, attorney’s fees (including expert fees), and
13 costs.”.

14 **SEC. 105. CONSTRUCTION.**

15 (a) RELIEF.—Nothing in this subtitle, including any
16 amendment made by this subtitle, shall be construed to
17 limit the scope of, or the relief available under, section
18 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794),
19 the Americans with Disabilities Act of 1990 (42 U.S.C.
20 12101 et seq.), or any other provision of law.

21 (b) DEFENDANTS.—Nothing in this subtitle, includ-
22 ing any amendment made by this subtitle, shall be con-
23 strued to limit the scope of the class of persons who may
24 be subjected to civil actions under the covered civil rights
25 provisions.

1 **SEC. 106. EFFECTIVE DATE.**

2 (a) IN GENERAL.—This subtitle, and the amend-
3 ments made by this subtitle, are retroactive to April 24,
4 2001, and effective as of that date.

5 (b) APPLICATION.—This subtitle, and the amend-
6 ments made by this subtitle, apply to all actions or pro-
7 ceedings pending on or after April 24, 2001, except as
8 to an action against a State on a claim brought under
9 the disparate impact standard, as to which the effective
10 date is the date of enactment of this Act.

11 **Subtitle B—Harassment**

12 **SEC. 111. FINDINGS.**

13 Congress finds the following:

14 (1) As the Supreme Court has held, covered en-
15 tities are liable for harassment on the basis of sex
16 under their education programs and activities under
17 title IX of the Education Amendments of 1972 (20
18 U.S.C. 1681 et seq.) (referred to in this subtitle as
19 “title IX”). *Franklin v. Gwinnett County Public*
20 *Schools*, 503 U.S. 60, 75 (1992) (damages remedy
21 available for harassment of student by a teacher
22 coach); *Davis v. Monroe County Board of Edu-*
23 *cation*, 526 U.S. 629, 633 (1999) (authorizing dam-
24 ages action against school board for student-on-stu-
25 dent sexual harassment).

1 (2) Courts have confirmed that covered entities
2 are liable for harassment on the basis of race, color,
3 or national origin under title VI of the Civil Rights
4 Act of 1964 (42 U.S.C. 2000d et seq.) (referred to
5 in this subtitle as “title VI”), e.g., *Bryant v. Inde-*
6 *pendent School District No. I-38*, 334 F.3d 928
7 (10th Cir. 2003) (liability for student-on-student ra-
8 cial harassment). Moreover, judicial interpretation of
9 the similarly worded Age Discrimination Act of 1975
10 (42 U.S.C. 6101 et seq.) and section 504 of the Re-
11 habilitation Act of 1973 (29 U.S.C. 794) has
12 tracked that of title VI and title IX.

13 (3) As these courts have properly recognized,
14 harassment on a prohibited basis under a program
15 or activity, whether perpetrated by employees or
16 agents of the program or activity, by peers of the
17 victim, or by others who conduct harassment under
18 the program or activity, is a form of unlawful and
19 intentional discrimination that inflicts substantial
20 harm on beneficiaries of the program or activity and
21 violates the obligation of a covered entity to main-
22 tain a nondiscriminatory environment.

23 (4) In a 5 to 4 ruling, the Supreme Court held
24 that students subjected to sexual harassment may
25 receive a damages remedy under title IX only when

1 school officials have “actual notice” of the harass-
2 ment and are “deliberately indifferent” to it. *Gebser*
3 *v. Lago Vista Independent School District*, 524 U.S.
4 274 (1998). See also *Davis v. Monroe County Board*
5 *of Education*, 526 U.S. 629 (1999).

6 (5) The standard delineated in *Gebser* and fol-
7 lowed in *Davis* has been applied by lower courts re-
8 garding the liability of covered entities for damages
9 for harassment based on race, color, or national ori-
10 gin under title VI. E.g., *Bryant v. Independent*
11 *School District No. I-38*, 334 F.3d 928 (10th Cir.
12 2003). Because of the similarities in the wording
13 and interpretation of the underlying statutes, this
14 standard may be applied to claims for damages
15 brought under the Age Discrimination Act of 1975
16 (42 U.S.C. 6101 et seq.) and section 504 of the Re-
17 habilitation Act of 1973 (29 U.S.C. 794) as well.

18 (6) Although they do not affect the relevant
19 standards for individuals to obtain injunctive and
20 equitable relief for harassment on the basis of race,
21 color, sex, national origin, age, or disability under
22 covered programs and activities, *Gebser* and its
23 progeny severely limit the availability of remedies for
24 such individuals by imposing new, more stringent
25 standards for recovery of damages under title VI

1 and title IX, and potentially under the Age Discrimi-
2 nation Act of 1975 and section 504 of the Rehabili-
3 tation Act of 1973. Yet in many cases, damages are
4 the only remedy that would effectively rectify past
5 harassment.

6 (7) As recognized by the dissenters in *Gebser*,
7 these limitations on effective relief thwart Congress’s
8 underlying purpose to protect students from harass-
9 ment. By making the “policy choice” to “rank[] pro-
10 tection of the school district’s purse above the pro-
11 tection of immature high school students”, the
12 *Gebser* case “is not faithful to the intent of the pol-
13 icymaking branch of our Government”. *Gebser*, 524
14 U.S. at 306 (Stevens, J., dissenting).

15 (8) The rulings in *Gebser* and its progeny cre-
16 ate an incentive for covered entities to insulate
17 themselves from knowledge of harassment on the
18 basis of race, color, sex, national origin, age, or dis-
19 ability rather than adopting and enforcing practices
20 that will minimize the danger of such harassment.
21 The rulings thus undermine the purpose of prohibi-
22 tions on discrimination in the civil rights laws: “to
23 induce [covered programs or activities] to adopt and
24 enforce practices that will minimize the danger that
25 vulnerable students [or other beneficiaries] will be

1 exposed to such odious behavior”. Gebser, 524 U.S.
2 at 300 (Stevens, J., dissenting).

3 (9) The Gebser ruling contravened the interpre-
4 tations of title VI and title IX by the Department
5 of Education, which interpretations recognized liabil-
6 ity for damages for harassment based on race, color,
7 sex, or national origin based on agency principles.
8 Sexual Harassment Guidance: Harassment of Stu-
9 dents by School Employees, Other Students, or
10 Third Parties, 62 Fed. Reg. 12034 (March 13,
11 1997); Racial Incidents and Harassment Against
12 Students at Educational Institutions: Investigative
13 Guidance, 59 Fed. Reg. 11448 (March 10, 1994).

14 (10) Legislative action is necessary and appro-
15 priate to reverse Gebser and its progeny and restore
16 the availability of a full range of remedies for har-
17 assment based on race, color, sex, national origin,
18 age, or disability. The Gebser majority itself invited
19 Congress to “speak directly on the subject” of dam-
20 ages liability to provide additional guidance to the
21 courts. 524 U.S. at 292.

22 (11) Restoring the availability of a full range of
23 remedies for harassment will—

24 (A) ensure that students and other bene-
25 ficiaries of federally funded programs and ac-

1 activities have protection from harassment on the
2 basis of race, color, sex, national origin, age, or
3 disability that is comparable in strength and ef-
4 fectiveness to that available to employees under
5 title VII of the Civil Rights Act of 1964 (42
6 U.S.C. 2000e et seq.), the Age Discrimination
7 in Employment Act of 1967 (29 U.S.C. 621 et
8 seq.), and title I of the Americans with Disabil-
9 ities Act of 1990 (42 U.S.C. 12111 et seq.);

10 (B) encourage covered entities to adopt
11 and enforce meaningful policies and procedures
12 to prevent and remedy harassment;

13 (C) deter incidents of harassment; and

14 (D) provide appropriate remedies for dis-
15 crimination.

16 (12) Congress has the same affirmative powers
17 to enact legislation restoring the availability of a full
18 range of remedies for harassment as it did to enact
19 the underlying statutory prohibitions on harassment,
20 including powers under section 5 of the 14th amend-
21 ment and section 8 of article I of the Constitution.

22 (13) The right to maintain a private right of
23 action under a provision added to a statute under
24 this subtitle will be effectuated by a waiver of sov-
25 ereign immunity in the same manner as sovereign

1 immunity is waived under the remaining provisions
2 of that statute.

3 **SEC. 112. RIGHT OF RECOVERY.**

4 (a) CIVIL RIGHTS ACT OF 1964.—Section 602A of
5 the Civil Rights Act of 1964, as added by section 104,
6 is amended by adding at the end the following:

7 “(c) CLAIMS BASED ON HARASSMENT.—

8 “(1) RIGHT OF RECOVERY.—In an action
9 brought against a covered entity by (including on be-
10 half of) an aggrieved person who has been subjected
11 to unlawful harassment under a program or activity,
12 the aggrieved person may recover equitable and legal
13 relief (including compensatory and punitive damages
14 subject to the provisions of paragraph (2)), attor-
15 ney’s fees (including expert fees), and costs.

16 “(2) AVAILABILITY OF DAMAGES.—

17 “(A) TANGIBLE ACTION BY AGENT OR EM-
18 PLOYEE.—If an agent or employee of a covered
19 entity engages in unlawful harassment under a
20 program or activity that results in a tangible
21 action to the aggrieved person, damages shall
22 be available against the covered entity.

23 “(B) NO TANGIBLE ACTION BY AGENT OR
24 EMPLOYEE.—If an agent or employee of a cov-
25 ered entity engages in unlawful harassment

1 under a program or activity that results in no
2 tangible action to the aggrieved person, no
3 damages shall be available against the covered
4 entity if it can demonstrate that—

5 “(i) it exercised reasonable care to
6 prevent and correct promptly any harass-
7 ment based on race, color, or national ori-
8 gin; and

9 “(ii) the aggrieved person unreason-
10 ably failed to take advantage of preventive
11 or corrective opportunities offered by the
12 covered entity that—

13 “(I) would likely have provided
14 redress and avoided the harm de-
15 scribed by the aggrieved person; and

16 “(II) would not have exposed the
17 aggrieved person to undue risk, effort,
18 or expense.

19 “(C) HARASSMENT BY THIRD PARTY.—If a
20 person who is not an agent or employee of a
21 covered entity subjects an aggrieved person to
22 unlawful harassment under a program or activ-
23 ity, and the covered entity involved knew or
24 should have known of the harassment, no dam-
25 ages shall be available against the covered enti-

1 ty if it can demonstrate that it exercised rea-
2 sonable care to prevent and correct promptly
3 any harassment based on race, color, or na-
4 tional origin.

