II

108TH CONGRESS
2D SESSION

S. 2088

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

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 2004

Mr. KENNEDY (for himself, Mr. DASCHLE, Mr. REID, Mr. LEAHY, Mr. DODD, Mr. HARKIN, Mr. KERRY, Mr. FEINGOLD, Ms. MIKULSKI, Mr. SCHUMER, Mrs. MURRAY, Mr. DURBIN, Mr. EDWARDS, Mrs. CLINTON, Mr. SARBANES, Mr. LAUTENBERG, Mr. CORZINE, Ms. LANDRIEU, and Ms. CANTWELL) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004''.

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

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.

Congress finds the following:

(1) This subtitle is made necessary by a decision of the Supreme Court in Alexander v. Sandoval, 532 U.S. 275 (2001) that significantly impairs statutory protections against discrimination that Congress has erected over a period of almost 4 decades. The Sandoval decision undermines these statutory protections by stripping victims of discrimination (defined under regulations that Congress required Federal departments and agencies to promulgate to implement title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)) of the right to bring action in Federal court to redress the discrimination and by casting doubt on the validity of the regulations themselves.

(2) The Sandoval decision attacks settled expectations created by title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972 (also known as the ''Patsy Takemoto Mink Equal Opportunity in Education Act'') (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (collectively referred to in this Act as the ''covered civil rights provisions''). The covered civil rights provisions were designed to establish and make effective

the rights of persons to be free from discrimination on the part of entities that are subject to 1 or more of the covered civil rights provisions, as appropriate (referred to in this Act as ''covered entities''). In 1964 Congress adopted title VI of the Civil Rights Act of 1964 to ensure that Federal dollars would not be used to subsidize or support programs or activities that discriminated on racial, color, or national origin grounds. In the years that followed, Congress extended these protections by enacting laws barring discrimination in federally funded activities on the basis of sex in title IX of the Education Amendments of 1972, age in the Age Discrimination Act of 1975, and disability in section 504 of the Rehabilitation Act of 1973.

(3) From the outset, Congress and the executive branch made clear that the regulatory process would be used to ensure broad protections for beneficiaries of the law. The first regulations promulgated by the Department of Justice under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) forbade the use of ''criteria or methods of administration which have the effect of subjecting individuals to discrimination . . .'' (section 80.3 of title 45, Code of Federal Regulations) and prohib-

ited retaliation against persons participating in litigation or administrative resolution of charges of discrimination brought under the Act. These regulations were drafted by the same executive branch officials who played a central role in drafting title VI of the Civil Rights Act of 1964. The language used is, in relevant respects, virtually indistinguishable from regulations under the several Acts in effect today. For example, section 304 of the Age Discrimination Act of 1975 (42 U.S.C. 6103) required the Secretary of the Department of Health, Education, and Welfare (HEW) (now Health and Human Services (HHS)) to promulgate ''general regulations'' to effectuate the purposes of the Act. These ''government-wide regulations,'' governing age discrimination in programs and activities receiving Federal financial assistance condemn ''any actions which have [a discriminatory] effect, on the basis of age . . .'' (section 90.12 of title 45, Code of Federal Regulations).

(4) None of the regulations under the laws addressed in this subtitle have ever been invalidated. In 1966, Congress considered and rejected a proposal to invalidate the disparate impact regulations promulgated pursuant to title VI of the Civil Rights

Act of 1964 (42 U.S.C. 2000d et seq.). In 1975, Congress reviewed and maintained the implementing regulations promulgated pursuant to title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), pursuant to a statutory procedure designed to afford Congress the opportunity to invalidate provisions deemed to be inconsistent with congressional intent. The Supreme Court has recognized that Congress's failure to disapprove regulations implies that the regulations accurately reflect congressional intent. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 533–34 (1982). Moreover, the Supreme Court explicitly recognized congressional approval of the regulations promulgated to implement section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) in Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984), stating that ''[t]he regulations particularly merit deference in the present case: the responsible Congressional committees participated in their formation and both these committees and Congress itself endorsed the regulations in their final form.''.

(5) All of the civil rights provisions cited in this section were designed to confer a benefit on persons who were discriminated against. They relied heavily on private attorneys general for effective enforce-

ment. Congress acknowledged that it could not secure compliance solely through enforcement actions initiated by the Attorney General. Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (per curiam).

(6) The Supreme Court has made it clear that individuals suffering discrimination under these statutes have a private right of action in the Federal courts, and that this is necessary for effective protection of the law, although Congress did not make such a right of action explicit in the statute. Cannon v. University of Chicago, 441 U.S. 677 (1979).

(7)(A) Notwithstanding the decision of the Supreme Court in Cort v. Ash, 422 U.S. 66 (1975) to abandon prior precedent and require explicit statutory statements of a right of action, Congress and the Courts both before and after Cort have recognized an implied right of action under the above statutes. For example, Congress has consistently provided the means for enforcing the statutes. In 1972, Congress established a right to attorney's fees in private actions brought under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) and title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) that continued with enactment

of the Civil Rights Attorneys' Fees Awards Act of 1976 (Public Law 94–559; 90 Stat. 2641). In 1973, Congress provided a right to attorney's fees for prevailing parties under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) without expressly stating that there was a right of action. In 1978 Congress amended the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) to include a right to attorney's fees. Because the Age Discrimination Act of 1975 was enacted while the Cort decision was pending, Congress also enacted in 1978 a limited private right of action to enforce the Age Discrimination Act of 1975.

(B) The Senate Report that accompanied the Civil Rights Attorneys' Fees Awards Act of 1976 (Public Law 94–559; 90 Stat. 2641) stated that ''All of these civil rights laws . . . depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain.'' S. Rep. No. 94–1011 (1976).

(8) The Supreme Court had no basis in law or in legislative history in Sandoval for denying a right of action under regulations promulgated pursuant to

title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) while permitting it under the statute. The regulations were congressionally mandated and their promulgation was specifically directed by Congress under section 602 of that Act (42 U.S.C. 2000d–1) ''to effectuate'' the antidiscrimination provisions of the statute. Title VI of the Civil Rights Act of 1964 stressed the importance of the regulations by requiring them to be ''approved by the President''. Similarly, the regulations promulgated pursuant to title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) were also congressionally authorized and specifically directed by Congress to effectuate the provisions of the statute. Title IX of the Education Amendments of 1972 stressed the importance of the regulations by requiring them to be ''approved by the President''.

(9) Regulations that prohibit practices that have the effect of discrimination are consistent with prohibitions of disparate treatment that require a showing of intent, as the Supreme Court has acknowledged in the following decisions:

(A) A disparate impact standard allows a court to reach discrimination that could actually exist under the guise of compliance with

the law. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

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

(C) An invidious purpose may often be inferred from the totality of the relevant facts, including, where true, that the practice bears more heavily on one race than another. Washington v. Davis, 426 U.S. 229 (1976).

(D) The disparate impact method of proof is critical to ferreting out stereotypes underlying intentional discrimination. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

(10) The interpretation of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), and other statutes barring discrimination by covered entities as prohibiting practices that have disparate impact and that are not justified as necessary to achieve the goals of the programs or activities supported by the Federal financial assistance is powerfully reinforced by the use of

such a standard in enforcing title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.). When the Supreme Court wavered on the application of a disparate impact standard under title VII, Congress specifically reinstated it as law in the Civil Rights Act of 1991 (Public Law 102–166; 105 Stat. 1071).

(11) By reinstating a private right of action under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) and confirming that right for other civil rights statutes, Congress is not acting in a manner that would expose covered entities to unfair findings of discrimination. The legal standard for a disparate impact claim has never been structured so that a finding of discrimination could be based on numerical imbalance alone.

(12) In contrast, a failure to reinstate or confirm a private right of action would leave vindication of the rights to equality of opportunity solely to Federal agencies, which may fail to take necessary and appropriate action because of administrative overburden or other reasons. Action by Congress to specify a private right of action is necessary to ensure that persons will have a remedy if they are denied equal access to education, housing, health, environmental protection, transportation, and many

other programs and services by practices of covered entities that result in discrimination.

(13) As a result of the Supreme Court's decision in Sandoval, courts have dismissed numerous claims brought under the regulations promulgated pursuant to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) that challenged actions with an unjustified discriminatory effect. Although the Sandoval Court did not address title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), lower courts have similarly dismissed claims under such Act. Courts relying on the Sandoval decision have also dismissed claims seeking redress for unlawful retaliation against persons who opposed prohibited acts, brought actions, or participated in actions, under title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972. Because judicial interpretation of the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) has tracked that of title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972, without clarification of Sandoval, plaintiffs run the risk that courts may dismiss claims brought under regulations promulgated pursuant to the Age Discrimination Act of 1975 challenging actions with

an unjustified discriminatory effect and claims seeking redress for unlawful retaliation against persons who have brought or participated in actions under the Age Discrimination Act of 1975.

(14) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) has received different treatment by the Supreme Court. In Alexander v. Choate, 469 U.S. 287 (1985), the Court proceeded on the assumption that the statute itself prohibited some actions that had a disparate impact on handicapped individuals—an assumption borne out by congressional statements made during passage of the Act. In Sandoval, the Court appeared to accept this principle of Alexander. Moreover, the Supreme Court explicitly recognized congressional approval of the regulations promulgated to implement section 504 of the Rehabilitation Act of 1973 in Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984). Relying on the validity of the regulations, Congress incorporated the regulations into the statutory requirements of section 204 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12134). Thus it does not appear at this time that there is a risk that the private right of action to challenge disparate impact

discrimination under section 504 of the Rehabilitation Act of 1973 will become unavailable.