5 “(D) DEMONSTRATION.—For purposes of
6 subparagraphs (B) and (C), a showing that the
7 covered entity has exercised reasonable care to
8 prevent and correct promptly any harassment
9 based on race, color, or national origin includes
10 a demonstration by the covered entity that it
11 has—

12 “(i) established, adequately publicized,
13 and enforced an effective, comprehensive,
14 harassment prevention policy and com-
15 plaint procedure that is likely to provide
16 redress and avoid harm without exposing
17 the person subjected to the harassment to
18 undue risk, effort, or expense;

19 “(ii) undertaken prompt, thorough,
20 and impartial investigations pursuant to
21 its complaint procedure; and

22 “(iii) taken immediate and appro-
23 priate corrective action designed to stop
24 harassment that has occurred, correct its

1 effects on the aggrieved person and ensure
2 that the harassment does not recur.

3 “(E) PUNITIVE DAMAGES.—Punitive dam-
4 ages shall not be available under this subsection
5 against a government, government agency, or
6 political subdivision.

7 “(3) DEFINITIONS.—As used in this subsection:

8 “(A) DEMONSTRATES.—The term ‘dem-
9 onstrates’ means meets the burdens of produc-
10 tion and persuasion.

11 “(B) TANGIBLE ACTION.—The term ‘tan-
12 gible action’ means—

13 “(i) a significant adverse change in an
14 individual’s status caused by an agent or
15 employee of a covered entity with regard to
16 the individual’s participation in, access to,
17 or enjoyment of, the benefits of a program
18 or activity; or

19 “(ii) an explicit or implicit condition
20 by an agent or employee of a covered enti-
21 ty on an individual’s participation in, ac-
22 cess to, or enjoyment of, the benefits of a
23 program or activity based on the individ-
24 ual’s submission to the harassment.

1 “(C) UNLAWFUL HARASSMENT.—The term
2 ‘unlawful harassment’ means harassment that
3 is unlawful under this title.”.

4 (b) EDUCATION AMENDMENTS OF 1972.—Section
5 902A of the Civil Rights Act of 1964, as added by section
6 104, is amended by adding at the end the following:

7 “(c) CLAIMS BASED ON HARASSMENT.—

8 “(1) RIGHT OF RECOVERY.—In an action
9 brought against a covered entity by (including on be-
10 half of) aggrieved person who has been subjected to
11 unlawful harassment under a program or activity,
12 the aggrieved person may recover equitable and legal
13 relief (including compensatory and punitive damages
14 subject to the provisions of paragraph (2)), attor-
15 ney’s fees (including expert fees), and costs.

16 “(2) AVAILABILITY OF DAMAGES.—

17 “(A) TANGIBLE ACTION BY AGENT OR EM-
18 PLOYEE.—If an agent or employee of a covered
19 entity engages in unlawful harassment under a
20 program or activity that results in a tangible
21 action to the aggrieved person, damages shall
22 be available against the covered entity.

23 “(B) NO TANGIBLE ACTION BY AGENT OR
24 EMPLOYEE.—If an agent or employee of a cov-
25 ered entity engages in unlawful harassment

1 under a program or activity that results in no
2 tangible action to the aggrieved person, no
3 damages shall be available against the covered
4 entity if it can demonstrate that—

5 “(i) it exercised reasonable care to
6 prevent and correct promptly any harass-
7 ment based on sex; and

8 “(ii) the aggrieved person unreason-
9 ably failed to take advantage of preventive
10 or corrective opportunities offered by the
11 covered entity that—

12 “(I) would likely have provided
13 redress and avoided the harm de-
14 scribed by the aggrieved person; and

15 “(II) would not have exposed the
16 aggrieved person to undue risk, effort,
17 or expense.

18 “(C) HARASSMENT BY THIRD PARTY.—If a
19 person who is not an agent or employee of a
20 covered entity subjects an aggrieved person to
21 unlawful harassment under a program or activ-
22 ity, and the covered entity knew or should have
23 known of the harassment, no damages shall be
24 available against the covered entity if it can
25 demonstrate that it exercised reasonable care to

1 prevent and correct promptly any harassment
2 based on sex.

3 “(D) DEMONSTRATION.—For purposes of
4 subparagraphs (B) and (C), a showing that the
5 covered entity has exercised reasonable care to
6 prevent and correct promptly any harassment
7 based on sex includes a demonstration by the
8 covered entity that it has—

9 “(i) established, adequately publicized,
10 and enforced an effective, comprehensive,
11 harassment prevention policy and com-
12 plaint procedure that is likely to provide
13 redress and avoid harm without exposing
14 the person subjected to the harassment to
15 undue risk, effort, or expense;

16 “(ii) undertaken prompt, thorough,
17 and impartial investigations pursuant to
18 its complaint procedure; and

19 “(iii) taken immediate and appro-
20 priate corrective action designed to stop
21 harassment that has occurred, correct its
22 effects on the aggrieved person, and ensure
23 that the harassment does not recur.

24 “(E) PUNITIVE DAMAGES.—Punitive dam-
25 ages shall not be available under this subsection

1 against a government, government agency, or
2 political subdivision.

3 “(3) DEFINITIONS.—As used in this subsection:

4 “(A) DEMONSTRATES.—The term ‘dem-
5 onstrates’ means meets the burdens of produc-
6 tion and persuasion.

7 “(B) TANGIBLE ACTION.—The term ‘tan-
8 gible action’ means—

9 “(i) a significant adverse change in an
10 individual’s status caused by an agent or
11 employee of a covered entity with regard to
12 the individual’s participation in, access to,
13 or enjoyment of, the benefits of a program
14 or activity; or

15 “(ii) an explicit or implicit condition
16 by an agent or employee of a covered enti-
17 ty on an individual’s participation in, ac-
18 cess to, or enjoyment of, the benefits of a
19 program or activity based on the individ-
20 ual’s submission to the harassment.

21 “(C) UNLAWFUL HARASSMENT.—The term
22 ‘unlawful harassment’ means harassment that
23 is unlawful under this title.”.

24 (c) AGE DISCRIMINATION ACT OF 1975.—Section
25 305(g) of the Age Discrimination Act of 1975, as added

1 by section 104, is amended by adding at the end the fol-
2 lowing:

3 “(3)(A) If an action brought against a covered entity
4 by (including on behalf of) an aggrieved person who has
5 been subjected to unlawful harassment under a program
6 or activity, the aggrieved person may recover equitable and
7 legal relief (including compensatory and punitive damages
8 subject to the provisions of subparagraph (B)), attorney’s
9 fees (including expert fees), and costs.

10 “(B)(i) If an agent or employee of a covered entity
11 engages in unlawful harassment under a program or activ-
12 ity that results in a tangible action to the aggrieved per-
13 son, damages shall be available against the covered entity.

14 “(ii) If an agent or employee of a covered entity en-
15 gages in unlawful harassment under a program or activity
16 that results in no tangible action to the aggrieved person,
17 no damages shall be available against the covered entity
18 if it can demonstrate that—

19 “(I) it exercised reasonable care to prevent and
20 correct promptly any harassment based on age; and

21 “(II) the aggrieved person unreasonably failed
22 to take advantage of preventive or corrective oppor-
23 tunities offered by the covered entity that—

1 “(aa) would likely have provided redress
2 and avoided the harm described by the ag-
3 grieved person; and

4 “(bb) would not have exposed the ag-
5 grieved person to undue risk, effort, or expense.

6 “(iii) If a person who is not an agent or employee
7 of a covered entity subjects an aggrieved person to unlaw-
8 ful harassment under a program or activity, and the cov-
9 ered entity knew or should have known of the harassment,
10 no damages shall be available against the covered entity
11 if it can demonstrate that it exercised reasonable care to
12 prevent and correct promptly any harassment based on
13 age.

14 “(iv) For purposes of clauses (ii) and (iii), a showing
15 that the covered entity has exercised reasonable care to
16 prevent and correct promptly any harassment based on
17 age includes a demonstration by the covered entity that
18 it has—

19 “(I) established, adequately publicized, and en-
20 forced an effective, comprehensive, harassment pre-
21 vention policy and complaint procedure that is likely
22 to provide redress and avoid harm without exposing
23 the person subjected to the harassment to undue
24 risk, effort, or expense;

1 “(II) undertaken prompt, thorough, and impar-
2 tial investigations pursuant to its complaint proce-
3 dure; and

4 “(III) taken immediate and appropriate correc-
5 tive action designed to stop harassment that has oc-
6 curred, correct its effects on the aggrieved person,
7 and ensure that the harassment does not recur.

8 “(v) Punitive damages shall not be available under
9 this paragraph against a government, government agency,
10 or political subdivision.

11 “(C) As used in this paragraph:

12 “(i) The term ‘demonstrates’ means meets the
13 burdens of production and persuasion.

14 “(ii) The term ‘tangible action’ means—

15 “(I) a significant adverse change in an in-
16 dividual’s status caused by an agent or em-
17 ployee of a covered entity with regard to the in-
18 dividual’s participation in, access to, or enjoy-
19 ment of, the benefits of a program or activity;
20 or

21 “(II) an explicit or implicit condition by an
22 agent or employee of a covered entity on an in-
23 dividual’s participation in, access to, or enjoy-
24 ment of, the benefits of a program or activity

1 based on the individual’s submission to the har-
2 assment.

3 “(iii) The term ‘unlawful harassment’ means
4 harassment that is unlawful under this title.”.

5 (d) REHABILITATION ACT OF 1973.—Section 504(e)
6 of the Rehabilitation Act of 1973, as added by section 104,
7 is amended by adding at the end the following:

8 “(3)(A) In an action brought against a covered entity
9 by (including on behalf of) an aggrieved person who has
10 been subjected to unlawful harassment under a program
11 or activity, the aggrieved person may recover equitable and
12 legal relief (including compensatory and punitive damages
13 subject to the provisions of subparagraph (B)), attorney’s
14 fees (including expert fees), and costs.

15 “(B)(i) If an agent or employee of a covered entity
16 engages in unlawful harassment under a program or activ-
17 ity that results in a tangible action to the aggrieved per-
18 son, damages shall be available against the covered entity.

19 “(ii) If an agent or employee of a covered entity en-
20 gages in unlawful harassment under a program or activity
21 that results in no tangible action to the aggrieved person,
22 no damages shall be available against the covered entity
23 if it can demonstrate that—

1 “(I) it exercised reasonable care to prevent and
2 correct promptly any harassment based on disability;
3 and

4 “(II) the aggrieved person unreasonably failed
5 to take advantage of preventive or corrective oppor-
6 tunities offered by the covered entity that—

7 “(aa) would likely have provided redress
8 and avoided the harm described by the ag-
9 grieved person; and

10 “(bb) would not have exposed the ag-
11 grieved person to undue risk, effort, or expense.

12 “(iii) If a person who is not an agent or employee
13 of a covered entity subjects an aggrieved person to unlaw-
14 ful harassment under a program or activity, and the cov-
15 ered entity knew or should have known of the harassment,
16 no damages shall be available against the covered entity
17 if it can demonstrate that it exercised reasonable care to
18 prevent and correct promptly any harassment based on
19 disability.