(15) Since the enactment of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and section 504 of the Rehabilitation Act of 1973, Congress has intended that the prohibitions on discrimination in those provisions include a prohibition on retaliation. The ability to prevent retaliation against persons who oppose any policy or practice prohibited by those provisions, or make a charge, testify, assist, or participate in any manner in an investigation, proceeding, or hearing under those provisions, is essential to realizing the prohibitions on discrimination in those provisions.

(16) The right to maintain a private right of action under a provision added to a statute under this subtitle will be effectuated by a waiver of sovereign immunity in the same manner as sovereign immunity is waived under the remaining provisions of that statute.

SEC. 102. PROHIBITED DISCRIMINATION.

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

(1) by striking ''No'' and inserting ''(a) No''; and

(2) by adding at the end the following:

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

''(i) a person aggrieved by discrimination on the basis of race, color, or national origin (referred to in this title as an 'aggrieved person') demonstrates that an entity subject to this title (referred to in this title as a 'covered entity') has a policy or practice that causes a disparate impact on the basis of race, color, or national origin and the covered entity fails to demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner; or

''(ii) the aggrieved person demonstrates (consistent with the demonstration required under title VII with respect to an 'alternative employment practice') that a less discriminatory alternative policy or practice exists, and the covered entity refuses to adopt such alternative policy or practice.

''(B)(i) With respect to demonstrating that a particular policy or practice causes a disparate impact as de-

scribed in subparagraph (A)(i), the aggrieved person shall demonstrate that each particular challenged policy or practice causes a disparate impact, except that if the aggrieved person demonstrates to the court that the elements of a covered entity's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one policy or practice.

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

''(2) A demonstration that a policy or practice is necessary to achieve the goals of a program or activity may not be used as a defense against a claim of intentional discrimination under this title.

''(3) In this subsection, the term 'demonstrates' means meets the burdens of production and persuasion.

''(c) No person in the United States shall be subjected to discrimination, including retaliation, because such person opposed any policy or practice prohibited by this title, or because such person made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.''.

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

(1) by redesignating subsection (c) as subsection (e); and

(2) by inserting after subsection (b) the following:

''(c)(1)(A) Subject to the conditions described in paragraphs (1) through (9) of subsection (a), discrimination (including exclusion from participation and denial of benefits) based on disparate impact is established under this title only if—

''(i) a person aggrieved by discrimination on the basis of sex (referred to in this title as an 'aggrieved person') demonstrates that an entity subject to this title (referred to in this title as a 'covered entity') has a policy or practice that causes a disparate impact on the basis of sex and the covered entity fails to demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner; or

''(ii) the aggrieved person demonstrates (consistent with the demonstration required under title

VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) with respect to an 'alternative employment practice') that a less discriminatory alternative policy or practice exists, and the covered entity refuses to adopt such alternative policy or practice.

''(B)(i) With respect to demonstrating that a particular policy or practice causes a disparate impact as described in subparagraph (A)(i), the aggrieved person shall demonstrate that each particular challenged policy or practice causes a disparate impact, except that if the aggrieved person demonstrates to the court that the elements of a covered entity's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one policy or practice.

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

''(2) A demonstration that a policy or practice is necessary to achieve the goals of a program or activity may not be used as a defense against a claim of intentional discrimination under this title.

''(3) In this subsection, the term 'demonstrates' means meets the burdens of production and persuasion.

''(d) No person in the United States shall be subjected to discrimination, including retaliation, because such person opposed any policy or practice prohibited by this title, or because such person made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.''.

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

(1) by striking ''Pursuant'' and inserting ''(a) Pursuant''; and

(2) by adding at the end the following:

''(b)(1)(A) Subject to the conditions described in subsections (b) and (c) of section 304, discrimination (including exclusion from participation and denial of benefits) based on disparate impact is established under this title only if—

''(i) a person aggrieved by discrimination on the basis of age (referred to in this title as an 'aggrieved person') demonstrates that an entity subject to this title (referred to in this title as a 'covered entity') has a policy or practice that causes a disparate impact on the basis of age and the covered entity fails

to demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner; or

''(ii) the aggrieved person demonstrates (consistent with the demonstration required under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) with respect to an 'alternative employment practice') that a less discriminatory alternative policy or practice exists, and the covered entity refuses to adopt such alternative policy or practice.

''(B)(i) With respect to demonstrating that a particular policy or practice causes a disparate impact as described in subparagraph (A)(i), the aggrieved person shall demonstrate that each particular challenged policy or practice causes a disparate impact, except that if the aggrieved person demonstrates to the court that the elements of a covered entity's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one policy or practice.

''(ii) If the covered entity demonstrates that a specific policy or practice does not cause the disparate impact, the covered entity shall not be required to demonstrate that

such policy or practice is necessary to achieve the goals of its program or activity.

''(2) A demonstration that a policy or practice is necessary to achieve the goals of a program or activity may not be used as a defense against a claim of intentional discrimination under this title.

''(3) In this subsection, the term 'demonstrates' means meets the burdens of production and persuasion.

''(c) No person in the United States shall be subjected to discrimination, including retaliation, because such person opposed any policy or practice prohibited by this title, or because such person made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.''.

SEC. 103. RIGHTS OF ACTION.

(a) CIVIL RIGHTS ACT OF 1964.—Section 602 of the Civil Rights Act of 1964 (42 U.S.C. 2000d–1) is amended—

(1) by inserting ''(a)'' before ''Each Federal department and agency which is empowered''; and

(2) by adding at the end the following:

''(b) Any person aggrieved by the failure of a covered entity to comply with this title, including any regulation promulgated pursuant to this title, may bring a civil action

in any Federal or State court of competent jurisdiction to enforce such person's rights.''.

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

(1) by inserting ''(a)'' before ''Each Federal department and agency which is empowered''; and

(2) by adding at the end the following:

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

(c) AGE DISCRIMINATION ACT OF 1975.—Section 305(e) of the Age Discrimination Act of 1975 (42 U.S.C. 6104(e)) is amended in the first sentence of paragraph (1), by striking ''this Act'' and inserting ''this title, including a regulation promulgated to carry out this title,''.

SEC. 104. RIGHT OF RECOVERY.

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

''SEC. 602A. ACTIONS BROUGHT BY AGGRIEVED PERSONS.

''(a) CLAIMS BASED ON PROOF OF INTENTIONAL DISCRIMINATION.—In an action brought by an aggrieved

person under this title against a covered entity who has engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under this title (including its implementing regulations), the aggrieved person may recover equitable and legal relief (including compensatory and punitive damages), attorney's fees (including expert fees), and costs, except that punitive damages are not available against a government, government agency, or political subdivision.

''(b) CLAIMS BASED ON THE DISPARATE IMPACT STANDARD OF PROOF.—In an action brought by an aggrieved person under this title against a covered entity who has engaged in unlawful discrimination based on disparate impact prohibited under this title (including its implementing regulations), the aggrieved person may recover equitable relief, attorney's fees (including expert fees), and costs.''.

(b) EDUCATION AMENDMENTS OF 1972.—Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) is amended by inserting after section 902 the following:

''SEC. 902A. ACTIONS BROUGHT BY AGGRIEVED PERSONS.

''(a) CLAIMS BASED ON PROOF OF INTENTIONAL DISCRIMINATION.—In an action brought by an aggrieved person under this title against a covered entity who has

engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under this title (including its implementing regulations), the aggrieved person may recover equitable and legal relief (including compensatory and punitive damages), attorney's fees (including expert fees), and costs, except that punitive damages are not available against a government, government agency, or political subdivision.

''(b) CLAIMS BASED ON THE DISPARATE IMPACT STANDARD OF PROOF.—In an action brought by an aggrieved person under this title against a covered entity who has engaged in unlawful discrimination based on disparate impact prohibited under this title (including its implementing regulations), the aggrieved person may recover equitable relief, attorney's fees (including expert fees), and costs.''.

(c) AGE DISCRIMINATION ACT OF 1975.—

(1) IN GENERAL.—Section 305 of the Age Discrimination Act of 1975 (42 U.S.C. 6104) is amended by adding at the end the following:

''(g)(1) In an action brought by an aggrieved person under this title against a covered entity who has engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under this title (including its implementing regulations),

the aggrieved person may recover equitable and legal relief (including compensatory and punitive damages), attorney's fees (including expert fees), and costs, except that punitive damages are not available against a government, government agency, or political subdivision.

''(2) In an action brought by an aggrieved person under this title against a covered entity who has engaged in unlawful discrimination based on disparate impact prohibited under this title (including its implementing regulations), the aggrieved person may recover equitable relief, attorney's fees (including expert fees), and costs.''.

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

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

(i) by striking ''to enjoin a violation'' and inserting ''to redress a violation''; and

(ii) by striking the second sentence and inserting the following: ''The Court shall award the costs of suit, including a reasonable attorney's fee (including expert fees), to the prevailing plaintiff.''.

(B) ELIMINATING UNNECESSARY MANDATES: TO EXHAUST ADMINISTRATIVE REMEDIES; AND TO DELAY SUIT LONGER THAN 180 DAYS TO OBTAIN AGENCY REVIEW.—Section 305(f) of the Age Discrimination Act of 1975 (42 U.S.C. 6104(f)) is amended by striking ''With respect to actions brought for relief based on an alleged violation of the provisions of this title,'' and inserting ''Actions brought for relief based on an alleged violation of the provisions of this title may be initiated in a court of competent jurisdiction, pursuant to section 305(e), or before the relevant Federal department or agency. With respect to such actions brought initially before the relevant Federal department or agency,''.

(C) ELIMINATING DUPLICATIVE ''REASONABLENESS'' REQUIREMENT; CLARIFYING THAT ''REASONABLE FACTORS OTHER THAN AGE'' IS DEFENSE TO A DISPARATE IMPACT CLAIM, NOT AN EXCEPTION TO ADA COVERAGE.—Section 304(b)(1) of the Age Discrimination Act of 1975 (42 U.S.C. 6103(b)(1)) is amended by striking ''involved—'' and all that follows through the period and inserting ''involved such

action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity.''.

(d) REHABILITATION ACT OF 1973.—Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) is amended by adding at the end the following:

''(e)(1) In an action brought by a person aggrieved by discrimination on the basis of disability (referred to in this section as an 'aggrieved person') under this section against an entity subject to this section (referred to in this section as a 'covered entity') who has engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under this section (including its implementing regulations), the aggrieved person may recover equitable and legal relief (including compensatory and punitive damages), attorney's fees (including expert fees), and costs, except that punitive damages are not available against a government, government agency, or political subdivision.

''(2) In an action brought by an aggrieved person under this section against a covered entity who has engaged in unlawful discrimination based on disparate impact prohibited under this section (including its implementing regulations), the aggrieved person may recover

equitable relief, attorney's fees (including expert fees), and costs.''.

SEC. 105. CONSTRUCTION.

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

(b) DEFENDANTS.—Nothing in this subtitle, including any amendment made by this subtitle, shall be construed to limit the scope of the class of persons who may be subjected to civil actions under the covered civil rights provisions.

SEC. 106. EFFECTIVE DATE.

(a) IN GENERAL.—This subtitle, and the amendments made by this subtitle, are retroactive to April 24, 2001, and effective as of that date.

(b) APPLICATION.—This subtitle, and the amendments made by this subtitle, apply to all actions or proceedings pending on or after April 24, 2001, except as to an action against a State on a claim brought under the disparate impact standard, as to which the effective date is the date of enactment of this Act.

Subtitle B—Harassment

SEC. 111. FINDINGS.

Congress finds the following:

(1) As the Supreme Court has held, covered entities are liable for harassment on the basis of sex under their education programs and activities under title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) (referred to in this subtitle as ''title IX''). Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 75 (1992) (damages remedy available for harassment of student by a teacher coach); Davis v. Monroe County Board of Education, 526 U.S. 629, 633 (1999) (authorizing damages action against school board for student-on-student sexual harassment).

(2) Courts have confirmed that covered entities are liable for harassment on the basis of race, color, or national origin under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (referred to in this subtitle as ''title VI''), e.g., Bryant v. Independent School District No. I–38, 334 F.3d 928 (10th Cir. 2003) (liability for student-on-student racial harassment). Moreover, judicial interpretation of the similarly worded Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) and section 504 of the Re-

habilitation Act of 1973 (29 U.S.C. 794) has tracked that of title VI and title IX.

(3) As these courts have properly recognized, harassment on a prohibited basis under a program or activity, whether perpetrated by employees or agents of the program or activity, by peers of the victim, or by others who conduct harassment under the program or activity, is a form of unlawful and intentional discrimination that inflicts substantial harm on beneficiaries of the program or activity and violates the obligation of a covered entity to maintain a nondiscriminatory environment.

(4) In a 5 to 4 ruling, the Supreme Court held that students subjected to sexual harassment may receive a damages remedy under title IX only when school officials have ''actual notice'' of the harassment and are ''deliberately indifferent'' to it. Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998). See also Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

(5) The standard delineated in Gebser and followed in Davis has been applied by lower courts regarding the liability of covered entities for damages for harassment based on race, color, or national origin under title VI. E.g., Bryant v. Independent

School District No. I–38, 334 F.3d 928 (10th Cir. 2003). Because of the similarities in the wording and interpretation of the underlying statutes, this standard may be applied to claims for damages brought under the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) as well.

(6) Although they do not affect the relevant standards for individuals to obtain injunctive and equitable relief for harassment on the basis of race, color, sex, national origin, age, or disability under covered programs and activities, Gebser and its progeny severely limit the availability of remedies for such individuals by imposing new, more stringent standards for recovery of damages under title VI and title IX, and potentially under the Age Discrimination Act of 1975 and section 504 of the Rehabilitation Act of 1973. Yet in many cases, damages are the only remedy that would effectively rectify past harassment.

(7) As recognized by the dissenters in Gebser, these limitations on effective relief thwart Congress's underlying purpose to protect students from harassment. By making the ''policy choice'' to ''rank[] protection of the school district's purse above the pro-

tection of immature high school students'', the Gebser case ''is not faithful to the intent of the policymaking branch of our Government''. Gebser, 524 U.S. at 306 (Stevens, J., dissenting).

(8) The rulings in Gebser and its progeny create an incentive for covered entities to insulate themselves from knowledge of harassment on the basis of race, color, sex, national origin, age, or disability rather than adopting and enforcing practices that will minimize the danger of such harassment. The rulings thus undermine the purpose of prohibitions on discrimination in the civil rights laws: ''to induce [covered programs or activities] to adopt and enforce practices that will minimize the danger that vulnerable students [or other beneficiaries] will be exposed to such odious behavior''. Gebser, 524 U.S. at 300 (Stevens, J., dissenting).

(9) The Gebser ruling contravened the interpretations of title VI and title IX by the Department of Education, which interpretations recognized liability for damages for harassment based on race, color, sex, or national origin based on agency principles. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (March 13,

1997); Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance, 59 Fed. Reg. 11448 (March 10, 1994).

(10) Legislative action is necessary and appropriate to reverse Gebser and its progeny and restore the availability of a full range of remedies for harassment based on race, color, sex, national origin, age, or disability. The Gebser majority itself invited Congress to ''speak directly on the subject'' of damages liability to provide additional guidance to the courts. 524 U.S. at 292.

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

(A) ensure that students and other beneficiaries of federally funded programs and activities have protection from harassment on the basis of race, color, sex, national origin, age, or disability that is comparable in strength and effectiveness to that available to employees under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), and title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.);

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

(C) deter incidents of harassment; and

(D) provide appropriate remedies for discrimination.

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

(13) The right to maintain a private right of action under a provision added to a statute under this subtitle will be effectuated by a waiver of sovereign immunity in the same manner as sovereign immunity is waived under the remaining provisions of that statute.

SEC. 112. RIGHT OF RECOVERY.

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

''(c) CLAIMS BASED ON HARASSMENT.—

''(1) RIGHT OF RECOVERY.—In an action brought against a covered entity by (including on be-

half of) an aggrieved person who has been subjected to unlawful harassment under a program or activity, the aggrieved person may recover equitable and legal relief (including compensatory and punitive damages subject to the provisions of paragraph (2)), attorney's fees (including expert fees), and costs.

''(2) AVAILABILITY OF DAMAGES.—

''(A) TANGIBLE ACTION BY AGENT OR EMPLOYEE.—If an agent or employee of a covered entity engages in unlawful harassment under a program or activity that results in a tangible action to the aggrieved person, damages shall be available against the covered entity.

''(B) NO TANGIBLE ACTION BY AGENT OR EMPLOYEE.—If an agent or employee of a covered entity engages in unlawful harassment under a program or activity that results in no tangible action to the aggrieved person, no damages shall be available against the covered entity if it can demonstrate that—

''(i) it exercised reasonable care to prevent and correct promptly any harassment based on race, color, or national origin; and

"(ii) the aggrieved person unreasonably failed to take advantage of preventive or corrective opportunities offered by the covered entity that—

"(I) would likely have provided redress and avoided the harm described by the aggrieved person; and

"(II) would not have exposed the aggrieved person to undue risk, effort, or expense.

"(C) HARASSMENT BY THIRD PARTY.—If a person who is not an agent or employee of a covered entity subjects an aggrieved person to unlawful harassment under a program or activity, and the covered entity involved knew or should have known of the harassment, no damages shall be available against the covered entity if it can demonstrate that it exercised reasonable care to prevent and correct promptly any harassment based on race, color, or national origin.

"(D) DEMONSTRATION.—For purposes of subparagraphs (B) and (C), a showing that the covered entity has exercised reasonable care to prevent and correct promptly any harassment

based on race, color, or national origin includes a demonstration by the covered entity that it has—

''(i) established, adequately publicized, and enforced an effective, comprehensive, harassment prevention policy and complaint procedure that is likely to provide redress and avoid harm without exposing the person subjected to the harassment to undue risk, effort, or expense;

''(ii) undertaken prompt, thorough, and impartial investigations pursuant to its complaint procedure; and

''(iii) taken immediate and appropriate corrective action designed to stop harassment that has occurred, correct its effects on the aggrieved person and ensure that the harassment does not recur.

''(E) PUNITIVE DAMAGES.—Punitive damages shall not be available under this subsection against a government, government agency, or political subdivision.

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

''(A) DEMONSTRATES.—The term 'demonstrates' means meets the burdens of production and persuasion.

''(B) TANGIBLE ACTION.—The term 'tangible action' means—

''(i) a significant adverse change in an individual's status caused by an agent or employee of a covered entity with regard to the individual's participation in, access to, or enjoyment of, the benefits of a program or activity; or

''(ii) an explicit or implicit condition by an agent or employee of a covered entity on an individual's participation in, access to, or enjoyment of, the benefits of a program or activity based on the individual's submission to the harassment.

''(C) UNLAWFUL HARASSMENT.—The term 'unlawful harassment' means harassment that is unlawful under this title.''.

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

''(c) CLAIMS BASED ON HARASSMENT.—

''(1) RIGHT OF RECOVERY.—In an action brought against a covered entity by (including on behalf of) an aggrieved person who has been subjected to unlawful harassment under a program or activity, the aggrieved person may recover equitable and legal relief (including compensatory and punitive damages subject to the provisions of paragraph (2)), attorney's fees (including expert fees), and costs.