20 “(iv) For purposes of clauses (ii) and (iii), a showing
21 that the covered entity has exercised reasonable care to
22 prevent and correct promptly any harassment based on
23 disability includes a demonstration by the covered entity
24 that it has—

1 “(I) established, adequately publicized, and en-
2 forced an effective, comprehensive, harassment pre-
3 vention policy and complaint procedure that is likely
4 to provide redress and avoid harm without exposing
5 the person subjected to the harassment to undue
6 risk, effort, or expense;

7 “(II) undertaken prompt, thorough, and impar-
8 tial investigations pursuant to its complaint proce-
9 dure; and

10 “(III) taken immediate and appropriate correc-
11 tive action designed to stop harassment that has oc-
12 curred, correct its effects on the aggrieved person,
13 and ensure that the harassment does not recur.

14 “(v) Punitive damages shall not be available under
15 this paragraph against a government, government agency,
16 or political subdivision.

17 “(C) As used in this paragraph:

18 “(i) The term ‘demonstrates’ means meets the
19 burdens of production and persuasion.

20 “(ii) The term ‘tangible action’ means—

21 “(I) a significant adverse change in an in-
22 dividual’s status caused by an agent or em-
23 ployee of a covered entity with regard to the in-
24 dividual’s participation in, access to, or enjoy-

1 ment of, the benefits of a program or activity;
2 or

3 “(II) an explicit or implicit condition by an
4 agent or employee of a covered entity on an in-
5 dividual’s participation in, access to, or enjoy-
6 ment of, the benefits of a program or activity
7 based on the individual’s submission to the har-
8 assment.

9 “(iii) The term ‘unlawful harassment’ means
10 harassment that is unlawful under this section.”.

11 **SEC. 113. CONSTRUCTION.**

12 Nothing in this subtitle, including any amendment
13 made by this subtitle, shall be construed to limit the scope
14 of the class of persons who may be subjected to civil ac-
15 tions under the covered civil rights provisions.

16 **SEC. 114. EFFECTIVE DATE.**

17 (a) **IN GENERAL.**—This subtitle, and the amend-
18 ments made by this subtitle, are retroactive to June 22,
19 1998, and effective as of that date.

20 (b) **APPLICATION.**—This subtitle, and the amend-
21 ments made by this subtitle, apply to all actions or pro-
22 ceedings pending on or after June 22, 1998, except as to
23 an action against a State, as to which the effective date
24 is the date of enactment of this Act.

1 **TITLE II—UNIFORMED SERVICES**
2 **EMPLOYMENT AND REEM-**
3 **PLOYMENT RIGHTS ACT OF**
4 **1994 AMENDMENT**

5 **SEC. 201. AMENDMENT TO THE UNIFORMED SERVICES EM-**
6 **PLOYMENT AND REEMPLOYMENT RIGHTS**
7 **ACT OF 1994.**

8 (a) FINDINGS.—Congress makes the following find-
9 ings:

10 (1) The Federal Government has an important
11 interest in attracting and training a military to pro-
12 vide for the National defense. The Constitution
13 grants Congress the power to raise and support an
14 army for purposes of the common defense. The Na-
15 tion’s military readiness requires that all members of
16 the Armed Forces, including those employed in State
17 programs and activities, be able to serve without
18 jeopardizing their civilian employment opportunities.

19 (2) The Uniformed Services Employment and
20 Reemployment Rights Act of 1994, commonly re-
21 ferred to as “USERRA” and codified as chapter 43
22 of title 38, United States Code, is intended to safe-
23 guard the reemployment rights of members of the
24 uniformed services (as that term is defined in sec-
25 tion 4303(16) of title 38, United States Code) and

1 to prevent discrimination against any person who is
2 a member of, applies to be a member of, performs,
3 has performed, applies to perform, or has an obliga-
4 tion to perform service in a uniformed service. Effec-
5 tive enforcement of the Act depends on the ability of
6 private individuals to enforce its provisions in court.

7 (3) In *Seminole Tribe of Florida v. Florida*,
8 517 U.S. 44 (1996), the Supreme Court held that
9 congressional legislation enacted pursuant to the
10 commerce clause of article I, section 8, of the Con-
11 stitution cannot abrogate the immunity of States
12 under the 11th amendment to the Constitution.
13 Some courts have interpreted *Seminole Tribe of*
14 *Florida v. Florida* as a basis for denying relief to
15 persons affected by a State violation of USERRA.
16 In addition, in *Alden v. Maine* 527 U.S. 706, 712
17 (1999), the Supreme Court held that this immunity
18 also prohibits the Federal Government from sub-
19 jecting “non-consenting states to private suits for
20 damages in state courts.” As a result, although
21 USERRA specifically provides that a person may
22 commence an action for relief against a State for its
23 violation of that Act, persons harmed by State viola-
24 tions of that Act lack important remedies to vindi-
25 cate the rights and benefits that are available to all

1 other persons covered by that Act. Unless a State
2 chooses to waive sovereign immunity, or the Attor-
3 ney General brings an action on their behalf, per-
4 sons affected by State violations of USERRA may
5 have no adequate Federal remedy for such viola-
6 tions.

7 (4) A failure to provide a private right of action
8 by persons affected by State violations of USERRA
9 would leave vindication of their rights and benefits
10 under that Act solely to Federal agencies, which may
11 fail to take necessary and appropriate action because
12 of administrative overburden or other reasons. Ac-
13 tion by Congress to specify such a private right of
14 action ensures that persons affected by State viola-
15 tions of USERRA have a remedy if they are denied
16 their rights and benefits under that Act.

17 (b) CLARIFICATION OF RIGHT OF ACTION UNDER
18 USERRA.—Section 4323 of title 38, United States Code,
19 is amended—

20 (1) in subsection (b), by striking paragraph (2)
21 and inserting the following new paragraph (2):

22 “(2) In the case of an action against a State (as an
23 employer) by a person, the action may be brought in a
24 district court of the United States or State court of com-
25 petent jurisdiction.”;

1 (2) by redesignating subsection (j) as sub-
2 section (k); and

3 (3) by inserting after subsection (i) the fol-
4 lowing new subsection (j):

5 “(j)(1)(A) A State’s receipt or use of Federal finan-
6 cial assistance for any program or activity of a State shall
7 constitute a waiver of sovereign immunity, under the 11th
8 amendment to the Constitution or otherwise, to a suit
9 brought by an employee of that program or activity under
10 this chapter for the rights or benefits authorized the em-
11 ployee by this chapter.

12 “(B) In this paragraph, the term ‘program or activ-
13 ity’ has the meaning given the term in section 309 of the
14 Age Discrimination Act of 1975 (42 U.S.C. 6107).

15 “(2) An official of a State may be sued in the official
16 capacity of the official by any person covered by paragraph
17 (1) who seeks injunctive relief against a State (as an em-
18 ployer) under subsection (e). In such a suit the court may
19 award to the prevailing party those costs authorized by
20 section 722 of the Revised Statutes (42 U.S.C. 1988).”.

21 **TITLE III—AIR CARRIER ACCESS**
22 **ACT OF 1986 AMENDMENT**

23 **SEC. 301. FINDINGS.**

24 Congress finds the following:

1 (1) In *Love v. Delta Air Lines*, 310 F. 3d 1347
2 (11th Cir. 2002), the United States Court of Ap-
3 peals for the Eleventh Circuit held that when Con-
4 gress passed the Air Carrier Access Act of 1986,
5 adding a provision now codified at section 41705 of
6 title 49, United States Code (referred to in this title
7 as the “ACAA”), Congress did not intend to create
8 a private right of action with which individuals with
9 disabilities could sue air carriers in Federal court for
10 discrimination on the basis of disability. The court
11 recognized that other courts of appeals have held
12 that the ACAA created a private right of action.
13 Nevertheless, the court, relying on the Supreme
14 Court’s decision in *Alexander v. Sandoval*, 532 U.S.
15 275 (2001), concluded that the ACAA did not create
16 a private right of action.

17 (2) The absence of a private right of action
18 leaves enforcement of the ACAA solely in the hands
19 of the Department of Transportation, which is over-
20 burdened and lacks the resources to investigate,
21 prosecute violators for, and remediate all of the vio-
22 lations of the rights of travelers who are individuals
23 with disabilities. Nor can the Department of Trans-
24 portation bring an action that will redress the injury
25 of an individual resulting from such a violation. The

1 Department of Transportation can take action that
2 fines an air carrier or requires the air carrier to
3 obey the law in the future, but the Department is
4 not authorized to issue orders that redress the inju-
5 ries sustained by individual air passengers. Action
6 by Congress is necessary to ensure that individuals
7 with disabilities will have adequate remedies avail-
8 able when air carriers violate the ACAA (including
9 its regulations), and only courts may provide this re-
10 dress to individuals.

11 (3) When an air carrier violates the ACAA and
12 discriminates against an individual with a disability,
13 frequently the only way to compensate that indi-
14 vidual for the harm the individual has suffered is
15 through an award of money damages. For example,
16 violations of the ACAA may result in travelers who
17 are individuals with disabilities missing flights for
18 business appointments or important personal events,
19 or in such travelers suffering humiliating treatment
20 at the hands of air carriers. Those harms cannot be
21 remedied solely through injunctive relief.

22 (4) Unlike other civil rights statutes, the ACAA
23 does not contain a fee-shifting provision under which
24 a prevailing plaintiff can be awarded attorney's fees.
25 Action by Congress is necessary to correct this

1 anomaly. The availability of attorney’s fees is essen-
2 tial to ensuring that persons who have been ag-
3 grievied by violations of the ACAA can enforce their
4 rights. The inclusion of a fee-shifting provision in
5 the ACAA will permit individuals to serve as private
6 attorneys general, a necessary role on which enforce-
7 ment of civil rights statutes depends.

8 **SEC. 302. CIVIL ACTION.**

9 Section 41705 of title 49, United States Code, is
10 amended by adding at the end the following:

11 “(d) CIVIL ACTION.—(1) Any person aggrieved by an
12 air carrier’s violation of subsection (a) (including any reg-
13 ulation implementing such subsection) may bring a civil
14 action in the district court of the United States in the
15 district in which the aggrieved person resides, in the dis-
16 trict containing the air carrier’s principal place of busi-
17 ness, or in the district in which the violation took place.
18 Any such action must be commenced within 2 years after
19 the date of the violation.

20 “(2) In any civil action brought by an aggrieved per-
21 son pursuant to paragraph (1), the plaintiff may obtain
22 both equitable and legal relief, including compensatory
23 and punitive damages. The court in such action shall, in
24 addition to such relief awarded to a prevailing plaintiff,

1 award reasonable attorney’s fees, reasonable expert fees,
2 and costs of the action to the plaintiff.”.