''(2) AVAILABILITY OF DAMAGES.—

''(A) TANGIBLE ACTION BY AGENT OR EMPLOYEE.—If an agent or employee of a covered entity engages in unlawful harassment under a program or activity that results in a tangible action to the aggrieved person, damages shall be available against the covered entity.

''(B) NO TANGIBLE ACTION BY AGENT OR EMPLOYEE.—If an agent or employee of a covered entity engages in unlawful harassment under a program or activity that results in no tangible action to the aggrieved person, no damages shall be available against the covered entity if it can demonstrate that—

''(i) it exercised reasonable care to prevent and correct promptly any harassment based on sex; and

"(ii) the aggrieved person unreasonably failed to take advantage of preventive or corrective opportunities offered by the covered entity that—

"(I) would likely have provided redress and avoided the harm described by the aggrieved person; and

"(II) would not have exposed the aggrieved person to undue risk, effort, or expense.

"(C) HARASSMENT BY THIRD PARTY.—If a person who is not an agent or employee of a covered entity subjects an aggrieved person to unlawful harassment under a program or activity, and the covered entity knew or should have known of the harassment, no damages shall be available against the covered entity if it can demonstrate that it exercised reasonable care to prevent and correct promptly any harassment based on sex.

"(D) DEMONSTRATION.—For purposes of subparagraphs (B) and (C), a showing that the covered entity has exercised reasonable care to prevent and correct promptly any harassment

based on sex includes a demonstration by the covered entity that it has—

''(i) established, adequately publicized, and enforced an effective, comprehensive, harassment prevention policy and complaint procedure that is likely to provide redress and avoid harm without exposing the person subjected to the harassment to undue risk, effort, or expense;

''(ii) undertaken prompt, thorough, and impartial investigations pursuant to its complaint procedure; and

''(iii) taken immediate and appropriate corrective action designed to stop harassment that has occurred, correct its effects on the aggrieved person, and ensure that the harassment does not recur.

''(E) PUNITIVE DAMAGES.—Punitive damages shall not be available under this subsection against a government, government agency, or political subdivision.

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

''(A) DEMONSTRATES.—The term 'demonstrates' means meets the burdens of production and persuasion.

''(B) TANGIBLE ACTION.—The term 'tangible action' means—

''(i) a significant adverse change in an individual's status caused by an agent or employee of a covered entity with regard to the individual's participation in, access to, or enjoyment of, the benefits of a program or activity; or

''(ii) an explicit or implicit condition by an agent or employee of a covered entity on an individual's participation in, access to, or enjoyment of, the benefits of a program or activity based on the individual's submission to the harassment.

''(C) UNLAWFUL HARASSMENT.—The term 'unlawful harassment' means harassment that is unlawful under this title.''.

(c) AGE DISCRIMINATION ACT OF 1975.—Section 305(g) of the Age Discrimination Act of 1975, as added by section 104, is amended by adding at the end the following:

''(3)(A) If an action brought against a covered entity by (including on behalf of) an aggrieved person who has been subjected to unlawful harassment under a program or activity, the aggrieved person may recover equitable and

legal relief (including compensatory and punitive damages subject to the provisions of subparagraph (B)), attorney's fees (including expert fees), and costs.

''(B)(i) If an agent or employee of a covered entity engages in unlawful harassment under a program or activity that results in a tangible action to the aggrieved person, damages shall be available against the covered entity.

''(ii) If an agent or employee of a covered entity engages in unlawful harassment under a program or activity that results in no tangible action to the aggrieved person, no damages shall be available against the covered entity if it can demonstrate that—

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

''(II) the aggrieved person unreasonably failed to take advantage of preventive or corrective opportunities offered by the covered entity that—

''(aa) would likely have provided redress and avoided the harm described by the aggrieved person; and

''(bb) would not have exposed the aggrieved person to undue risk, effort, or expense.

''(iii) If a person who is not an agent or employee of a covered entity subjects an aggrieved person to unlawful harassment under a program or activity, and the cov-

ered entity knew or should have known of the harassment, no damages shall be available against the covered entity if it can demonstrate that it exercised reasonable care to prevent and correct promptly any harassment based on age.

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

''(I) established, adequately publicized, and enforced an effective, comprehensive, harassment prevention policy and complaint procedure that is likely to provide redress and avoid harm without exposing the person subjected to the harassment to undue risk, effort, or expense;

''(II) undertaken prompt, thorough, and impartial investigations pursuant to its complaint procedure; and

''(III) taken immediate and appropriate corrective action designed to stop harassment that has occurred, correct its effects on the aggrieved person, and ensure that the harassment does not recur.

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

''(C) As used in this paragraph:

''(i) The term 'demonstrates' means meets the burdens of production and persuasion.

''(ii) The term 'tangible action' means—

''(I) a significant adverse change in an individual's status caused by an agent or employee of a covered entity with regard to the individual's participation in, access to, or enjoyment of, the benefits of a program or activity; or

''(II) an explicit or implicit condition by an agent or employee of a covered entity on an individual's participation in, access to, or enjoyment of, the benefits of a program or activity based on the individual's submission to the harassment.

''(iii) The term 'unlawful harassment' means harassment that is unlawful under this title.''.

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

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

''(B)(i) If an agent or employee of a covered entity engages in unlawful harassment under a program or activity that results in a tangible action to the aggrieved person, damages shall be available against the covered entity.

''(ii) If an agent or employee of a covered entity engages in unlawful harassment under a program or activity that results in no tangible action to the aggrieved person, no damages shall be available against the covered entity if it can demonstrate that—

''(I) it exercised reasonable care to prevent and correct promptly any harassment based on disability; and

''(II) the aggrieved person unreasonably failed to take advantage of preventive or corrective opportunities offered by the covered entity that—

''(aa) would likely have provided redress and avoided the harm described by the aggrieved person; and

''(bb) would not have exposed the aggrieved person to undue risk, effort, or expense.

''(iii) If a person who is not an agent or employee of a covered entity subjects an aggrieved person to unlawful harassment under a program or activity, and the covered entity knew or should have known of the harassment, no damages shall be available against the covered entity if it can demonstrate that it exercised reasonable care to prevent and correct promptly any harassment based on disability.

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

''(I) established, adequately publicized, and enforced an effective, comprehensive, harassment prevention policy and complaint procedure that is likely to provide redress and avoid harm without exposing the person subjected to the harassment to undue risk, effort, or expense;

''(II) undertaken prompt, thorough, and impartial investigations pursuant to its complaint procedure; and

''(III) taken immediate and appropriate corrective action designed to stop harassment that has occurred, correct its effects on the aggrieved person, and ensure that the harassment does not recur.

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

''(C) As used in this paragraph:

''(i) The term 'demonstrates' means meets the burdens of production and persuasion.

''(ii) The term 'tangible action' means—

''(I) a significant adverse change in an individual's status caused by an agent or employee of a covered entity with regard to the individual's participation in, access to, or enjoyment of, the benefits of a program or activity; or

''(II) an explicit or implicit condition by an agent or employee of a covered entity on an individual's participation in, access to, or enjoyment of, the benefits of a program or activity based on the individual's submission to the harassment.

''(iii) The term 'unlawful harassment' means harassment that is unlawful under this section.''.

SEC. 113. CONSTRUCTION.

Nothing in this subtitle, including any amendment made by this subtitle, shall be construed to limit the scope of the class of persons who may be subjected to civil actions under the covered civil rights provisions.

SEC. 114. EFFECTIVE DATE.

(a) IN GENERAL.—This subtitle, and the amendments made by this subtitle, are retroactive to June 22, 1998, and effective as of that date.

(b) APPLICATION.—This subtitle, and the amendments made by this subtitle, apply to all actions or proceedings pending on or after June 22, 1998, except as to an action against a State, as to which the effective date is the date of enactment of this Act.

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

SEC. 201. AMENDMENT TO THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994.

(a) FINDINGS.—Congress makes the following findings:

(1) The Federal Government has an important interest in attracting and training a military to provide for the National defense. The Constitution

grants Congress the power to raise and support an army for purposes of the common defense. The Nation's military readiness requires that all members of the Armed Forces, including those employed in State programs and activities, be able to serve without jeopardizing their civilian employment opportunities.

(2) The Uniformed Services Employment and Reemployment Rights Act of 1994, commonly referred to as ''USERRA'' and codified as chapter 43 of title 38, United States Code, is intended to safeguard the reemployment rights of members of the uniformed services (as that term is defined in section 4303(16) of title 38, United States Code) and to prevent discrimination against any person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service. Effective enforcement of the Act depends on the ability of private individuals to enforce its provisions in court.

(3) In Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the Supreme Court held that congressional legislation enacted pursuant to the commerce clause of Article I, section 8, of the Constitution cannot abrogate the immunity of States under the 11th amendment to the Constitution.

Some courts have interpreted Seminole Tribe of Florida v. Florida as a basis for denying relief to persons affected by a State violation of USERRA. In addition, in Alden v. Maine 527 U.S. 706, 712 (1999), the Supreme Court held that this immunity also prohibits the Federal Government from subjecting ''non-consenting states to private suits for damages in state courts.'' As a result, although USERRA specifically provides that a person may commence an action for relief against a State for its violation of that Act, persons harmed by State violations of that Act lack important remedies to vindicate the rights and benefits that are available to all other persons covered by that Act. Unless a State chooses to waive sovereign immunity, or the Attorney General brings an action on their behalf, persons affected by State violations of USERRA may have no adequate Federal remedy for such violations.

(4) A failure to provide a private right of action by persons affected by State violations of USERRA would leave vindication of their rights and benefits under that Act solely to Federal agencies, which may fail to take necessary and appropriate action because of administrative overburden or other reasons. Ac-

tion by Congress to specify such a private right of action ensures that persons affected by State violations of USERRA have a remedy if they are denied their rights and benefits under that Act.