3 **TITLE IV—AGE DISCRIMINATION**
4 **IN EMPLOYMENT ACT AMEND-**
5 **MENTS**

6 **SEC. 401. SHORT TITLE.**

7 This title may be cited as the “Older Workers’ Rights
8 Restoration Act of 2004”.

9 **SEC. 402. FINDINGS.**

10 Congress finds the following:

11 (1) Since 1974, the Age Discrimination in Em-
12 ployment Act of 1967 (29 U.S.C. 621 et seq.) (re-
13 ferred to in this section as the “ADEA”) has prohib-
14 ited States from discriminating in employment on
15 the basis of age. In *EEOC v. Wyoming*, 460 U.S.
16 226 (1983), the Supreme Court upheld Congress’
17 constitutional authority to prohibit States from dis-
18 criminating in employment on the basis of age. The
19 prohibitions of the ADEA remain in effect and con-
20 tinue to apply to the States, as the prohibitions have
21 for more than 25 years.

22 (2) Age discrimination in employment remains
23 a serious problem both nationally and among State
24 agencies, and has invidious effects on its victims, the

1 labor force, and the economy as a whole. For exam-
2 ple, age discrimination in employment—

3 (A) increases the risk of unemployment
4 among older workers, who will as a result be
5 more likely to be dependent on government re-
6 sources;

7 (B) prevents the best use of available labor
8 resources;

9 (C) adversely effects the morale and pro-
10 ductivity of older workers; and

11 (D) perpetuates unwarranted stereotypes
12 about the abilities of older workers.

13 (3) Private civil suits by the victims of employ-
14 ment discrimination have been a crucial tool for en-
15 forcement of the ADEA since the enactment of that
16 Act. In *Kimel v. Florida Board of Regents*, 528 U.S.
17 62 (2000), however, the Supreme Court held that
18 Congress had not abrogated State sovereign immu-
19 nity to suits by individuals under the ADEA. The
20 Federal Government has an important interest in
21 ensuring that Federal financial assistance is not
22 used to subsidize or facilitate violations of the
23 ADEA. Private civil suits are a critical tool for ad-
24 vancing that interest.

1 (4) As a result of the Kimel decision, although
2 age-based discrimination by State employers remains
3 unlawful, the victims of such discrimination lack im-
4 portant remedies for vindication of their rights that
5 are available to all other employees covered under
6 that Act, including employees in the private sector,
7 local government, and the Federal Government. Un-
8 less a State chooses to waive sovereign immunity, or
9 the Equal Employment Opportunity Commission
10 brings an action on their behalf, State employees
11 victimized by violations of the ADEA have no ade-
12 quate Federal remedy for violations of that Act. In
13 the absence of the deterrent effect that such rem-
14 edies provide, there is a greater likelihood that enti-
15 ties carrying out programs and activities receiving
16 Federal financial assistance will use that assistance
17 to violate that Act, or that the assistance will other-
18 wise subsidize or facilitate violations of that Act.

19 (5) Federal law has long treated nondiscrimina-
20 tion obligations as a core component of programs or
21 activities that, in whole or part, receive Federal fi-
22 nancial assistance. That assistance should not be
23 used, directly or indirectly, to subsidize invidious dis-
24 crimination. Assuring nondiscrimination in employ-

1 ment is a crucial aspect of assuring nondiscrimina-
2 tion in those programs and activities.

3 (6) Discrimination on the basis of age in pro-
4 grams or activities receiving Federal financial assist-
5 ance is, in contexts other than employment, forbid-
6 den by the Age Discrimination Act of 1975 (42
7 U.S.C. 6101 et seq.). Congress determined that it
8 was not necessary for the Age Discrimination Act of
9 1975 to apply to employment discrimination because
10 the ADEA already forbade discrimination in employ-
11 ment by, and authorized suits against, State agen-
12 cies and other entities that receive Federal financial
13 assistance. In section 1003 of the Rehabilitation Act
14 Amendments of 1986 (42 U.S.C. 2000d–7), Con-
15 gress required all State entities subject to the Age
16 Discrimination Act of 1975 to waive any immunity
17 from suit for discrimination claims arising under the
18 Age Discrimination Act of 1975. The earlier limita-
19 tion in the Age Discrimination Act of 1975, origi-
20 nally intended only to avoid duplicative coverage and
21 remedies, has in the wake of the Kimel decision be-
22 come a serious loophole leaving millions of State em-
23 ployees without an important Federal remedy for
24 age discrimination, resulting in the use of Federal fi-

1 nancial assistance to subsidize or facilitate violations
2 of the ADEA.

3 (7) The Supreme Court has upheld Congress's
4 authority to condition receipt of Federal financial
5 assistance on acceptance by the States or other cov-
6 ered entities of conditions regarding or related to the
7 use of that assistance, as in *Cannon v. University of*
8 *Chicago*, 441 U.S. 677 (1979). The Court has fur-
9 ther recognized that Congress may require a State,
10 as a condition of receipt of Federal financial assist-
11 ance, to waive the State's sovereign immunity to
12 suits for a violation of Federal law, as in *College*
13 *Savings Bank v. Florida Prepaid Postsecondary*
14 *Education Expense Board*, 527 U.S. 666 (1999). In
15 the wake of the *Kimel* decision, in order to assure
16 compliance with, and to provide effective remedies
17 for violations of, the ADEA in State programs or ac-
18 tivities receiving or using Federal financial assist-
19 ance, and in order to ensure that Federal financial
20 assistance does not subsidize or facilitate violations
21 of the ADEA, it is necessary to require such a waiv-
22 er as a condition of receipt or use of that assistance.

23 (8) A State's receipt or use of Federal financial
24 assistance in any program or activity of a State will
25 constitute a limited waiver of sovereign immunity

1 under section 7(g) of the ADEA (as added by sec-
2 tion 404). The waiver will not eliminate a State's
3 immunity with respect to programs or activities that
4 do not receive or use Federal financial assistance.
5 The State will waive sovereign immunity only with
6 respect to suits under the ADEA brought by employ-
7 ees within the programs or activities that receive or
8 use that assistance. With regard to those programs
9 and activities that are covered by the waiver, the
10 State employees will be accorded only the same rem-
11 edies that are accorded to other covered employees
12 under the ADEA.

13 (9) The Supreme Court has repeatedly held
14 that State sovereign immunity does not bar suits for
15 prospective injunctive relief brought against State
16 officials, as in *Ex parte Young* (209 U.S. 123
17 (1908)). Clarification of the language of the ADEA
18 will confirm that that Act authorizes such suits. The
19 injunctive relief available in such suits will continue
20 to be no broader than the injunctive relief that was
21 available under that Act before the *Kimel* decision,
22 and that is available to all other employees under
23 that Act.

24 (10) In *Griggs v. Duke Power Co.*, 401 U.S.
25 424, 431 (1971), the Supreme Court recognized that

1 title VII of the Civil Rights Act of 1964 (42 U.S.C.
2 2000e et seq.) “proscribes not only overt discrimina-
3 tion [in employment] but also [employment] prac-
4 tices that are fair in form, but discriminatory in op-
5 eration. . . .” In doing so, the Court relied on sec-
6 tion 703(a)(2) of title VII of the Civil Rights Act
7 of 1964 (42 U.S.C. 2000e–2(a)(2)), which contains
8 language identical to section 4(a)(2) of the ADEA,
9 except that the latter substitutes the word age for
10 the grounds of prohibited discrimination specified by
11 title VII of the Civil Rights Act of 1964: “race,
12 color, religion, sex, or national origin.” The Court
13 has confirmed that this and other related statutory
14 language, identical to both title VII of the Civil
15 Rights Act of 1964 and the ADEA, supports appli-
16 cation of the disparate impact doctrine. *Connecticut*
17 *v. Teal*, 457 U.S. 440 (1982); *General Electric Co.*
18 *v. Gilbert*, 429 U.S. 125 (1976).

19 (11) Other indicia of Congress’s intent to per-
20 mit the disparate impact method of proving viola-
21 tions of the ADEA are legion, and include numerous
22 other textual parallels between the ADEA and title
23 VII of the Civil Rights Act of 1964, such as in the
24 two laws’ substantive prohibitions. *Lorillard v. Pons*,
25 434 U.S. 575, 584 (1978) (the ADEA’s substantive

1 prohibitions “were derived in haec verba from Title
2 VII”). Moreover, the ADEA and title VII of the
3 Civil Rights Act of 1964 share “a common purpose:
4 ‘the elimination of discrimination in the work-
5 place,’”. *McKennon v. Nashville Banner Pub. Co.*,
6 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer &*
7 *Co. v. Evans*, 441 U.S. 750, 756 (1979)). Inter-
8 preting title VII of the Civil Rights Act of 1964 in
9 a consistent manner is particularly appropriate when
10 “the two provisions share a common *raison d’etre*.”
11 *Northercross v. Board of Educ. of Memphis City*
12 *Schools*, 412 U.S. 427, 428 (1973).

13 (12) The ADEA’s legislative history confirms
14 Congress’s intent to redress all “arbitrary” age dis-
15 crimination in the workplace, including arbitrary
16 facially neutral policies and practices falling more
17 harshly on older workers. Such policies continue to
18 be based on the kind of “subconscious stereotypes
19 and prejudices” which cannot be “adequately policed
20 through disparate treatment analysis,” and thus, re-
21 quire application of the disparate impact theory of
22 proof. *Watson v. Fort Worth Bank & Trust*, 487
23 U.S. 977, 990 (1988). As the Supreme Court has
24 noted, these prejudices are “the essence of age dis-

1 crimination.”. *Hazen Paper Co. v. Biggins*, 507 U.S.
2 604, 610, n.15 (1993).

3 (13) In 1991, Congress reaffirmed that title
4 VII of the Civil Rights Act of 1964 permits victims
5 of employment bias to state a cause of action for
6 disparate impact discrimination when it added a pro-
7 vision to title VII of the Civil Rights Act of 1964 to
8 clarify the burden of proof in disparate impact cases
9 in section 703(k) of the Civil Rights Act of 1964 (42
10 U.S.C. 2000e-2(k)).

11 (14) Subsequently, several lower courts and
12 Federal Courts of Appeal have mistakenly relied on
13 language in the Supreme Court’s opinion in *Hazen*
14 *Paper Co. v. Biggins*, 507 U.S. 604 (1993), to sug-
15 gest that the disparate impact method of proof does
16 not apply to claims under the ADEA. *Mullin v.*
17 *Raytheon Co.*, 164 F.3d 696, 700–01 (1st Cir.
18 1999); *EEOC v. Francis W. Parker School*, 41 F.3d
19 1073, 1076–77 (7th Cir. 1994); *Ellis v. United Air-*
20 *lines, Inc.*, 73 F.3d 999, 1006–07 (10th Cir. 1996);
21 *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719,
22 732 (3d Cir. 1995); *Lyon v. Ohio Educ. Ass’n and*
23 *Prof’l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir.
24 1995). Congress did not intend the ADEA to be in-
25 terpreted to provide older workers less protections

1 against discrimination than those protected under
2 title VII of the Civil Rights Act of 1964. As a result,
3 it is necessary to clarify the burden of proof in a dis-
4 parate impact case under the ADEA, and thereby
5 reaffirm that victims of age discrimination in em-
6 ployment discrimination may state a cause of action
7 based on the disparate impact method of proving
8 discrimination in appropriate circumstances.

9 **SEC. 403. PURPOSES.**

10 The purposes of this title are—

11 (1) to provide to State employees in programs
12 or activities that receive or use Federal financial as-
13 sistance the same rights and remedies for practices
14 violating the Age Discrimination in Employment Act
15 of 1967 (29 U.S.C. 621 et seq.) as are available to
16 other employees under that Act, and that were avail-
17 able to State employees prior to the Supreme
18 Court's decision in *Kimel v. Florida Board of Re-*
19 *gents*, 528 U.S. 62 (2000);

20 (2) to provide that the receipt or use of Federal
21 financial assistance for a program or activity con-
22 stitutes a State waiver of sovereign immunity from
23 suits by employees within that program or activity
24 for violations of the Age Discrimination in Employ-
25 ment Act of 1967;

1 (3) to affirm that suits for injunctive relief are
2 available against State officials in their official ca-
3 pacities for violations of the Age Discrimination in
4 Employment Act of 1967; and

5 (4) to reaffirm the applicability of the disparate
6 impact standard of proof to claims under the Age
7 Discrimination in Employment Act of 1967.

8 **SEC. 404. REMEDIES FOR STATE EMPLOYEES.**

9 Section 7 of the Age Discrimination in Employment
10 Act of 1967 (29 U.S.C. 626) is amended by adding at
11 the end the following:

12 “(g)(1)(A) A State’s receipt or use of Federal finan-
13 cial assistance for any program or activity of a State shall
14 constitute a waiver of sovereign immunity, under the 11th
15 amendment to the Constitution or otherwise, to a suit
16 brought by an employee of that program or activity under
17 this Act for equitable, legal, or other relief authorized
18 under this Act.

19 “(B) In this paragraph, the term ‘program or activ-
20 ity’ has the meaning given the term in section 309 of the
21 Age Discrimination Act of 1975 (42 U.S.C. 6107).

22 “(2) An official of a State may be sued in the official
23 capacity of the official by any employee who has complied
24 with the procedures of subsections (d) and (e), for injunc-
25 tive relief that is authorized under this Act. In such a suit

1 the court may award to the prevailing party those costs
2 authorized by section 722 of the Revised Statutes (42
3 U.S.C. 1988).”.

4 **SEC. 405. DISPARATE IMPACT CLAIMS.**

5 Section 4 of the Age Discrimination in Employment
6 Act of 1967 (29 U.S.C. 623) is amended by adding at
7 the end the following:

8 “(n)(1) Discrimination based on disparate impact is
9 established under this title only if—

10 “(A) an aggrieved party demonstrates that an
11 employer, employment agency, or labor organization
12 has a policy or practice that causes a disparate im-
13 pact on the basis of age and the employer, employ-
14 ment agency, or labor organization fails to dem-
15 onstrate that the challenged policy or practice is
16 based on reasonable factors that are job-related and
17 consistent with business necessity other than age; or

18 “(B) the aggrieved party demonstrates (con-
19 sistent with the demonstration standard under title
20 VII of the Civil Rights Act of 1964 (42 U.S.C.
21 2000e et seq.) with respect to an ‘alternative em-
22 ployment practice’) that a less discriminatory alter-
23 native policy or practice exists, and the employer,
24 employment agency, or labor organization refuses to
25 adopt such alternative policy or practice.

1 “(2)(A) With respect to demonstrating that a par-
2 ticular policy or practice causes a disparate impact as de-
3 scribed in paragraph (1)(A), the aggrieved party shall
4 demonstrate that each particular challenged policy or
5 practice causes a disparate impact, except that if the ag-
6 grieved party demonstrates to the court that the elements
7 of an employer, employment agency, or labor organiza-
8 tion’s decisionmaking process are not capable of separa-
9 tion for analysis, the decisionmaking process may be ana-
10 lyzed as one policy or practice.

11 “(B) If the employer, employment agency, or labor
12 organization demonstrates that a specific policy or prac-
13 tice does not cause the disparate impact, the employer,
14 employment agency, or labor organization shall not be re-
15 quired to demonstrate that such policy or practice is nec-
16 essary to the operation of its business.

17 “(3) A demonstration that a policy or practice is nec-
18 essary to the operation of the employer, employment agen-
19 cy, or labor organization’s business may not be used as
20 a defense against a claim of intentional discrimination
21 under this title.

22 “(4) In this subsection, the term ‘demonstrates’
23 means meets the burdens of production and persuasion.”.

1 **SEC. 406. EFFECTIVE DATE.**

2 (a) WAIVER OF SOVEREIGN IMMUNITY.—With re-
3 spect to a particular program or activity, section 7(g)(1)
4 of the Age Discrimination in Employment Act of 1967 (29
5 U.S.C. 626(g)(1)) applies to conduct occurring on or after
6 the day, after the date of enactment of this title, on which
7 a State first receives or uses Federal financial assistance
8 for that program or activity.

9 (b) SUITS AGAINST OFFICIALS.—Section 7(g)(2) of
10 the Age Discrimination in Employment Act of 1967 (29
11 U.S.C. 626(g)(2)) applies to any suit pending on or after
12 the date of enactment of this title.

13 **TITLE V—CIVIL RIGHTS**
14 **REMEDIES AND RELIEF**
15 **Subtitle A—Prevailing Party**

16 **SEC. 501. SHORT TITLE.**

17 This subtitle may be cited as the “Settlement En-
18 couragement and Fairness Act”.

19 **SEC. 502. DEFINITION OF PREVAILING PARTY.**

20 (a) IN GENERAL.—Chapter 1 of title 1, United
21 States Code, is amended by adding at the end the fol-
22 lowing:

23 **“§ 9. Definition of ‘prevailing party’**

24 “(a) In determining the meaning of any Act of Con-
25 gress, or of any ruling, regulation, or interpretation of the
26 various administrative bureaus and agencies of the United

1 States, or of any judicial or administrative rule, which pro-
2 vides for the recovery of attorney’s fees, the term ‘pre-
3 vailing party’ shall include, in addition to a party who sub-
4 stantially prevails through a judicial or administrative
5 judgment or order, or an enforceable written agreement,
6 a party whose pursuit of a nonfrivolous claim or defense
7 was a catalyst for a voluntary or unilateral change in posi-
8 tion by the opposing party that provides any significant
9 part of the relief sought.

10 “(b)(1) If an Act, ruling, regulation, interpretation,
11 or rule described in subsection (a) requires a defendant,
12 but not a plaintiff, to satisfy certain different or additional
13 criteria to qualify for the recovery of attorney’s fees, sub-
14 section (a) shall not affect the requirement that such de-
15 fendant satisfy such criteria.

16 “(2) If an Act, ruling, regulation, interpretation, or
17 rule described in subsection (a) requires a party to satisfy
18 certain criteria, unrelated to whether or not such party
19 has prevailed, to qualify for the recovery of attorney’s fees,
20 subsection (a) shall not affect the requirement that such
21 party satisfy such criteria.”.

22 (b) CLERICAL AMENDMENT.—The table of sections
23 at the beginning of chapter 1 of title 1, United States
24 Code, is amended by adding at the end the following new
25 item:

“9. Definition of ‘prevailing party’.”.

1 (c) APPLICATION.—Section 9 of title 1, United States
2 Code, as added by this Act, shall apply to any case pend-
3 ing or filed on or after the date of enactment of this sub-
4 title.

5 **Subtitle B—Arbitration**

6 **SEC. 511. SHORT TITLE.**

7 This subtitle may be cited as the “Preservation of
8 Civil Rights Protections Act of 2004”.

9 **SEC. 512. AMENDMENT TO FEDERAL ARBITRATION ACT.**

10 Section 1 of title 9, United States Code, is amended
11 by striking “of seamen” and all that follows through
12 “commerce”.

13 **SEC. 513. UNENFORCEABILITY OF ARBITRATION CLAUSES** 14 **IN EMPLOYMENT CONTRACTS.**

15 (a) PROTECTION OF EMPLOYEE RIGHTS.—Notwith-
16 standing any other provision of law, any clause of any
17 agreement between an employer and an employee that re-
18 quires arbitration of a dispute arising under the Constitu-
19 tion or laws of the United States shall not be enforceable.

20 (b) EXCEPTIONS.—

21 (1) WAIVER OR CONSENT AFTER DISPUTE
22 ARISES.—Subsection (a) shall not apply with respect
23 to any dispute if, after such dispute arises, the par-
24 ties involved knowingly and voluntarily consent to
25 submit such dispute to arbitration.

1 (2) COLLECTIVE BARGAINING AGREEMENTS.—
2 Subsection (a) shall not preclude an employee or
3 union from enforcing any of the rights or terms of
4 a valid collective bargaining agreement.

5 **SEC. 514. APPLICATION OF AMENDMENTS.**

6 This subtitle and the amendment made by section
7 512 shall apply with respect to all employment contracts
8 in force before, on, or after the date of enactment of this
9 subtitle.

10 **Subtitle C—Expert Witness Fees**

11 **SEC. 521. PURPOSE.**

12 The purpose of this subtitle is to allow recovery of
13 expert fees by prevailing parties under civil rights fee-
14 shifting statutes.

15 **SEC. 522. FINDINGS.**

16 Congress finds the following:

17 (1) This subtitle is made necessary by the deci-
18 sion of the Supreme Court in *West Virginia Univer-*
19 *sity Hospitals Inc. v. Casey*, 499 U.S. 83 (1991). In
20 *Casey*, the Court, per Justice Scalia, ruled that ex-
21 pert fees were not recoverable under section 722 of
22 the Revised Statutes (42 U.S.C. 1988), as amended
23 by the Civil Rights Attorneys' Fees Awards Act of
24 1976 (Public Law 94–559; 90 Stat. 2641), because
25 the Civil Rights Attorneys' Fees Awards Act of 1976

1 expressly authorized an award of an “attorney’s fee”
2 to a prevailing party but said nothing expressly
3 about expert fees.