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

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

''(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a district court of the United States or State court of competent jurisdiction.'';

(2) by redesignating subsection (j) as subsection (k); and

(3) by inserting after subsection (i) the following new subsection (j):

''(j)(1)(A) A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by an employee of that program or activity under this chapter for the rights or benefits authorized the employee by this chapter.

''(B) In this paragraph, the term 'program or activity' has the meaning given the term in section 309 of the Age Discrimination Act of 1975 (42 U.S.C. 6107).

''(2) An official of a State may be sued in the official capacity of the official by any person covered by paragraph (1) who seeks injunctive relief against a State (as an employer) under subsection (e). In such a suit the court may award to the prevailing party those costs authorized by section 722 of the Revised Statutes (42 U.S.C. 1988).''.

TITLE III—AIR CARRIER ACCESS ACT OF 1986 AMENDMENT

SEC. 301. FINDINGS.

Congress finds the following:

(1) In Love v. Delta Air Lines, 310 F. 3d 1347 (11th Cir. 2002), the United States Court of Appeals for the Eleventh Circuit held that when Congress passed the Air Carrier Access Act of 1986, adding a provision now codified at section 41705 of title 49, United States Code (referred to in this title as the ''ACAA''), Congress did not intend to create a private right of action with which individuals with disabilities could sue air carriers in Federal court for discrimination on the basis of disability. The court recognized that other courts of appeals have held that the ACAA created a private right of action.

Nevertheless, the court, relying on the Supreme Court's decision in Alexander v. Sandoval, 532 U.S. 275 (2001), concluded that the ACAA did not create a private right of action.

(2) The absence of a private right of action leaves enforcement of the ACAA solely in the hands of the Department of Transportation, which is overburdened and lacks the resources to investigate, prosecute violators for, and remediate all of the violations of the rights of travelers who are individuals with disabilities. Nor can the Department of Transportation bring an action that will redress the injury of an individual resulting from such a violation. The Department of Transportation can take action that fines an air carrier or requires the air carrier to obey the law in the future, but the Department is not authorized to issue orders that redress the injuries sustained by individual air passengers. Action by Congress is necessary to ensure that individuals with disabilities will have adequate remedies available when air carriers violate the ACAA (including its regulations), and only courts may provide this redress to individuals.

(3) When an air carrier violates the ACAA and discriminates against an individual with a disability,

frequently the only way to compensate that individual for the harm the individual has suffered is through an award of money damages. For example, violations of the ACAA may result in travelers who are individuals with disabilities missing flights for business appointments or important personal events, or in such travelers suffering humiliating treatment at the hands of air carriers. Those harms cannot be remedied solely through injunctive relief.

(4) Unlike other civil rights statutes, the ACAA does not contain a fee-shifting provision under which a prevailing plaintiff can be awarded attorney's fees. Action by Congress is necessary to correct this anomaly. The availability of attorney's fees is essential to ensuring that persons who have been aggrieved by violations of the ACAA can enforce their rights. The inclusion of a fee-shifting provision in the ACAA will permit individuals to serve as private attorneys general, a necessary role on which enforcement of civil rights statutes depends.

SEC. 302. CIVIL ACTION.

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

''(d) CIVIL ACTION.—(1) Any person aggrieved by an air carrier's violation of subsection (a) (including any reg-

ulation implementing such subsection) may bring a civil action in the district court of the United States in the district in which the aggrieved person resides, in the district containing the air carrier's principal place of business, or in the district in which the violation took place. Any such action must be commenced within 2 years after the date of the violation.

''(2) In any civil action brought by an aggrieved person pursuant to paragraph (1), the plaintiff may obtain both equitable and legal relief, including compensatory and punitive damages. The court in such action shall, in addition to such relief awarded to a prevailing plaintiff, award reasonable attorney's fees, reasonable expert fees, and costs of the action to the plaintiff.''.

TITLE IV—AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS

SEC. 401. SHORT TITLE.

This title may be cited as the ''Older Workers' Rights Restoration Act of 2004''.

SEC. 402. FINDINGS.

Congress finds the following:

(1) Since 1974, the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.) (referred to in this section as the ''ADEA'') has prohib-

ited States from discriminating in employment on the basis of age. In EEOC v. Wyoming, 460 U.S. 226 (1983), the Supreme Court upheld Congress's constitutional authority to prohibit States from discriminating in employment on the basis of age. The prohibitions of the ADEA remain in effect and continue to apply to the States, as the prohibitions have for more than 25 years.

(2) Age discrimination in employment remains a serious problem both nationally and among State agencies, and has invidious effects on its victims, the labor force, and the economy as a whole. For example, age discrimination in employment—

(A) increases the risk of unemployment among older workers, who will as a result be more likely to be dependent on government resources;

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

(C) adversely effects the morale and productivity of older workers; and

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

(3) Private civil suits by the victims of employment discrimination have been a crucial tool for en-

forcement of the ADEA since the enactment of that Act. In Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), however, the Supreme Court held that Congress had not abrogated State sovereign immunity to suits by individuals under the ADEA. The Federal Government has an important interest in ensuring that Federal financial assistance is not used to subsidize or facilitate violations of the ADEA. Private civil suits are a critical tool for advancing that interest.

(4) As a result of the Kimel decision, although age-based discrimination by State employers remains unlawful, the victims of such discrimination lack important remedies for vindication of their rights that are available to all other employees covered under that Act, including employees in the private sector, local government, and the Federal Government. Unless a State chooses to waive sovereign immunity, or the Equal Employment Opportunity Commission brings an action on their behalf, State employees victimized by violations of the ADEA have no adequate Federal remedy for violations of that Act. In the absence of the deterrent effect that such remedies provide, there is a greater likelihood that entities carrying out programs and activities receiving

Federal financial assistance will use that assistance to violate that Act, or that the assistance will otherwise subsidize or facilitate violations of that Act.

(5) Federal law has long treated nondiscrimination obligations as a core component of programs or activities that, in whole or part, receive Federal financial assistance. That assistance should not be used, directly or indirectly, to subsidize invidious discrimination. Assuring nondiscrimination in employment is a crucial aspect of assuring nondiscrimination in those programs and activities.

(6) Discrimination on the basis of age in programs or activities receiving Federal financial assistance is, in contexts other than employment, forbidden by the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.). Congress determined that it was not necessary for the Age Discrimination Act of 1975 to apply to employment discrimination because the ADEA already forbade discrimination in employment by, and authorized suits against, State agencies and other entities that receive Federal financial assistance. In section 1003 of the Rehabilitation Act Amendments of 1986 (42 U.S.C. 2000d–7), Congress required all State entities subject to the Age Discrimination Act of 1975 to waive any immunity

from suit for discrimination claims arising under the Age Discrimination Act of 1975. The earlier limitation in the Age Discrimination Act of 1975, originally intended only to avoid duplicative coverage and remedies, has in the wake of the Kimel decision become a serious loophole leaving millions of State employees without an important Federal remedy for age discrimination, resulting in the use of Federal financial assistance to subsidize or facilitate violations of the ADEA.

(7) The Supreme Court has upheld Congress's authority to condition receipt of Federal financial assistance on acceptance by the States or other covered entities of conditions regarding or related to the use of that assistance, as in Cannon v. University of Chicago, 441 U.S. 677 (1979). The Court has further recognized that Congress may require a State, as a condition of receipt of Federal financial assistance, to waive the State's sovereign immunity to suits for a violation of Federal law, as in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999). In the wake of the Kimel decision, in order to assure compliance with, and to provide effective remedies for violations of, the ADEA in State programs or ac-

tivities receiving or using Federal financial assistance, and in order to ensure that Federal financial assistance does not subsidize or facilitate violations of the ADEA, it is necessary to require such a waiver as a condition of receipt or use of that assistance.

(8) A State's receipt or use of Federal financial assistance in any program or activity of a State will constitute a limited waiver of sovereign immunity under section 7(g) of the ADEA (as added by section 404). The waiver will not eliminate a State's immunity with respect to programs or activities that do not receive or use Federal financial assistance. The State will waive sovereign immunity only with respect to suits under the ADEA brought by employees within the programs or activities that receive or use that assistance. With regard to those programs and activities that are covered by the waiver, the State employees will be accorded only the same remedies that are accorded to other covered employees under the ADEA.

(9) The Supreme Court has repeatedly held that State sovereign immunity does not bar suits for prospective injunctive relief brought against State officials, as in Ex parte Young (209 U.S. 123 (1908)). Clarification of the language of the ADEA

will confirm that that Act authorizes such suits. The injunctive relief available in such suits will continue to be no broader than the injunctive relief that was available under that Act before the Kimel decision, and that is available to all other employees under that Act.

(10) In Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), the Supreme Court recognized that title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) ''proscribes not only overt discrimination [in employment] but also [employment] practices that are fair in form, but discriminatory in operation. . . .'' In doing so, the Court relied on section 703(a)(2) of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2(a)(2)), which contains language identical to section 4(a)(2) of the ADEA, except that the latter substitutes the word age for the grounds of prohibited discrimination specified by title VII of the Civil Rights Act of 1964: ''race, color, religion, sex, or national origin.'' The Court has confirmed that this and other related statutory language, identical to both title VII of the Civil Rights Act of 1964 and the ADEA, supports application of the disparate impact doctrine. Connecticut

v. Teal, 457 U.S. 440 (1982); General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

(11) Other indicia of Congress's intent to permit the disparate impact method of proving violations of the ADEA are legion, and include numerous other textual parallels between the ADEA and title VII of the Civil Rights Act of 1964, such as in the two laws' substantive prohibitions. Lorillard v. Pons, 434 U.S. 575, 584 (1978) (the ADEA's substantive prohibitions ''were derived in haec verba from Title VII''). Moreover, the ADEA and title VII of the Civil Rights Act of 1964 share ''a common purpose: 'the elimination of discrimination in the workplace,' ''. McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 358 (1995) (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)). Interpreting title VII of the Civil Rights Act of 1964 in a consistent manner is particularly appropriate when ''the two provisions share a common raison d'etre.''. Northcross v. Board of Educ. of Memphis City Schools, 412 U.S. 427, 428 (1973).