4 (2) This subtitle is especially necessary both be-
5 cause of the important roles played by experts in
6 civil rights litigation and because expert fees often
7 represent a major cost of the litigation. In fact, in
8 Casey itself, as pointed out by Justice Stevens in
9 dissent, the district court had found that the expert
10 witnesses were “essential” and “necessary” to the
11 successful prosecution of the plaintiffs case, and the
12 expert fees were not paltry but amounted to
13 \$104,133. Justice Stevens also pointed out that the
14 majority opinion requiring the plaintiff to “assume
15 the cost of \$104,133 in expert witness fees is at war
16 with the congressional purpose of making the pre-
17 vailing party whole.” Casey (499 U.S. at 111).

18 (3) Much of the rationale for denying expert
19 fees as part of the shifting of attorney’s fees under
20 provisions of law such as section 722 of the Revised
21 Statutes (42 U.S.C. 1988), whose language does not
22 expressly include expert fees, was based on the fact
23 that many fee-shifting statutes enacted by Congress
24 “explicitly shift expert witness fees as well as attor-
25 ney’s fees.” Casey (499 U.S. at 88). In fact, Justice

1 Scalia pointed out that in 1976—the same year that
2 Congress amended section 722 of the Revised Stat-
3 utes (42 U.S.C. 1988) by providing for the shifting
4 of attorney’s fees—Congress expressly authorized
5 the shifting of attorney’s fees and of expert fees in
6 the Toxic Substances Control Act (15 U.S.C. 2601
7 et seq.), the Consumer Product Safety Act (15
8 U.S.C. 2051 et seq.), the Resource Conservation and
9 Recovery Act of 1976 (Public Law 94–580; 90 Stat.
10 2795), and the Natural Gas Pipeline Safety Act
11 Amendments of 1976 (Public Law 94–477; 90 Stat.
12 2073). *Casey* (499 U.S. at 88). Congress had done
13 the same in other years on dozens of occasions.
14 *Casey* (499 U.S. at 88–90 & n. 4).

15 (4) In the same year that the Supreme Court
16 decided *Casey*, Congress responded quickly but only
17 through the Civil Rights Act of 1991 (Public Law
18 102–166; 105 Stat. 1071) by amending title VII of
19 the Civil Rights Act of 1964 (42 U.S.C. 2000e et
20 seq.) and section 722 of the Revised Statutes (42
21 U.S.C. 1988) with express authorizations of the re-
22 covery of expert fees in successful employment dis-
23 crimination litigation. It is long past time to correct,
24 in Federal civil rights litigation, *Casey*’s denial of ex-
25 pert fees.

1 **SEC. 523. EFFECTIVE PROVISIONS.**

2 (a) SECTION 722 OF THE REVISED STATUTES.—Sec-
3 tion 722 of the Revised Statutes (42 U.S.C. 1988) is
4 amended—

5 (1) in subsection (b), by inserting “(including
6 expert fees)” after “attorney’s fee”; and

7 (2) by striking subsection (c).

8 (b) FAIR LABOR STANDARDS ACT OF 1938.—Section
9 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C.
10 216(b)) is amended by inserting “(including expert fees)”
11 after “attorney’s fee”.

12 (c) VOTING RIGHTS ACT OF 1965.—Section 14(e) of
13 the Voting Rights Act of 1965 (42 U.S.C. 1973l(e)) is
14 amended by inserting “(including expert fees)” after “at-
15 torney’s fee”.

16 (d) FAIR HOUSING ACT.—Title VIII of the Civil
17 Rights Act of 1968 (42 U.S.C. 3601 et seq.) is amended—

18 (1) in section 812(p), by inserting “(including
19 expert fees)” after “attorney’s fee”;

20 (2) in section 813(c)(2), by inserting “(includ-
21 ing expert fees)” after “attorney’s fee”; and

22 (3) in section 814(d)(2), by inserting “(includ-
23 ing expert fees)” after “attorney’s fee”.

24 (e) IDEA.—Section 615(i)(3)(B) of the Individuals
25 with Disabilities Education Act (20 U.S.C. 1415(i)(3)(B))

1 is amended by inserting “(including expert fees)” after
2 “attorney’s fees”.

3 (f) CIVIL RIGHTS ACT OF 1964.—Section 204(b) of
4 the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(b)) is
5 amended by inserting “(including expert fees)” after “at-
6 torney’s fee”.

7 (g) REHABILITATION ACT OF 1973.—Section 505(b)
8 of the Rehabilitation Act of 1973 (29 U.S.C. 794a(b)) is
9 amended by inserting “(including expert fees)” after “at-
10 torney’s fee”.

11 (h) EQUAL CREDIT OPPORTUNITY ACT.—Section
12 706(d) of the Equal Credit Opportunity Act (15 U.S.C.
13 1691e(d)) is amended by inserting “(including expert
14 fees)” after “attorney’s fee”.

15 (i) FAIR CREDIT REPORTING ACT.—The Fair Credit
16 Reporting Act (15 U.S.C. 1681 et seq.) is amended—

17 (1) in section 616(a)(3), by inserting “(includ-
18 ing expert fees)” after “attorney’s fees”; and

19 (2) in section 617(a)(2), by inserting “(includ-
20 ing expert fees)” after “attorney’s fees”.

21 (j) FREEDOM OF INFORMATION ACT.—Section
22 552(a)(4)(E) of title 5, United States Code, is amended
23 by inserting “(including expert fees)” after “attorney
24 fees”.

1 (k) PRIVACY ACT.—Section 552a(g) of title 5, United
2 States Code, is amended—

3 (1) in paragraph (2)(B), by inserting “(includ-
4 ing expert fees)” after “attorney fees”;

5 (2) in paragraph (3)(B), by inserting “(includ-
6 ing expert fees)” after “attorney fees”; and

7 (3) in paragraph (4)(B), by inserting “(includ-
8 ing expert fees)” after “attorney fees”.

9 (l) TRUTH IN LENDING ACT.—Section 130(a)(3) of
10 the Truth in Lending Act (15 U.S.C. 1640(a)(3)) is
11 amended by inserting “(including expert fees)” after “at-
12 torney’s fee”.

13 **Subtitle D—Equal Remedies Act of** 14 **2004**

15 **SEC. 531. SHORT TITLE.**

16 This subtitle may be cited as the “Equal Remedies
17 Act of 2004”.

18 **SEC. 532. EQUALIZATION OF REMEDIES.**

19 Section 1977A of the Revised Statutes (42 U.S.C.
20 1981a), as added by section 102 of the Civil Rights Act
21 of 1991, is amended—

22 (1) in subsection (b)—

23 (A) by striking paragraph (3); and

24 (B) by redesignating paragraph (4) as
25 paragraph (3); and

1 (2) in subsection (c), by striking “section—”
2 and all that follows through the period, and insert-
3 ing “section, any party may demand a jury trial.”.

4 **TITLE VI—PROHIBITIONS**
5 **AGAINST SEX DISCRIMINATION**

6 **SEC. 601. SHORT TITLE.**

7 This title may be cited as the “Paycheck Fairness
8 Act”.

9 **SEC. 602. FINDINGS.**

10 Congress makes the following findings:

11 (1) Women have entered the workforce in
12 record numbers.

13 (2) Even today, women earn significantly lower
14 pay than men for work on jobs that require equal
15 skill, effort, and responsibility and that are per-
16 formed under similar working conditions. These pay
17 disparities exist in both the private and govern-
18 mental sectors. In many instances, the pay dispari-
19 ties can only be due to continued intentional dis-
20 crimination or the lingering effects of past discrimi-
21 nation.

22 (3) The existence of such pay disparities—

23 (A) depresses the wages of working fami-
24 lies who rely on the wages of all members of the
25 family to make ends meet;

1 (B) prevents the optimum utilization of
2 available labor resources;

3 (C) has been spread and perpetuated,
4 through commerce and the channels and instru-
5 mentalities of commerce, among the workers of
6 the several States;

7 (D) burdens commerce and the free flow of
8 goods in commerce;

9 (E) constitutes an unfair method of com-
10 petition in commerce;

11 (F) leads to labor disputes burdening and
12 obstructing commerce and the free flow of
13 goods in commerce;

14 (G) interferes with the orderly and fair
15 marketing of goods in commerce; and

16 (H) in many instances, may deprive work-
17 ers of equal protection on the basis of sex in
18 violation of the 5th and 14th amendments.

19 (4)(A) Artificial barriers to the elimination of
20 discrimination in the payment of wages on the basis
21 of sex continue to exist decades after the enactment
22 of the Fair Labor Standards Act of 1938 (29 U.S.C.
23 201 et seq.) and the Civil Rights Act of 1964 (42
24 U.S.C. 2000a et seq.).

1 (B) Elimination of such barriers would have
2 positive effects, including—

3 (i) providing a solution to problems in the
4 economy created by unfair pay disparities;

5 (ii) substantially reducing the number of
6 working women earning unfairly low wages,
7 thereby reducing the dependence on public as-
8 sistance;

9 (iii) promoting stable families by enabling
10 all family members to earn a fair rate of pay;

11 (iv) remedying the effects of past discrimi-
12 nation on the basis of sex and ensuring that in
13 the future workers are afforded equal protection
14 on the basis of sex; and

15 (v) ensuring equal protection pursuant to
16 Congress's power to enforce the 5th and 14th
17 amendments.

18 (5) With increased information about the provi-
19 sions added by the Equal Pay Act of 1963 and wage
20 data, along with more effective remedies, women will
21 be better able to recognize and enforce their rights
22 to equal pay for work on jobs that require equal
23 skill, effort, and responsibility and that are per-
24 formed under similar working conditions.

1 (6) Certain employers have already made great
2 strides in eradicating unfair pay disparities in the
3 workplace and their achievements should be recog-
4 nized.

5 **SEC. 603. ENHANCED ENFORCEMENT OF EQUAL PAY RE-**
6 **QUIREMENTS.**

7 (a) **REQUIRED DEMONSTRATION FOR AFFIRMATIVE**
8 **DEFENSE.**—Section 6(d)(1) of the Fair Labor Standards
9 Act of 1938 (29 U.S.C. 206(d)(1)) is amended by striking
10 “(iv) a differential” and all that follows through the period
11 and inserting the following: “(iv) a differential based on
12 a bona fide factor other than sex, such as education, train-
13 ing or experience, except that this clause shall apply only
14 if—

15 “(I) the employer demonstrates that—

16 “(aa) such factor—

17 “(AA) is job-related with respect to
18 the position in question; or

19 “(BB) furthers a legitimate business
20 purpose, except that this item shall not
21 apply where the employee demonstrates
22 that an alternative employment practice
23 exists that would serve the same business
24 purpose without producing such differen-

1 tial and that the employer has refused to
2 adopt such alternative practice; and

3 “(bb) such factor was actually applied and
4 used reasonably in light of the asserted jus-
5 tification; and

6 “(II) upon the employer succeeding under sub-
7 clause (I), the employee fails to demonstrate that
8 the differential produced by the reliance of the em-
9 ployer on such factor is itself the result of discrimi-
10 nation on the basis of sex by the employer.

11 An employer that is not otherwise in compliance with this
12 paragraph may not reduce the wages of any employee in
13 order to achieve such compliance.”.

14 (b) APPLICATION OF PROVISIONS.—Section 6(d)(1)
15 of the Fair Labor Standards Act of 1938 (29 U.S.C.
16 206(d)(1)) is amended by adding at the end the following:
17 “The provisions of this subsection shall apply to applicants
18 for employment if such applicants, upon employment by
19 the employer, would be subject to any provisions of this
20 section.”.

21 (c) ELIMINATION OF ESTABLISHMENT REQUIRE-
22 MENT.—Section 6(d) of the Fair Labor Standards Act of
23 1938 (29 U.S.C. 206(d)) is amended—

24 (1) by striking “, within any establishment in
25 which such employees are employed,”; and

1 (2) by striking “in such establishment” each
2 place it appears.

3 (d) NONRETALIATION PROVISION.—Section 15(a)(3)
4 of the Fair Labor Standards Act of 1938 (29 U.S.C.
5 215(a)(3)) is amended—

6 (1) by striking “or has” each place it appears
7 and inserting “has”; and

8 (2) by inserting before the semicolon the fol-
9 lowing: “, or has inquired about, discussed, or other-
10 wise disclosed the wages of the employee or another
11 employee, or because the employee (or applicant) has
12 made a charge, testified, assisted, or participated in
13 any manner in an investigation, proceeding, hearing,
14 or action under section 6(d)”.

15 (e) ENHANCED PENALTIES.—Section 16(b) of the
16 Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) is
17 amended—

18 (1) by inserting after the first sentence the fol-
19 lowing: “Any employer who violates section 6(d)
20 shall additionally be liable for such compensatory or
21 punitive damages as may be appropriate, except that
22 the United States shall not be liable for punitive
23 damages.”;

24 (2) in the sentence beginning “An action to”,
25 by striking “either of the preceding sentences” and

1 inserting “any of the preceding sentences of this
2 subsection”;

3 (3) in the sentence beginning “No employees
4 shall”, by striking “No employees” and inserting
5 “Except with respect to class actions brought to en-
6 force section 6(d), no employee”;

7 (4) by inserting after the sentence referred to
8 in paragraph (3), the following: “Notwithstanding
9 any other provision of Federal law, any action
10 brought to enforce section 6(d) may be maintained
11 as a class action as provided by the Federal Rules
12 of Civil Procedure.”; and

13 (5) in the sentence beginning “The court in”—

14 (A) by striking “in such action” and in-
15 serting “in any action brought to recover the li-
16 ability prescribed in any of the preceding sen-
17 tences of this subsection”; and

18 (B) by inserting before the period the fol-
19 lowing: “, including expert fees”.

20 (f) ACTION BY SECRETARY.—Section 16(c) of the
21 Fair Labor Standards Act of 1938 (29 U.S.C. 216(c)) is
22 amended—

23 (1) in the first sentence—

24 (A) by inserting “or, in the case of a viola-
25 tion of section 6(d), additional compensatory or

1 punitive damages,” before “and the agree-
2 ment”; and

3 (B) by inserting before the period the fol-
4 lowing: “, or such compensatory or punitive
5 damages, as appropriate”;

6 (2) in the second sentence, by inserting before
7 the period the following: “and, in the case of a viola-
8 tion of section 6(d), additional compensatory or pu-
9 nitive damages”;

10 (3) in the third sentence, by striking “the first
11 sentence” and inserting “the first or second sen-
12 tence”; and

13 (4) in the last sentence—

14 (A) by striking “commenced in the case”
15 and inserting “commenced—
16 “(1) in the case”;

17 (B) by striking the period and inserting “;
18 or”; and

19 (C) by adding at the end the following:

20 “(2) in the case of a class action brought to en-
21 force section 6(d), on the date on which the indi-
22 vidual becomes a party plaintiff to the class action.”.

23 **SEC. 604. TRAINING.**

24 The Equal Employment Opportunity Commission
25 and the Office of Federal Contract Compliance Programs,

1 subject to the availability of funds appropriated under sec-
2 tion 609, shall provide training to Commission employees
3 and affected individuals and entities on matters involving
4 discrimination in the payment of wages.

5 **SEC. 605. RESEARCH, EDUCATION, AND OUTREACH.**

6 The Secretary of Labor shall conduct studies and
7 provide information to employers, labor organizations, and
8 the general public concerning the means available to elimi-
9 nate pay disparities between men and women, including—

10 (1) conducting and promoting research to de-
11 velop the means to correct expeditiously the condi-
12 tions leading to the pay disparities;

13 (2) publishing and otherwise making available
14 to employers, labor organizations, professional asso-
15 ciations, educational institutions, the media, and the
16 general public the findings resulting from studies
17 and other materials, relating to eliminating the pay
18 disparities;

19 (3) sponsoring and assisting State and commu-
20 nity informational and educational programs;

21 (4) providing information to employers, labor
22 organizations, professional associations, and other
23 interested persons on the means of eliminating the
24 pay disparities;

1 (5) recognizing and promoting the achievements
2 of employers, labor organizations, and professional
3 associations that have worked to eliminate the pay
4 disparities; and

5 (6) convening a national summit to discuss, and
6 consider approaches for rectifying, the pay dispari-
7 ties.

8 **SEC. 606. TECHNICAL ASSISTANCE AND EMPLOYER REC-**
9 **OGNITION PROGRAM.**

10 (a) GUIDELINES.—

11 (1) IN GENERAL.—The Secretary of Labor shall
12 develop guidelines to enable employers to evaluate
13 job categories based on objective criteria such as
14 educational requirements, skill requirements, inde-
15 pendence, working conditions, and responsibility, in-
16 cluding decisionmaking responsibility and de facto
17 supervisory responsibility.

18 (2) USE.—The guidelines developed under
19 paragraph (1) shall be designed to enable employers
20 voluntarily to compare wages paid for different jobs
21 to determine if the pay scales involved adequately
22 and fairly reflect the educational requirements, skill
23 requirements, independence, working conditions, and
24 responsibility for each such job with the goal of

1 eliminating unfair pay disparities between occupa-
2 tions traditionally dominated by men or women.

3 (3) PUBLICATION.—The guidelines shall be de-
4 veloped under paragraph (1) and published in the
5 Federal Register not later than 180 days after the
6 date of enactment of this title.

7 (b) EMPLOYER RECOGNITION.—

8 (1) PURPOSE.—It is the purpose of this sub-
9 section to emphasize the importance of, encourage
10 the improvement of, and recognize the excellence of
11 employer efforts to pay wages to women that reflect
12 the real value of the contributions of such women to
13 the workplace.

14 (2) IN GENERAL.—To carry out the purpose of
15 this subsection, the Secretary of Labor shall estab-
16 lish a program under which the Secretary shall pro-
17 vide for the recognition of employers who, pursuant
18 to a voluntary job evaluation conducted by the em-
19 ployer, adjust their wage scales (such adjustments
20 shall not include the lowering of wages paid to men)
21 using the guidelines developed under subsection (a)
22 to ensure that women are paid fairly in comparison
23 to men.

24 (3) TECHNICAL ASSISTANCE.—The Secretary of
25 Labor may provide technical assistance to assist an

1 employer in carrying out an evaluation under para-
2 graph (2).

3 (c) REGULATIONS.—The Secretary of Labor shall
4 promulgate such rules and regulations as may be nec-
5 essary to carry out this section.

6 **SEC. 607. ESTABLISHMENT OF THE NATIONAL AWARD FOR**
7 **PAY EQUITY IN THE WORKPLACE.**

8 (a) IN GENERAL.—There is established the Secretary
9 of Labor’s National Award for Pay Equity in the Work-
10 place, which shall be evidenced by a medal bearing the
11 inscription “Secretary of Labor’s National Award for Pay
12 Equity in the Workplace”. The medal shall be of such de-
13 sign and materials, and bear such additional inscriptions,
14 as the Secretary of Labor may prescribe.

15 (b) CRITERIA FOR QUALIFICATION.—To qualify to
16 receive an award under this section a business shall—

17 (1) submit a written application to the Sec-
18 retary of Labor, at such time, in such manner, and
19 containing such information as the Secretary may
20 require, including at a minimum information that
21 demonstrates that the business has made substantial
22 effort to eliminate pay disparities between men and
23 women, and deserves special recognition as a con-
24 sequence; and

1 (2) meet such additional requirements and
2 specifications as the Secretary of Labor determines
3 to be appropriate.

4 (c) MAKING AND PRESENTATION OF AWARD.—

5 (1) AWARD.—After receiving recommendations
6 from the Secretary of Labor, the President or the
7 designated representative of the President shall an-
8 nually present the award described in subsection (a)
9 to businesses that meet the qualifications described
10 in subsection (b).

11 (2) PRESENTATION.—The President or the des-
12 ignated representative of the President shall present
13 the award under this section with such ceremonies
14 as the President or the designated representative of
15 the President may determine to be appropriate.

16 (d) BUSINESS.—In this section, the term “business”
17 includes—

18 (1)(A) a corporation, including a nonprofit cor-
19 poration;

20 (B) a partnership;

21 (C) a professional association;

22 (D) a labor organization; and

23 (E) a business entity similar to an entity de-
24 scribed in any of subparagraphs (A) through (D);

1 data from employers as described by the sex, race,
2 and national origin of employees.

3 “(2) In implementing paragraph (1), the Commission
4 shall have as its primary consideration the most effective
5 and efficient means for enhancing the enforcement of Fed-
6 eral laws prohibiting pay discrimination. For this purpose,
7 the Commission shall consider factors including the impo-
8 sition of burdens on employers, the frequency of required
9 reports (including which employers should be required to
10 prepare reports), appropriate protections for maintaining
11 data confidentiality, and the most effective format for the
12 data collection reports.”.

13 **SEC. 609. AUTHORIZATION OF APPROPRIATIONS.**

14 There are authorized to be appropriated such sums
15 as may be necessary to carry out this title.

16 **TITLE VII—PROTECTIONS FOR**
17 **WORKERS**

18 **Subtitle A—Protection for**
19 **Undocumented Workers**

20 **SEC. 701. FINDINGS.**

21 Congress finds the following:

22 (1) The National Labor Relations Act (29
23 U.S.C. 151 et seq.) (in this subtitle referred to as
24 the “NLRA”), enacted in 1935, guarantees the right
25 of employees to organize and to bargain collectively

1 with their employers. The NLRA implements the na-
2 tional labor policy of assuring free choice and en-
3 couraging collective bargaining as a means of main-
4 taining industrial peace. The National Labor Rela-
5 tions Board (in this subtitle referred to as the
6 “NLRB”) was created by Congress to enforce the
7 provisions of the NLRA.