(12) The ADEA's legislative history confirms Congress's intent to redress all ''arbitrary'' age discrimination in the workplace, including arbitrary facially neutral policies and practices falling more

harshly on older workers. Such policies continue to be based on the kind of ''subconscious stereotypes and prejudices'' which cannot be ''adequately policed through disparate treatment analysis,'' and thus, require application of the disparate impact theory of proof. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988). As the Supreme Court has noted, these prejudices are ''the essence of age discrimination.''. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, n.15 (1993).

(13) In 1991, Congress reaffirmed that title VII of the Civil Rights Act of 1964 permits victims of employment bias to state a cause of action for disparate impact discrimination when it added a provision to title VII of the Civil Rights Act of 1964 to clarify the burden of proof in disparate impact cases in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2(k)).

(14) Subsequently, several lower courts and Federal Courts of Appeal have mistakenly relied on language in the Supreme Court's opinion in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), to suggest that the disparate impact method of proof does not apply to claims under the ADEA. Mullin v. Raytheon Co., 164 F.3d 696, 700–01 (1st Cir.

1999); EEOC v. Francis W. Parker School, 41 F.3d 1073, 1076–77 (7th Cir. 1994); Ellis v. United Airlines, Inc., 73 F.3d 999, 1006–07 (10th Cir. 1996); DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995); Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995). Congress did not intend the ADEA to be interpreted to provide older workers less protections against discrimination than those protected under title VII of the Civil Rights Act of 1964. As a result, it is necessary to clarify the burden of proof in a disparate impact case under the ADEA, and thereby reaffirm that victims of age discrimination in employment discrimination may state a cause of action based on the disparate impact method of proving discrimination in appropriate circumstances.

SEC. 403. PURPOSES.

The purposes of this title are—

(1) to provide to State employees in programs or activities that receive or use Federal financial assistance the same rights and remedies for practices violating the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.) as are available to other employees under that Act, and that were available to State employees prior to the Supreme

Court's decision in Kimel v. Florida Board of Regents, 528 U.S. 62 (2000);

(2) to provide that the receipt or use of Federal financial assistance for a program or activity constitutes a State waiver of sovereign immunity from suits by employees within that program or activity for violations of the Age Discrimination in Employment Act of 1967;

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

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

SEC. 404. REMEDIES FOR STATE EMPLOYEES.

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

''(g)(1)(A) A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by an employee of that program or activity under

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

''(B) In this paragraph, the term 'program or activity' has the meaning given the term in section 309 of the Age Discrimination Act of 1975 (42 U.S.C. 6107).

''(2) An official of a State may be sued in the official capacity of the official by any employee who has complied with the procedures of subsections (d) and (e), for injunctive relief that is authorized under this Act. In such a suit the court may award to the prevailing party those costs authorized by section 722 of the Revised Statutes (42 U.S.C. 1988).''.

SEC. 405. DISPARATE IMPACT CLAIMS.

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

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

''(A) an aggrieved party demonstrates that an employer, employment agency, or labor organization has a policy or practice that causes a disparate impact on the basis of age and the employer, employment agency, or labor organization fails to demonstrate that the challenged policy or practice is

based on reasonable factors that are job-related and consistent with business necessity other than age; or

''(B) the aggrieved party demonstrates (consistent with the demonstration standard under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) with respect to an 'alternative employment practice') that a less discriminatory alternative policy or practice exists, and the employer, employment agency, or labor organization refuses to adopt such alternative policy or practice.

''(2)(A) With respect to demonstrating that a particular policy or practice causes a disparate impact as described in paragraph (1)(A), the aggrieved party shall demonstrate that each particular challenged policy or practice causes a disparate impact, except that if the aggrieved party demonstrates to the court that the elements of an employer, employment agency, or labor organization's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one policy or practice.

''(B) If the employer, employment agency, or labor organization demonstrates that a specific policy or practice does not cause the disparate impact, the employer, employment agency, or labor organization shall not be re-

quired to demonstrate that such policy or practice is necessary to the operation of its business.

''(3) A demonstration that a policy or practice is necessary to the operation of the employer, employment agency, or labor organization's business may not be used as a defense against a claim of intentional discrimination under this title.

''(4) In this subsection, the term 'demonstrates' means meets the burdens of production and persuasion.''.

SEC. 406. EFFECTIVE DATE.

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

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

TITLE V—CIVIL RIGHTS REMEDIES AND RELIEF

Subtitle A—Prevailing Party

SEC. 501. SHORT TITLE.

This subtitle may be cited as the ''Settlement Encouragement and Fairness Act''.

SEC. 502. DEFINITION OF PREVAILING PARTY.

(a) IN GENERAL.—Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

''§ 9. Definition of 'prevailing party'

''(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, or of any judicial or administrative rule, which provides for the recovery of attorney's fees, the term 'prevailing party' shall include, in addition to a party who substantially prevails through a judicial or administrative judgment or order, or an enforceable written agreement, a party whose pursuit of a nonfrivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought.

''(b)(1) If an Act, ruling, regulation, interpretation, or rule described in subsection (a) requires a defendant,

but not a plaintiff, to satisfy certain different or additional criteria to qualify for the recovery of attorney's fees, subsection (a) shall not affect the requirement that such defendant satisfy such criteria.

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

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

''9. Definition of 'prevailing party'.''.

(c) APPLICATION.—Section 9 of title 1, United States Code, as added by this Act, shall apply to any case pending or filed on or after the date of enactment of this subtitle.

Subtitle B—Arbitration

SEC. 511. SHORT TITLE.

This subtitle may be cited as the ''Preservation of Civil Rights Protections Act of 2004''.

SEC. 512. AMENDMENT TO FEDERAL ARBITRATION ACT.

Section 1 of title 9, United States Code, is amended by striking ''of seamen'' and all that follows through ''commerce''.

SEC. 513. UNENFORCEABILITY OF ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS.

(a) PROTECTION OF EMPLOYEE RIGHTS.—Notwithstanding any other provision of law, any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under the Constitution or laws of the United States shall not be enforceable.

(b) EXCEPTIONS.—

(1) WAIVER OR CONSENT AFTER DISPUTE ARISES.—Subsection (a) shall not apply with respect to any dispute if, after such dispute arises, the parties involved knowingly and voluntarily consent to submit such dispute to arbitration.

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

SEC. 514. APPLICATION OF AMENDMENTS.

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

Subtitle C—Expert Witness Fees

SEC. 521. PURPOSE.

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

SEC. 522. FINDINGS.

Congress finds the following:

(1) This subtitle is made necessary by the decision of the Supreme Court in West Virginia University Hospitals Inc. v. Casey, 499 U.S. 83 (1991). In Casey, the Court, per Justice Scalia, ruled that expert fees were not recoverable under section 722 of the Revised Statutes (42 U.S.C. 1988), as amended by the Civil Rights Attorneys' Fees Awards Act of 1976 (Public Law 94–559; 90 Stat. 2641), because the Civil Rights Attorneys' Fees Awards Act of 1976 expressly authorized an award of an ''attorney's fee'' to a prevailing party but said nothing expressly about expert fees.

(2) This subtitle is especially necessary both because of the important roles played by experts in civil rights litigation and because expert fees often represent a major cost of the litigation. In fact, in Casey itself, as pointed out by Justice Stevens in dissent, the district court had found that the expert

witnesses were ''essential'' and ''necessary'' to the successful prosecution of the plaintiffs case, and the expert fees were not paltry but amounted to $104,133. Justice Stevens also pointed out that the majority opinion requiring the plaintiff to ''assume the cost of $104,133 in expert witness fees is at war with the congressional purpose of making the prevailing party whole.''. Casey (499 U.S. at 111).

(3) Much of the rationale for denying expert fees as part of the shifting of attorney's fees under provisions of law such as section 722 of the Revised Statutes (42 U.S.C. 1988), whose language does not expressly include expert fees, was based on the fact that many fee-shifting statutes enacted by Congress ''explicitly shift expert witness fees as well as attorney's fees.''. Casey (499 U.S. at 88). In fact, Justice Scalia pointed out that in 1976—the same year that Congress amended section 722 of the Revised Statutes (42 U.S.C. 1988) by providing for the shifting of attorney's fees—Congress expressly authorized the shifting of attorney's fees and of expert fees in the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), the Consumer Product Safety Act (15 U.S.C. 2051 et seq.), the Resource Conservation and Recovery Act of 1976 (Public Law 94–580; 90 Stat.

2795), and the Natural Gas Pipeline Safety Act Amendments of 1976 (Public Law 94–477; 90 Stat. 2073). Casey (499 U.S. at 88). Congress had done the same in other years on dozens of occasions. Casey (499 U.S. at 88–90 & n. 4).

(4) In the same year that the Supreme Court decided Casey, Congress responded quickly but only through the Civil Rights Act of 1991 (Public Law 102–166; 105 Stat. 1071) by amending title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) and section 722 of the Revised Statutes (42 U.S.C. 1988) with express authorizations of the recovery of expert fees in successful employment discrimination litigation. It is long past time to correct, in Federal civil rights litigation, Casey's denial of expert fees.

SEC. 523. EFFECTIVE PROVISIONS.

(a) SECTION 722 OF THE REVISED STATUTES.—Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended—

(1) in subsection (b), by inserting ''(including expert fees)'' after ''attorney's fee''; and

(2) by striking subsection (c).