8 (2) Under section 8 of the NLRA, employers
9 are prohibited from discriminating against employ-
10 ees “in regard to hire or tenure of employment or
11 any term or condition of employment to encourage
12 or discourage membership in any labor organiza-
13 tion”. (29 U.S.C. 158(a)(3)). Employers who violate
14 these provisions are subject to a variety of sanctions,
15 including reinstatement of workers found to be ille-
16 gally discharged because of their union support or
17 activity and provision of backpay to those employees.
18 Such sanctions serve to remedy and deter illegal ac-
19 tions by employers.

20 (3) In *Hoffman Plastic Compounds Inc. v.*
21 *NLRB*, 535 U.S. 137 (2002), the Supreme Court
22 held by a 5 to 4 vote that Federal immigration pol-
23 icy, as articulated in the Immigration Reform and
24 Control Act of 1986, prevented the NLRB from
25 awarding backpay to an undocumented immigrant

1 who was discharged in violation of the NLRA be-
2 cause of his support for union representation at his
3 workplace.

4 (4) The decision in Hoffman has an impact on
5 all employees, regardless of immigration or citizen-
6 ship status, who try to improve their working condi-
7 tions. In the wake of Hoffman Plastics, employers
8 may be more likely to report to the Department of
9 Homeland Security minority workers, regardless of
10 their immigration or citizenship status, who pursue
11 claims under the NLRA against their employers.
12 Fear that employers may retaliate against employees
13 that exercise their rights under the NLRA has a
14 chilling effect on all employees who exercise their
15 labor rights.

16 (5) The NLRA is not the only Federal employ-
17 ment statute that provides for a backpay award as
18 a remedy for an unlawful discharge. For example,
19 courts routinely award backpay to employees who
20 are found to have been discharged in violation of
21 title VII of the Civil Rights Act of 1964 (42 U.S.C.
22 2000e et seq.) or the Fair Labor Standards Act of
23 1938 (29 U.S.C. 201 et seq.) (in retaliation for com-
24 plaining about a failure to comply with the minimum
25 wage). In the wake of the Hoffman decision, defend-

1 ant employers will now argue that backpay awards
2 to unlawfully discharged undocumented workers are
3 barred under Federal employment statutes and even
4 under State employment statutes.

5 (6) Because the Hoffman decision prevents the
6 imposition of sanctions on employers who discrimi-
7 nate against undocumented immigrant workers, em-
8 ployers are encouraged to employ such workers for
9 low-paying and dangerous jobs because they have no
10 legal redress for violations of the law. This creates
11 an economic incentive for employers to hire and ex-
12 ploit undocumented workers, which in turn tends to
13 undermine the living standards and working condi-
14 tions of all Americans, citizens and noncitizens alike.

15 (7) The Hoffman decision disadvantages many
16 employers as well. Employers who are forced to com-
17 pete with firms that hire and exploit undocumented
18 immigrant workers are saddled with an economic
19 disadvantage in the labor marketplace. The unin-
20 tended creation of an economic inducement for em-
21 ployers to exploit undocumented immigrant workers
22 gives those employers an unfair competitive advan-
23 tage over employers that treat workers lawfully and
24 fairly.

1 (8) The Court’s decision in Hoffman makes
2 clear that “any ‘perceived deficiency in the NLRA’s
3 existing remedial arsenal’ must be ‘addressed by
4 congressional action[.]’” Hoffman Plastic Com-
5 pounds Inc. v. NLRB, 535 U.S. 137, 152 (2002)
6 (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883,
7 904 (1984)). In emphasizing the importance of back
8 pay awards, Justice Breyer noted that such awards
9 against employers “help[] to deter unlawful activity
10 that both labor laws and immigration laws seek to
11 prevent”. Hoffman Plastic Compounds Inc. v.
12 NLRB, 535 U.S. 137, 152 (2002). Because back
13 pay awards are designed both to remedy the individ-
14 ual’s private right to be free from discrimination as
15 well as to enforce the important public policy against
16 discriminatory employment practices, Congress must
17 take the following corrective action.

18 **SEC. 702. CONTINUED APPLICATION OF BACKPAY REM-**
19 **EDIES.**

20 (a) IN GENERAL.—Section 274A(h) of the Immigra-
21 tion and Nationality Act (8 U.S.C. 1324a(h)) is amended
22 by adding at the end the following:

23 “(4) BACKPAY REMEDIES.—Backpay or other
24 monetary relief for unlawful employment practices

1 shall not be denied to a present or former employee
2 as a result of the employer's or the employee's—

3 “(A) failure to comply with the require-
4 ments of this section; or

5 “(B) violation of a provision of Federal law
6 related to the employment verification system
7 described in subsection (b) in establishing or
8 maintaining the employment relationship.”.

9 (b) EFFECTIVE DATE.—The amendment made by
10 subsection (a) shall apply to any failure to comply or any
11 violation that occurs prior to, on, or after the date of en-
12 actment of this title.

13 **Subtitle B—Fair Labor Standards** 14 **Act Amendments**

15 **SEC. 711. SHORT TITLE.**

16 This subtitle may be cited as the “Workers’ Minimum
17 Wage and Overtime Rights Restoration Act of 2004”.

18 **SEC. 712. FINDINGS.**

19 Congress finds the following with respect to the Fair
20 Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) (in
21 this subtitle referred to as the “FLSA”):

22 (1) Since 1974, the FLSA has regulated States
23 with respect to the payment of minimum wage and
24 overtime rates. In *Garcia v. San Antonio Metropoli-*
25 *tan Transit Authority*, 469 U.S. 528 (1985), the Su-

1 preme Court upheld Congress's constitutional au-
2 thority to regulate States in the payment of min-
3 imum wages and overtime. The prohibitions of the
4 FLSA remain in effect and continue to apply to the
5 States.

6 (2) Wage and overtime violations in employ-
7 ment remain a serious problem both nationally and
8 among State and other public and private entities
9 receiving Federal financial assistance, and has invid-
10 ious effects on its victims, the labor force, and the
11 general welfare and economy as a whole. For exam-
12 ple, seven State governments have no overtime laws
13 at all. Fourteen State governments have minimum
14 wage and overtime laws; however, they exclude em-
15 ployees covered under the FLSA. As such, public
16 employees, since they are covered under the FLSA
17 are not protected under these State laws. Addition-
18 ally, four States have minimum wage and overtime
19 laws which are inferior to the FLSA. Further, the
20 Department of Labor continues to receive a substan-
21 tial number of wage and overtime charges against
22 State government employers.

23 (3) Private civil suits by the victims of employ-
24 ment law violations have been a crucial tool for en-
25 forcement of the FLSA. In *Alden v. Maine*, 527

1 U.S. 706 (1999), however, the Supreme Court held
2 that Congress lacks the power under the 14th
3 amendment to the Constitution to abrogate State
4 sovereign immunity to suits for legal relief by indi-
5 viduals under the FLSA. The Federal Government
6 has an important interest in ensuring that Federal
7 financial assistance is not used to facilitate viola-
8 tions of the FLSA, and private civil suits for mone-
9 tary relief are a critical tool for advancing that in-
10 terest.

11 (4) After the Alden decision, wage and overtime
12 violations by State employers remain unlawful, but
13 victims of such violations lack important remedies
14 for vindication of their rights available to all other
15 employees covered by the FLSA. In the absence of
16 the deterrent effect that such remedies provide,
17 there is a great likelihood that State entities car-
18 rying out federally funded programs and activities
19 will use Federal financial assistance to violate the
20 FLSA, or that the Federal financial assistance will
21 otherwise subsidize or facilitate FLSA violations.

22 (5) The Supreme Court has upheld Congress's
23 authority to condition receipt of Federal financial
24 assistance on acceptance by State or other covered
25 entities of conditions regarding or related to the use

1 of those funds, as in *Cannon v. University of Chi-*
2 *cago*, 441 U.S. 677 (1979).

3 (6) The Court has further recognized that Con-
4 gress may require State entities, as a condition of
5 receipt of Federal financial assistance, to waive their
6 State sovereign immunity to suits for a violation of
7 Federal law, as in *College Savings Bank v. Florida*
8 *Prepaid Postsecondary Education Expense Board*,
9 527 U.S. 666 (1999).

10 (7) In the wake of the *Alden* decision, it is nec-
11 essary, in order to foster greater compliance with,
12 and adequate remedies for violations of, the FLSA,
13 particularly in federally funded programs or activi-
14 ties operated by State entities, to require State enti-
15 ties to consent to a waiver of State sovereign immu-
16 nity as a condition of receipt of such Federal finan-
17 cial assistance.

18 (8) The Supreme Court has repeatedly held
19 that State sovereign immunity does not bar suits for
20 prospective injunctive relief brought against State
21 officials acting in their official capacity, as in *Ex*
22 *parte Young* (209 U.S. 123 (1908)). The injunctive
23 relief available in such suits under the FLSA will
24 continue to be the same as that which was available
25 under those laws prior to enactment of this subtitle.

1 **SEC. 713. PURPOSES.**

2 The purposes of this subtitle are—

3 (1) to provide to State employees in programs
4 or activities that receive or use Federal financial as-
5 sistance the same rights and remedies for practices
6 violating the FLSA as are available to other employ-
7 ees under the FLSA, and that were available to
8 State employees prior to the Supreme Court’s deci-
9 sion in *Alden v. Maine*, 527 U.S. 706 (1999);

10 (2) to provide that the receipt or use of Federal
11 financial assistance for a program or activity con-
12 stitutes a State waiver of sovereign immunity from
13 suits by employees within that program or activity
14 for violations of the FLSA; and

15 (3) to affirm that suits for injunctive relief are
16 available against State officials in their official ca-
17 pacities for violations of the FLSA.

18 **SEC. 714. REMEDIES FOR STATE EMPLOYEES.**

19 Section 16 of the Fair Labor Standards Act of 1938
20 (29 U.S.C. 216) is amended by adding at the end the fol-
21 lowing:

22 “(f)(1) A State’s receipt or use of Federal financial
23 assistance for any program or activity of a State shall con-
24 stitute a waiver of sovereign immunity, under the 11th
25 amendment to the Constitution or otherwise, to a suit
26 brought by an employee of that program or activity under

1 this Act for equitable, legal, or other relief authorized
2 under this Act.

3 “(2) In this subsection, the term ‘program or activity’
4 has the meaning given the term in section 309 of the Age
5 Discrimination Act of 1975 (42 U.S.C. 6107).”.

○