(b) FAIR LABOR STANDARDS ACT OF 1938.—Section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C.

216(b)) is amended by inserting ''(including expert fees)'' after ''attorney's fee''.

(c) VOTING RIGHTS ACT OF 1965.—Section 14(e) of the Voting Rights Act of 1965 (42 U.S.C. 1973*l*(e)) is amended by inserting ''(including expert fees)'' after ''attorney's fee''.

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

(1) in section 812(p), by inserting ''(including expert fees)'' after ''attorney's fee'';

(2) in section 813(c)(2), by inserting ''(including expert fees)'' after ''attorney's fee''; and

(3) in section 814(d)(2), by inserting ''(including expert fees)'' after ''attorney's fee''.

(e) IDEA.—Section 615(i)(3)(B) of the Individuals with Disabilities Education Act (20 U.S.C. 1415(i)(3)(B)) is amended by inserting ''(including expert fees)'' after ''attorney's fees''.

(f) CIVIL RIGHTS ACT OF 1964.—Section 204(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(b)) is amended by inserting ''(including expert fees)'' after ''attorney's fee''.

(g) REHABILITATION ACT OF 1973.—Section 505(b) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(b)) is

amended by inserting ''(including expert fees)'' after ''attorney's fee''.

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

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

(1) in section 616(a)(3), by inserting ''(including expert fees)'' after ''attorney's fees''; and

(2) in section 617(a)(2), by inserting ''(including expert fees)'' after ''attorney's fees''.

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

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

(1) in paragraph (2)(B), by inserting ''(including expert fees)'' after ''attorney fees'';

(2) in paragraph (3)(B), by inserting ''(including expert fees)'' after ''attorney fees''; and

(3) in paragraph (4)(B), by inserting ''(including expert fees)'' after ''attorney fees''.

(l) TRUTH IN LENDING ACT.—Section 130(a)(3) of the Truth in Lending Act (15 U.S.C. 1640(a)(3)) is amended by inserting ''(including expert fees)'' after ''attorney's fee''.

Subtitle D—Equal Remedies Act of 2004

SEC. 531. SHORT TITLE.

This subtitle may be cited as the ''Equal Remedies Act of 2004''.

SEC. 532. EQUALIZATION OF REMEDIES.

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

(1) in subsection (b)—

(A) by striking paragraph (3); and

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

(2) in subsection (c), by striking ''section—'' and all that follows through the period, and inserting ''section, any party may demand a jury trial.''.

TITLE VI—PROHIBITIONS AGAINST SEX DISCRIMINATION

SEC. 601. SHORT TITLE.

This title may be cited as the ''Paycheck Fairness Act''.

SEC. 602. FINDINGS.

Congress makes the following findings:

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

(2) Even today, women earn significantly lower pay than men for work on jobs that require equal skill, effort, and responsibility and that are performed under similar working conditions. These pay disparities exist in both the private and governmental sectors. In many instances, the pay disparities can only be due to continued intentional discrimination or the lingering effects of past discrimination.

(3) The existence of such pay disparities—

(A) depresses the wages of working families who rely on the wages of all members of the family to make ends meet;

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

(C) has been spread and perpetuated, through commerce and the channels and instrumentalities of commerce, among the workers of the several States;

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

(E) constitutes an unfair method of competition in commerce;

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

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

(H) in many instances, may deprive workers of equal protection on the basis of sex in violation of the 5th and 14th amendments.

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

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

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

(ii) substantially reducing the number of working women earning unfairly low wages, thereby reducing the dependence on public assistance;

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

(iv) remedying the effects of past discrimination on the basis of sex and ensuring that in the future workers are afforded equal protection on the basis of sex; and

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

(5) With increased information about the provisions added by the Equal Pay Act of 1963 and wage data, along with more effective remedies, women will be better able to recognize and enforce their rights to equal pay for work on jobs that require equal skill, effort, and responsibility and that are performed under similar working conditions.

(6) Certain employers have already made great strides in eradicating unfair pay disparities in the workplace and their achievements should be recognized.

SEC. 603. ENHANCED ENFORCEMENT OF EQUAL PAY REQUIREMENTS.

(a) REQUIRED DEMONSTRATION FOR AFFIRMATIVE DEFENSE.—Section 6(d)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(1)) is amended by striking

''(iv) a differential'' and all that follows through the period and inserting the following: ''(iv) a differential based on a bona fide factor other than sex, such as education, training or experience, except that this clause shall apply only if—

''(I) the employer demonstrates that—

''(aa) such factor—

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

''(BB) furthers a legitimate business purpose, except that this item shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice; and

''(bb) such factor was actually applied and used reasonably in light of the asserted justification; and

''(II) upon the employer succeeding under subclause (I), the employee fails to demonstrate that the differential produced by the reliance of the employer on such factor is itself the result of discrimination on the basis of sex by the employer.

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

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

(c) ELIMINATION OF ESTABLISHMENT REQUIREMENT.—Section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)) is amended—

(1) by striking '', within any establishment in which such employees are employed,''; and

(2) by striking ''in such establishment'' each place it appears.

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

(1) by striking ''or has'' each place it appears and inserting ''has''; and

(2) by inserting before the semicolon the following: '', or has inquired about, discussed, or otherwise disclosed the wages of the employee or another

employee, or because the employee (or applicant) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or action under section 6(d)''.

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

(1) by inserting after the first sentence the following: ''Any employer who violates section 6(d) shall additionally be liable for such compensatory or punitive damages as may be appropriate, except that the United States shall not be liable for punitive damages.'';

(2) in the sentence beginning ''An action to'', by striking ''either of the preceding sentences'' and inserting ''any of the preceding sentences of this subsection'';

(3) in the sentence beginning ''No employees shall'', by striking ''No employees'' and inserting ''Except with respect to class actions brought to enforce section 6(d), no employee'';

(4) by inserting after the sentence referred to in paragraph (3), the following: ''Notwithstanding any other provision of Federal law, any action brought to enforce section 6(d) may be maintained

as a class action as provided by the Federal Rules of Civil Procedure.''; and

(5) in the sentence beginning ''The court in''—

(A) by striking ''in such action'' and inserting ''in any action brought to recover the liability prescribed in any of the preceding sentences of this subsection''; and

(B) by inserting before the period the following: '', including expert fees''.

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

(1) in the first sentence—

(A) by inserting ''or, in the case of a violation of section 6(d), additional compensatory or punitive damages,'' before ''and the agreement''; and

(B) by inserting before the period the following: '', or such compensatory or punitive damages, as appropriate'';

(2) in the second sentence, by inserting before the period the following: ''and, in the case of a violation of section 6(d), additional compensatory or punitive damages'';

(3) in the third sentence, by striking ''the first sentence'' and inserting ''the first or second sentence''; and

(4) in the last sentence—

(A) by striking ''commenced in the case'' and inserting ''commenced—

''(1) in the case'';

(B) by striking the period and inserting ''; or''; and

(C) by adding at the end the following:

''(2) in the case of a class action brought to enforce section 6(d), on the date on which the individual becomes a party plaintiff to the class action.''.

SEC. 604. TRAINING.

The Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, subject to the availability of funds appropriated under section 609, shall provide training to Commission employees and affected individuals and entities on matters involving discrimination in the payment of wages.

SEC. 605. RESEARCH, EDUCATION, AND OUTREACH.

The Secretary of Labor shall conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women, including—

(1) conducting and promoting research to develop the means to correct expeditiously the conditions leading to the pay disparities;

(2) publishing and otherwise making available to employers, labor organizations, professional associations, educational institutions, the media, and the general public the findings resulting from studies and other materials, relating to eliminating the pay disparities;

(3) sponsoring and assisting State and community informational and educational programs;

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

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

(6) convening a national summit to discuss, and consider approaches for rectifying, the pay disparities.

SEC. 606. TECHNICAL ASSISTANCE AND EMPLOYER RECOGNITION PROGRAM.

(a) GUIDELINES.—

(1) IN GENERAL.—The Secretary of Labor shall develop guidelines to enable employers to evaluate job categories based on objective criteria such as educational requirements, skill requirements, independence, working conditions, and responsibility, including decisionmaking responsibility and de facto supervisory responsibility.

(2) USE.—The guidelines developed under paragraph (1) shall be designed to enable employers voluntarily to compare wages paid for different jobs to determine if the pay scales involved adequately and fairly reflect the educational requirements, skill requirements, independence, working conditions, and responsibility for each such job with the goal of eliminating unfair pay disparities between occupations traditionally dominated by men or women.

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

(b) EMPLOYER RECOGNITION.—

(1) PURPOSE.—It is the purpose of this subsection to emphasize the importance of, encourage the improvement of, and recognize the excellence of employer efforts to pay wages to women that reflect

the real value of the contributions of such women to the workplace.

(2) IN GENERAL.—To carry out the purpose of this subsection, the Secretary of Labor shall establish a program under which the Secretary shall provide for the recognition of employers who, pursuant to a voluntary job evaluation conducted by the employer, adjust their wage scales (such adjustments shall not include the lowering of wages paid to men) using the guidelines developed under subsection (a) to ensure that women are paid fairly in comparison to men.

(3) TECHNICAL ASSISTANCE.—The Secretary of Labor may provide technical assistance to assist an employer in carrying out an evaluation under paragraph (2).

(c) REGULATIONS.—The Secretary of Labor shall promulgate such rules and regulations as may be necessary to carry out this section.

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

(a) IN GENERAL.—There is established the Secretary of Labor's National Award for Pay Equity in the Workplace, which shall be evidenced by a medal bearing the inscription ''Secretary of Labor's National Award for Pay

Equity in the Workplace''. The medal shall be of such design and materials, and bear such additional inscriptions, as the Secretary of Labor may prescribe.

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

(1) submit a written application to the Secretary of Labor, at such time, in such manner, and containing such information as the Secretary may require, including at a minimum information that demonstrates that the business has made substantial effort to eliminate pay disparities between men and women, and deserves special recognition as a consequence; and

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

(c) MAKING AND PRESENTATION OF AWARD.—

(1) AWARD.—After receiving recommendations from the Secretary of Labor, the President or the designated representative of the President shall annually present the award described in subsection (a) to businesses that meet the qualifications described in subsection (b).

(2) PRESENTATION.—The President or the designated representative of the President shall present

the award under this section with such ceremonies as the President or the designated representative of the President may determine to be appropriate.

(d) BUSINESS.—In this section, the term ''business'' includes—

(1)(A) a corporation, including a nonprofit corporation;

(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in any of subparagraphs (A) through (D);

(2) an entity carrying out an education referral program, a training program, such as an apprenticeship or management training program, or a similar program; and

(3) an entity carrying out a joint program, formed by a combination of any entities described in paragraph (1) or (2).

SEC. 608. COLLECTION OF PAY INFORMATION BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Section 709 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–8) is amended by adding at the end the following:

''(f)(1) Not later than 18 months after the date of enactment of this subsection, the Commission shall—

''(A) complete a survey of the data that is currently available to the Federal Government relating to employee pay information for use in the enforcement of Federal laws prohibiting pay discrimination and, in consultation with other relevant Federal agencies, identify additional data collections that will enhance the enforcement of such laws; and

''(B) based on the results of the survey and consultations under subparagraph (A), issue regulations to provide for the collection of pay information data from employers as described by the sex, race, and national origin of employees.

''(2) In implementing paragraph (1), the Commission shall have as its primary consideration the most effective and efficient means for enhancing the enforcement of Federal laws prohibiting pay discrimination. For this purpose, the Commission shall consider factors including the imposition of burdens on employers, the frequency of required reports (including which employers should be required to prepare reports), appropriate protections for maintaining data confidentiality, and the most effective format for the data collection reports.''.

SEC. 609. AUTHORIZATION OF APPROPRIATIONS.

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

TITLE VII—PROTECTIONS FOR WORKERS

Subtitle A—Protection for Undocumented Workers

SEC. 701. FINDINGS.

Congress finds the following:

(1) The National Labor Relations Act (29 U.S.C. 151 et seq.) (in this subtitle referred to as the ''NLRA''), enacted in 1935, guarantees the right of employees to organize and to bargain collectively with their employers. The NLRA implements the national labor policy of assuring free choice and encouraging collective bargaining as a means of maintaining industrial peace. The National Labor Relations Board (in this subtitle referred to as the ''NLRB'') was created by Congress to enforce the provisions of the NLRA.

(2) Under section 8 of the NLRA, employers are prohibited from discriminating against employees ''in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization''. (29 U.S.C. 158(a)(3)). Employers who violate

these provisions are subject to a variety of sanctions, including reinstatement of workers found to be illegally discharged because of their union support or activity and provision of backpay to those employees. Such sanctions serve to remedy and deter illegal actions by employers.

(3) In Hoffman Plastic Compounds Inc. v. NLRB, 535 U.S. 137 (2002), the Supreme Court held by a 5 to 4 vote that Federal immigration policy, as articulated in the Immigration Reform and Control Act of 1986, prevented the NLRB from awarding backpay to an undocumented immigrant who was discharged in violation of the NLRA because of his support for union representation at his workplace.

(4) The decision in Hoffman has an impact on all employees, regardless of immigration or citizenship status, who try to improve their working conditions. In the wake of Hoffman Plastics, employers may be more likely to report to the Department of Homeland Security minority workers, regardless of their immigration or citizenship status, who pursue claims under the NLRA against their employers. Fear that employers may retaliate against employees that exercise their rights under the NLRA has a

chilling effect on all employees who exercise their labor rights.

(5) The NLRA is not the only Federal employment statute that provides for a backpay award as a remedy for an unlawful discharge. For example, courts routinely award backpay to employees who are found to have been discharged in violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) (in retaliation for complaining about a failure to comply with the minimum wage). In the wake of the Hoffman decision, defendant employers will now argue that backpay awards to unlawfully discharged undocumented workers are barred under Federal employment statutes and even under State employment statutes.

(6) Because the Hoffman decision prevents the imposition of sanctions on employers who discriminate against undocumented immigrant workers, employers are encouraged to employ such workers for low-paying and dangerous jobs because they have no legal redress for violations of the law. This creates an economic incentive for employers to hire and exploit undocumented workers, which in turn tends to

undermine the living standards and working conditions of all Americans, citizens and noncitizens alike.

(7) The Hoffman decision disadvantages many employers as well. Employers who are forced to compete with firms that hire and exploit undocumented immigrant workers are saddled with an economic disadvantage in the labor marketplace. The unintended creation of an economic inducement for employers to exploit undocumented immigrant workers gives those employers an unfair competitive advantage over employers that treat workers lawfully and fairly.

(8) The Court's decision in Hoffman makes clear that ''any 'perceived deficiency in the NLRA's existing remedial arsenal' must be 'addressed by congressional action[.]' '' Hoffman Plastic Compounds Inc. v. NLRB, 535 U.S. 137, 152 (2002) (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 904 (1984)). In emphasizing the importance of back pay awards, Justice Breyer noted that such awards against employers ''help[] to deter unlawful activity that both labor laws and immigration laws seek to prevent''. Hoffman Plastic Compounds Inc. v. NLRB, 535 U.S. 137, 152 (2002). Because back pay awards are designed both to remedy the individ-

ual's private right to be free from discrimination as well as to enforce the important public policy against discriminatory employment practices, Congress must take the following corrective action.

SEC. 702. CONTINUED APPLICATION OF BACKPAY REMEDIES.

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

''(4) BACKPAY REMEDIES.—Backpay or other monetary relief for unlawful employment practices shall not be denied to a present or former employee as a result of the employer's or the employee's—

''(A) failure to comply with the requirements of this section; or

''(B) violation of a provision of Federal law related to the employment verification system described in subsection (b) in establishing or maintaining the employment relationship.''.

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

Subtitle B—Fair Labor Standards Act Amendments

SEC. 711. SHORT TITLE.

This subtitle may be cited as the ''Workers' Minimum Wage and Overtime Rights Restoration Act of 2004''.

SEC. 712. FINDINGS.

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

(1) Since 1974, the FLSA has regulated States with respect to the payment of minimum wage and overtime rates. In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), the Supreme Court upheld Congress's constitutional authority to regulate States in the payment of minimum wages and overtime. The prohibitions of the FLSA remain in effect and continue to apply to the States.

(2) Wage and overtime violations in employment remain a serious problem both nationally and among State and other public and private entities receiving Federal financial assistance, and has invidious effects on its victims, the labor force, and the general welfare and economy as a whole. For example, seven State governments have no overtime laws

at all. Fourteen State governments have minimum wage and overtime laws; however, they exclude employees covered under the FLSA. As such, public employees, since they are covered under the FLSA are not protected under these State laws. Additionally, four States have minimum wage and overtime laws which are inferior to the FLSA. Further, the Department of Labor continues to receive a substantial number of wage and overtime charges against State government employers.

(3) Private civil suits by the victims of employment law violations have been a crucial tool for enforcement of the FLSA. In Alden v. Maine, 527 U.S. 706 (1999), however, the Supreme Court held that Congress lacks the power under the 14th amendment to the Constitution to abrogate State sovereign immunity to suits for legal relief by individuals under the FLSA. The Federal Government has an important interest in ensuring that Federal financial assistance is not used to facilitate violations of the FLSA, and private civil suits for monetary relief are a critical tool for advancing that interest.

(4) After the Alden decision, wage and overtime violations by State employers remain unlawful, but

victims of such violations lack important remedies for vindication of their rights available to all other employees covered by the FLSA. In the absence of the deterrent effect that such remedies provide, there is a great likelihood that State entities carrying out federally funded programs and activities will use Federal financial assistance to violate the FLSA, or that the Federal financial assistance will otherwise subsidize or facilitate FLSA violations.

(5) The Supreme Court has upheld Congress's authority to condition receipt of Federal financial assistance on acceptance by State or other covered entities of conditions regarding or related to the use of those funds, as in Cannon v. University of Chicago, 441 U.S. 677 (1979).

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

(7) In the wake of the Alden decision, it is necessary, in order to foster greater compliance with, and adequate remedies for violations of, the FLSA,

particularly in federally funded programs or activities operated by State entities, to require State entities to consent to a waiver of State sovereign immunity as a condition of receipt of such Federal financial assistance.

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

SEC. 713. PURPOSES.

The purposes of this subtitle are—

(1) to provide to State employees in programs or activities that receive or use Federal financial assistance the same rights and remedies for practices violating the FLSA as are available to other employees under the FLSA, and that were available to State employees prior to the Supreme Court's decision in Alden v. Maine, 527 U.S. 706 (1999);

(2) to provide that the receipt or use of Federal financial assistance for a program or activity constitutes a State waiver of sovereign immunity from

suits by employees within that program or activity for violations of the FLSA; and

(3) to affirm that suits for injunctive relief are available against State officials in their official capacities for violations of the FLSA.

SEC. 714. REMEDIES FOR STATE EMPLOYEES.

Section 16 of the Fair Labor Standards Act of 1938 (29 U.S.C. 216) is amended by adding at the end the following:

''(f)(1) A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by an employee of that program or activity under this Act for equitable, legal, or other relief authorized under this Act.

''(2) In this subsection, the term 'program or activity' has the meaning given the term in section 309 of the Age Discrimination Act of 1975 (42 U.S.C. 6107).''.

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